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COMPETITION POLICY IN OECD COUNTRIES

1994 - 1995

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FOREWORD

This General Distribution document contains reports by OECD countries presented to the Committee on Competition Law and Policy in 1995. Depending on the countries, these reports cover the period 1994, 1995 or both, and for each the review period is clarified in a footnote. In addition, the annual reports for the Czech Republic, Hungary, Korea, Poland and the Slovak Republic are included here. Exceptionally, the reports from Hungary and Poland were reviewed by the CLP/WP3 in 1996.

The compilation of these reports which are made available to the public by individual governments, are preceded by a summary of main developments highlighting new features in competition law and policy and recent trends in enforcement practice. Competition policy during the review period focused once again on the investigation and prosecution of horizontal and vertical restrictions and on the supervision over mergers which might have anticompetitive effects.

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MAIN DEVELOPMENTS IN COMPETITION POLICY IN 1994 AND 1995*

I. Summary

Twenty-five countries and the European Union submitted reports on their activities for this period. There were initiatives that resulted in new competition legislation being passed or coming into effect in France, the Netherlands, Norway, Portugal, Slovakia, Sweden and the United States. Significant amendments to existing competition legislation were made in Australia, Austria, Czech Republic, the European Union, Finland, Greece, Ireland, Korea and Sweden. Three countries formulated proposals for new legislation, for amendments to existing legislation and for new procedural rules: Germany, New Zealand and Switzerland. To facilitate compliance with their laws, the United States published guidelines on various aspects of competition law or policy.

This period was characterised by deregulation efforts and significant merger activity with regard to the telecommunications sector. European countries continued to harmonise their domestic laws with the competition rules of the European Union. Although deregulation, privatisation and demonopolisation have had a great impact on laws, regulations and procedural rules, all countries were very active in enforcement. Efforts were not spared to counter practices constituting horizontal and vertical restraints on competition. Supervision over mergers which might have anti-competitive effects continued.

II. Changes to competition laws and policies adopted or envisaged

In **Australia**, in April 1995, the Council of Australian Governments agreed to a national competition policy based on the Hilmer Report, which was released in August 1993. The national competition policy package consists of the Competition Policy Reform Act 1995, three inter-governmental agreements (the Conduct Code Agreement, the Competition Principles Agreement and the Agreement to Implement the National Competition Policy and Related Reforms) and state and territory application legislation. The Competition Policy Reform Act amends the Trade Practices Act and the Prices Surveillance Act 1983. The Conduct Code Agreement sets out the processes for appointments of persons to the new Australian Competition and Consumer Commission (which is essentially a merger of the Trade Practices Commission and the Prices Surveillance Authority) and for future amendments to competition laws. The Competition Principles Agreement sets out principles and processes to guide future micro-economic reform. It also sets out processes for appointments to the new National Competition Council (a recommendatory and advisory body) and for the determination of its work programme. The Agreement to Implement the National Competition Policy and Related Reforms deals with the "Competition Payments". The Trade Practices Tribunal will be renamed the Australian Competition Tribunal, and will maintain its existing review functions in relation to determinations by the Trade Practices Commission/Australian

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* The relevant period covers globally 1994 and 1995. However for some countries, the review period is limited to year 1994, while for others, it is circumscribed to year 1995 Therefore, the relevant time covered is precised on top of each country report.

Competition and Consumer Commission under the Trade Practices Act, and will gain new review functions in relation to the new access regime.

Austria joined the European Union on 1 January 1995. On the basis of the ordinance issued by the Ministry of Justice on 28 February 1995, the four main block exemption agreements, i.e. exclusive dealing agreements, exclusive purchasing agreements, motor vehicle agreements and franchising agreements, were incorporated into Austrian law. Requirements under European law have entailed various prohibition proceedings and the adjustment of some of the agreements. The far-reaching reporting requirement has led to a comparatively high degree of transparency in this field of competitive restraints. In order to be able to conduct searches on the premises of enterprises in the course of proceedings pending before the European Commission, the legal background had to be created within the framework of the Austrian legal system. The right to enter premises in the course of investigations for officials of the European Commission and members of the Austrian competition unit was created by an amendment to the European Competition Act in Austria. A formal search warrant issued by the President of the Cartel Court is necessary.

In **Belgium**, with the entry into force on 1 April 1993 of the Economic Competition Protection Act of 5 August 1991 (the Competition Act) and the repeal of the Act of 27 May 1960 on the abuse of dominant position, Belgian competition legislation is now largely based on the principles of EC law. No amendments were made to the Competition Act in 1994. The Royal Decree of 29 September 1994 replaced the Competition Service by the Pricing and Competition Inspectorate.

In **Canada**, a public consultation process was started in April as the Bureau works on amending the Competition Act. A discussion paper on the proposed amendments was issued in June 1995, inviting wide participation and comment from stakeholder groups. Accordingly, the Bureau has established a small Amendments Unit within the Bureau which will be gathering and distilling public input in this area. As a result of concerns about efficiency, changes in the legal environment and resource constraints, and due to the fact that the vast majority of misleading advertising complaints (97 per cent) are made by telephone or by letter, the Director's formally announced his decision to close the Branch's field offices in seven cities and the consolidation of all staff at the Bureau's headquarters on 19 April 1995. A central unit within the Compliance and Operations Branch will handle complaints and public enquiries for all enforcement branches.

In **Finland**, at the beginning of July 1994, an amendment to the Act on Restrictions on Competition (447/94) came into force. The amendment clarified the application of the Act to co-operative activity among agricultural producers in the primary production of agricultural products. The Act will not be applied to agreements, decisions or comparable practices between agricultural producers or their organisations regarding primary production of agricultural products, when those practices advance the implementation of the objectives of the Agricultural Market System Act. The Act on Restrictions on Competition will however be applied to practices which appreciably hinder competition in the agricultural-product market or lead to the abuse of a dominant market position. The Act will thus make it possible to intervene in such practices as producer agreements regarding minimum prices, restriction on the use of alternative suppliers and boycotts directed against buyers or other producers. Another amendment was made to the Act on Restrictions on Competition (448/94), so as to increase the Office of Free Competition's powers to investigate restrictions on competition. The amendment emphasises the obligation of undertakings to co-operate actively with inspecting officials and gives the inspectors the right, at their own initiative, to search for documents and demand that closed places of storage be opened. In order to fulfil obligations placed on national competition authorities by the EU Accession Treaty, the Ministry of Trade and Industry is preparing an amendment to the Act on Restrictions on Competition.

After the amendment, the Office of Free Competition can assist the European Commission in carrying out investigations and inspections.

In **France**, the scope of participation by the Directorate General for Competition, Consumer Affairs and Product Safety/Quality (DGCCRF) in commissions on calls for tenders, which has long been authorised under the Government Procurement Code, has been widened in recent months. The Act of 29 January 1993 on the prevention of corruption and the Act of 8 February 1995 on government contracts and public service delegations provide for the presence of a representative of the DGCCRF at commissions convened to supervise certain calls for tenders. The Act of 5 February 1994 increased the penalties for the major offence of trademark infringement. To improve the functioning of the advertising industry, the Act of 29 January 1993 introduced new regulations clarifying the role of intermediaries and encouraging transparent relations between the various media, buyers of advertising space and advertisers, particularly by separating the buying and referral functions.

In **Germany**, the government intends to revise the Act against Restraints of Competition (ARC) to include an harmonisation of national law with Community law wherever considered necessary. The changes are to take account of the new dimension of competition that results from the growing integration of European markets. The reform of energy industry law and the ARC provisions on energy has reached a fairly advanced stage and will probably be submitted to the Cabinet for decision-taking within the next few months, independently of the general amendment of competition law.

In **Greece**, the Greek Competition Act 703/77 on the control of monopolies and oligopolies and on the protection of free competition (as revised by Acts 2000/91 and 1934/91) was amended and completed by Act 2296/95, which was enacted by the Greek Parliament on 24 February 1995. The main objective of these amendments is to achieve more efficiency and effectiveness in the enforcement of competition law. The main amendments provide for the following: establishment of a general merger control procedure, with a threshold of 50 million Ecus annual turnover or 25 per cent market share; the provision for negative clearance was brought back; fines imposed for anticompetitive practices or behaviour were readjusted.; the Competition Committee's decisions will be published in the press; short time limits within which investigation proceedings and decisions should be completed and be taken were introduced; and reconstruction, reinforcing jurisdiction and composition change of the Competition Committee as an independent authority with an autonomous administrative and organisational structure.

In **Ireland**, the Competition Act does not give the Competition Authority a direct role in the enforcement of competition law. During 1994, amending legislation was introduced which would confer upon the Authority power to enforce the Act by way of court actions. While the legislation was not finalised, it is now proposed that the courts should be enabled to impose fines for breaches of the Act.

In **Italy**, no developments were reported in this area.

In **Japan**, no developments were reported in this area.

In **Mexico**, no developments were reported in this area.

In the **Netherlands**, the Horizontal Price Maintenance Decree (Statute Book 80) took effect as of 1 July 1993. The Decree provides for the possibility of granting dispensation for pricing agreements if the existence of the agreement is required in the general interest. After a positive recommendation from the Council of State dated 10 December 1993, the Decree of 19 January 1994 (Statute Book 56), invalidating stipulations on market sharing in competition agreements (Market Sharing Agreements Decree) was enacted by Royal Decree. In principle, the Decree invalidates all market sharing agreements. This covers

the signing into law by President Clinton on 2 November 1994 of the International Antitrust Enforcement Assistance Act of 1994. The law permits the DOJ and the FTC to provide antitrust evidence to, and conduct investigations to obtain antitrust evidence for, a foreign antitrust authority, pursuant to a reciprocal antitrust mutual assistance agreement in effect with the foreign antitrust authority. The law sets forth requirements that such agreements must fulfil and permits the disclosure of otherwise confidential information, except Hart-Scott-Rodino pre-merger information, pursuant to such agreements.

In the **European Union**, the new legislative provisions introduced by the European Commission on Articles 85 and 86 in 1994 were formulated with the following goals in mind: First, to continue the programme initiated several years ago to reduce costs attributable to industry compliance with Community regulations, especially for SMEs; second, to ensure not only that the right of firms to a fair hearing is respected during competition proceedings instituted by Community authorities, but also that these proceedings are uncomplicated and, above all, fair and objective; third, to guarantee transparency, ensuring that European industry is familiar with Commission policy; and fourth, to ensure that Community competition policy is always based on an accurate analysis of the relevant market affected by the agreement or practice under review. The first and the fourth goals were key factors behind the changes made to form A/B and the "de minimis" facility notice. The new A/B form should lower regulatory costs in many areas, it should be easier to complete than the previous form and it should help companies present notifications which are clearer and more comprehensive. The Commission decided to raise the thresholds contained in the *de minimis* notice in order to take inflation and the GDP growth rate into account. The following agreements should automatically be considered *de minimis*: if the total combined turnover of the groups to which the parties to the agreement belong does not exceed ECU 300 million; and if the combined market share of the groups to which the parties to the agreement belong does not exceed five per cent of the relevant market. The third significant legislative project undertaken by the Commission involved revising the mandate of the Hearing Officer. The Commission decided to extend the scope of the Hearing Officer's powers to the following areas: deadlines for reply to the Statement of Objections, access to relevant information, hearings, business secrets and other confidential information. The Commission published a draft regulation combining two existing regulations on patent and know-how licences, and suggested including market-share thresholds in order to exempt from the scope of the regulation agreements between companies with very large market shares (40 per cent or more), or large market shares in oligopolistic markets. Finally, the Commission adopted a draft notice on the application of Community competition regulations to systems for international transfer of funds. This draft notice is part of a larger body of measures (which include a proposal for a directive) whose aim is to improve the international payments system.

In the **Czech Republic**, two amendments to Act No. 63/1991 on the Protection of Economic Competition were passed. The first amendment aimed to make the Act on the Protection of Economic Competition consistent with the Czech Commercial Code. The amended text also clarifies that the purpose of the Act on the Protection of Economic Competition is to ensure the protection of competition, and not the protection of competitors. Another important change in the Act was the definition and extension of personal liabilities. A new formulation of the general prohibition of anti-competitive agreements was included in the amendment, so that the prohibition now applies not only to agreements between competitors, but also to their concerted activities. The amendment now makes it possible to provide both individual and general (block) exemptions. The amendment also changed the legal arrangements and the overall philosophy with respect to mergers. Instead of approving merger agreements, the Ministry of Economic Competition (MEC) either authorises them or prohibits them. Finally, changes were made concerning fines and sanctions applied in the event of infringement of the Act on the Protection of Economic Competition.

According to the terms of Act No. 199/1994 On Allocating Contracts for Public Works, the Ministry of Economic Competition is responsible for ensuring the respect of this Act, by reviewing the objectives of the tenderers against the practices of the persons inviting to competitive tender; verifying the procedure followed by each company in allocating public works contracts covered by the Act on Allocating Contracts for Public Works; ensuring the participation of representatives from supervisory bodies at the opening of the envelopes containing the offers from the tenderers; providing statistical data on the allocation of public works; and imposing sanctions for infringement of the Act. A special department has been set up at the Ministry to supervise the allocation of public works.

In **Hungary**, the following three Acts amended the Competition Law adopted in 1990 :*i)* Act n°XVI /1994 on the Chambers of Commerce which notably extended the obligation of the Office of Economic Competition (OEC) to hear the opinion of the Chambers of Commerce to which the parties concerned belong and extended the rights of the Chambers of Commerce to commence civil court action against any person who, by illegal activity, significantly prejudices consumers or affects a broad range of them ; *ii)* Act n°XXXIX/1994 which transferred one part of competition surveillance competences from the State Securities Supervision to the OEC ; *iii)* Act n°XCVI/1995 on Insurance Institutions and Insurance Activities which extended the supervision of the OEC to the insurance sector. Further changes have been under consideration; they are important from the standpoint of clarification and effective enforcement.

In **Korea**, the Korean Fair Trade Commission (KFTC) drastically revised the Monopoly Regulation and Fair Trade Act (MRFTA) on 22 December 1994. The major changes were as follows. First, to effectively cope with the distinct problems arising from "Chaebol" (major conglomerates), the regulations on excessive concentration of economic power were strengthened. Second, to facilitate the conclusion of international contracts, the regulations on international contracts have been eased. Third, the surcharge has been increased to allow for the effective enforcement of the MRFTA. The KFTC has expanded the scope of application of the Fair Sub-Contract Trade Act to include sub-contracted technological services such as computer programming or engineering and design of machinery. In the past, the Act only applied to sub-contracted construction, manufacturing or repair.

In **Poland**, amendments to the Antimonopoly law took effect in May 1995. They affected all sections and notably these covering merger review and business restructuring. AMO supervision was extended beyond organisational mergers to cover asset acquisitions, share purchase , and interlocking directorates between and among competing enterprises. Financial institutions, including banks were made subject to the same controls and threshold limits were introduced to eliminate *de minimis* transactions.

In the **Slovak Republic**, the Antimonopoly Act was adopted in the former Czechoslovakia in January 1991. A few years after this Act was enforced, the Slovak Republic, one of the two successor states of the former Czechoslovak Republic, adopted a new Antimonopoly Act. The new act that came into force on 1 August 1994 shed the previous dogmatic approach towards competition. Hence, the evaluation of all types of restrictions (agreements, abuse and mergers) is based on the balance between the effects of economic efficiency and damages to competition ensuing from such practices. The balancing test consists of four steps: whether the agreement improves production or distribution, or contributes to technical and economic progress; whether users obtain a fair share of benefits; whether restrictions are indispensable for the attainment of benefits; and whether competition (at least potential competition) in the relevant market will not be eliminated by these agreements. The new Act sets forth a general ban on the abuse of dominant position. It includes a new definition of dominant position, based on broader economic criteria.. The Act introduces substantial changes in the field of merger control. It has abandoned the prohibition that was previously imposed on merger agreements and the stipulation of their invalidity. A new term, "concentration", covers mergers and acquisitions of control, including establishment of joint

ventures. The Act sets out two minimum thresholds for control -- either an aggregate global turnover of SKk 300 million or a 20 per cent market share in the relevant product market and in the market within the Slovak Republic. The new Act also simplifies the issue of joint ventures: joint ventures above the specified thresholds will always be subject to merger control if they are "fully-operational" enterprises (which implies that the joint venture involves material and personal funds for its activity, and that it is portrayed in the market as a separate economic entity), even though they would lead to the co-ordination of competitive behaviour between parent companies.

III. Enforcement of competition laws and policies

In **Australia**, the Trade Practices Commission considered 151 proposed mergers, compared with 132 in the previous period. Mergers involved the sectors of oil; flour; grocery wholesale operations; grain storage, handling and trading; private pathology practices; and taxi services. The pecuniary penalties of A$ 11.9 million and costs of A$ 2 375 million imposed by the Trade Practices Commission in a case involving allegations of an arrangement between the three major express freight companies were nearly a 50-fold increase on the previous highest award in proceedings previously brought under the Trade Practices Act. The Commission also examined cases relating to exchanges of information regarding price changes in the oil refining sector; collusive tendering in the building industry; price-fixing and market share arrangements in the concrete market; third-line forcing with regard to the launch of a football club; and resale price maintenance with respect to a refrigeration company. A number of competition issues came before the Commission as various arrangements were entered into and strategic positions taken in the developing pay television industry. The Commission investigated a number of complaints it had received about alleged co-operation between the free-to-air television networks in relation to the purchase of certain programming and sports television broadcasting rights.

In **Austria**, two cases in particular were brought to the attention of the Joint Committee for Cartels. The first involved the alleged abuse of purchasing power by a large retail chain which unilaterally altered the terms of payment for its supplies. The second case involved the alleged abuse of dominant position by a supplier of liquid gas by way of an exclusivity clause in its contracts with its customers. Another case involved the alleged abuse of a dominant position by a manufacturer of car starter batteries by refusal to supply a car accessories retailer. Since the introduction of merger control in November 1993 through the end of 1994, 238 cases were filed. From January to September 1995, 182 cases were announced or registered (announcements and registrations in a ratio of 1/2). One application for an investigation concerning possible market dominance was filed with the Cartel Court. Due to the strict requirements under European competition law governing the extent to which cartels are permissible, the number of registered cartels decreased by half and currently amounts to less than 30. The policy of medium-sized enterprises, i.e. to defuse competition by price and quota cartels instead of making necessary structural adjustments (including mergers), can in principle no longer be pursued. The few remaining cartels relate to market information systems, streamlining and specialisation agreements, etc. As a rule, they are confined to the traditional sectors and industries (e.g. welded wire mesh, carbonic acid, corrugated board and woodwool building slabs). The reporting requirement as specified under the 1993 Amendment to the Austrian Cartel Act concerning vertical agreements has thus far resulted in more than 600 reported cases.

In **Belgium**, 39 concentration notices were filed, the Competition Council rendered decisions on 42 cases and one concentration was prohibited. Nine notices for negative clearance and/or exemption were filed. Twenty complaints were referred, and the Competition Council rendered a decision in one case. Five applications for interim measures were filed, and the President of the Council rendered decisions in five cases, including one decision on a 1993 application. Approximately five orders referring to Articles

85 and 86 of the Treaty of Rome were notified to the Competition Council under Section 42 of the Competition Act, concerning primarily: selective distribution systems and refusal to deliver; abuse of market position; price collusion and selective distribution; and exclusive contracts and abuse of market position.

In **Canada**, the telecommunications sector saw the most activity, involving in particular Canada's largest cable television distributor and the markets of cable television distribution, radio and television broadcasting, radio paging, newspaper and magazine publishing and commercial printing. Neither the Competition Act in general, nor its specific merger provisions, deal with issues such as the concentration of media ownership. The Director provided a written submission to the Canadian Radio and Television Commission (CRTC) regarding an application for a balloting process for long-distance telephone service. Another area calling for special attention in the period was the marketing practices of some providers of long-distance telephone services. Applications were filed with the Competition Tribunal under the abuse of dominance provisions of the Competition Act concerning certain business practices of Yellow Pages publishers and concerning the business of providing scanner-based marketing research to consumer packaged goods manufacturers throughout Canada. An application was also filed regarding horizontal price maintenance in the real estate sector.

While the number of cases regarding misleading advertising and deceptive marketing practices the Bureau is taking on is decreasing, the total amount of fines has increased considerably over last year, and is in fact the highest of the past five years. In marketing practices cases, the average fine per case (C$ 61 191) and per accused (C$ 39 094) in 1994-1995 are roughly twice the previous highs within the last five years.

The Bureau has noted a disturbing trend in recent years towards an increasing number of instances of misleading claims in relation to bankruptcy sales. The importance the Bureau places on charging individuals was also underscored in six marketing practices cases during the year. Experience confirms that personal liability, in appropriate cases as provided for in the Act, is a significant component of the deterrent objective of prosecutions. Another noteworthy marketing practices case in the 1994-1995 fiscal year resulted in the obtaining of a restitution order against a company for failure to comply with the requirements for promotional contests. Overall, the Bureau's examination activity of mergers has remained steady over the past five years. For example, in fiscal year 1994-1995, there were 193 examinations commenced, compared to 192 during the 1993-1994 period. They occurred in the sectors of rail transport, the electric power transmission and distribution life insurance printing, newspapers and book store chains.

In **Finland**, 268 new matters in 1994 and 269 in 1995 involving restraints on competitions came up before the Office of Free Competition. Of these, 180 were requests for action received from undertakings and 20 were applications for exemptions. In 1994 the Office resolved a total of 213 matters regarding restraints on competition. In 120 cases the Office issued a formal decision; of these, 18 concerned applications for exemptions. The other cases were resolved by administrative letters, or did not lead to further measures. The Office of Free Competition referred two matters to the Competition Council for resolution. The Council rendered eleven decisions, of which five concerned applications for exemptions. In two cases the Council granted an exemption. Five Competition Council decisions were appealed to the Supreme Administrative Court, which issued a decision in one matter. In the control of horizontal restraints on competition, the Office of Free Competition's objective was to investigate and abolish cartel arrangements especially in the closed sector and basic industry. One of the most important cartel cases handled by the Office involved an application for an exemption for a price- and volume-target agreement between buyers and sellers of raw wood. In the investigation of vertical restraints on competition, the Office has focused on the retail trade in current consumer goods and speciality goods.

Measures taken by the Office were directed at the removal of competition-restraining conditions from agreements in retailing groups and chains, and at ending price discrimination of independent retailers. In the control of abuse of a dominant market position, the Office of Free Competition concentrated especially on basic industries which supply production inputs, and on eliminating abuse of the dominant market position of public undertakings. Special emphasis was given to the proposals made to the Competition Council by the Office regarding discriminatory and tying conditions applied by Imatran Voima in its electricity contracts and Neste in its fuel-delivery contracts.

In **France**, the Competition Council was far more active than in previous years with 140 referrals (compared with 127 in 1993), 89 decisions handed down (85 in 1993) and 32 opinions (20 in 1993). The increase in Council activity is mainly due to a rise in litigated cases involving applications for interim measures. One hundred thirteen contested cases were referred to the Council (103 in 1993). Of these, 34 were applications for interim measures (12 in 1993). In addition, 27 applications for an opinion were recorded in 1994, of which: nine on general competition issues; five on draft regulations affecting competition issues; three in response to an application from a court of law; and ten on concentrations. Of the 32 opinions, one concerned a draft bill regulating prices and requiring a preliminary opinion of the Council; five concerned draft bills introducing schemes which would restrict competition; five covered general competition issues; six were in response to applications from courts of law; and 15 were in concentration cases. In 27 cases, the Council imposed fines on 119 companies and 28 trade associations amounting to FF 76 740 000. Of the 18 decisions rendered in response to requests for interim measures, 15 were rejected, one was withdrawn and filed, two were favourably received and resulted in injunctions pronounced by the Council. Twenty-two of 75 decisions were appealed to the Paris Court of Appeals. As of 15 April 1995, the Court had ruled on 13 decisions of which eleven were affirmed in full. One appeal was rejected on a motion for dismissal of the application, and another decision was partially affirmed.

The Council handed down 33 decisions on the contents of Article 7(1) of the Ordinance of 1986 which prohibits concerted actions, contracts, express or implicit agreements or collusion whose goal or effect is to hinder, restrain or distort competition within a market. In seven of these decisions, the Council found that the existence of practices violating the Ordinance had not been proved. The Council had the opportunity to examine horizontal anti-competitive agreements taking on widely varying aspects. For example, these included price or margin agreements between theoretically competing companies, development and circulation of price schedules, price recommendations or price guidelines or discounts by trade associations, exchanges of information or agreements between tenderers for the same call for tenders, market-sharing agreements, concerted practices aimed at excluding certain companies from a market or limiting their access, and general terms of purchase or sale and their enforcement. The Council examined 20 cases and handed down ten decisions on agreements and exchanges of information on prices and margins. With regard to company groupings, the Council reiterated that grouping enterprises under the umbrella of one company or one Economic Interest Grouping (EIG) does not constitute a prohibited practice, unless it is proved that the practices engaged in by the company or by the EIG are intended or liable to distort competition within a market.

Nineteen of the Competition Council's decisions were appealed to the Paris Court of Appeals. Whereas the total number of decisions rose in relation to 1993, the number of appeals fell from 36 per cent in 1993 to 25 per cent in 1994. The Court of Appeals handed down 35 judgements in 1994, a bit more than double the number in 1993. In addition, the Court issued five orders in contrast to only one in 1993. The number of decisions rendered by the Council and the Paris Court of Appeals increased. Among the 35 judgements handed down by the Court of Appeals, 71.5 per cent affirmed the Council's decision, the same percentage affirmed in 1993. As in 1993, the judgements handed down were on the merits, except for a single application for interim measures. In addition, the number of appeals brought by the Minister fell from four in 1993 to a single case in 1994.

In 1994, the Directorate General continued to monitor the proper functioning of markets. Three hundred five indications of anti-competitive practices were observed, 230 enquiries launched (25 of which at the request of the Competition Council) and 193 enquiry reports prepared. The Minister of Finance made 26 referrals to the Council, in particular concerning practices observed in the awarding of government procurement contracts (seven times) and in the health sector (six times). This figure is lower than in previous years, especially in the services sector. The behaviour of service providers and their trade associations has shifted towards increased compliance with competition rules as a result of recent litigation.

In 1994, the DGCCRF recorded nearly 700 concentration operations. This figure, which is lower than the previous year, is explained by changes to the recording criteria which no longer include minor transactions. In 228 cases in 1994 (85 cases in 1993), proceedings were initiated in administrative courts for serious breaches of the provisions of the Government Procurement Code. In the area of trademark infringement, the DGCCRF worked particularly towards qualitative improvements by shifting the focus of investigations to industries with vulnerable products. The results are telling: the 2 010 cases opened in 1993 led to 123 reports and 24 warnings, while the 1 670 cases opened in 1994 led to 246 reports and 61 warnings. Textile industry products made up the majority of cases (approximately 75 brand names). These were followed by perfumes (20 brands), leather goods/shoes (14 brands) and watches (five brands). Piracy of less well-known products, such as glue tubes, lawnmowers, automobile spare parts and a combination hot-plate/washing machine, was uncovered.

In **Germany**, the Federal Cartel Office (FCO) initiated several proceedings based either exclusively or additionally on European competition rules. The ban on cartels continues to be one of the pillars of the German competition system. The FCO therefore continued to act on a number of cases where illegal co-ordination of conduct was suspected to be present. Still pending are a number of other proceedings for violations of the ban on cartels, in particular in the form of prohibited collusive tendering in the southwest German heating, air conditioning, ventilating and sanitary installations industry as well as in the market for road markings. In 1994-1995, the number of cartels legalised by the FCO rose from 239 to 258 (compared with an increase from 227 to 239 in the 1993-1994 period). In four cases, so-called small business co-operation agreements were involved. Such co-operation agreements account for some 40 per cent of all legalised cartels. The increase in the number of legal cartels is mostly due to nine cases of purchasing co-operation agreements operated exclusively by small- and medium-sized firms. The number of mergers notified to the FCO slightly increased to 1 564 mergers (1 514 in 1993). This figure again includes some 300 notifiable acquisitions of east German firms. The expectation expressed in the previous report that but for the cases attributable to German unification there would be about 1 200 mergers annually has been confirmed. As was the case in previous years, a vast majority of notified mergers was subject to the pre-merger notification requirement, accounting again for some 70 per cent of all notified mergers, and just under 80 per cent of mergers were subject to control. Most of the mergers notified to the FCO once more involved acquisitions of small and very small enterprises by large firms, which as a rule did not raise any particular competition concerns. As in the past, the number of truly large mergers having significant effects on competition was comparatively small. The FCO prohibited four merger projects, the same number as in the preceding period. The four projects concerned the German market for general lighting service lamps, electricity and gas suppliers and the construction industry. Apart from the four mergers prohibited in formal proceedings during the reporting period, eight merger proposals were abandoned by the firms after informal talks (prior to notification) with the FCO. In another seven cases, merger projects notified during the reporting period were withdrawn after the FCO had informed the firms involved of its intention to prohibit the project.

In **Greece**, the Directorate for Market Research and Competition (now Competition Committee) examined 47 cases arising either from its own initiative or from notifications and written complaints.

In **Ireland**, under the Groceries Order, based on the former legislation, the Director of Consumer Affairs undertook investigations in the case of milk, bread and sugar. During the year, 34 notifications of agreements were made to the Authority under the Competition Act, bringing the total of notifications since the Act came into force in 1991 to 1 271. The Authority disposed of 277 notifications in 1994, bringing the total disposed of to date to 805, or 63 per cent. The Authority took 116 decisions in 1994, bringing total decisions to 386, excluding one quashed by the High Court. The Authority granted two category licences, one dealing with franchise agreements, based on the EU block exemption, and one concerned with exclusive purchasing agreements with dealers in cylinder liquefied petroleum gas. In the latter case, the licence permits exclusive purchasing for a maximum period of two years, but does not allow a requirement for dealers to display a notice specifying the supplier's recommended resale prices.

While the Authority does not have a direct role in enforcement, as stated, it refused to grant a certificate or licence to a number of agreements which involved serious restrictions of competition, or made a grant only after amendment of the agreement. An interim report was sought concerning the price of UK newspapers in Ireland and on the question of dominance, in the light of an acquisition of shares and a loan to an important newspaper group by the major newspaper publisher in the State. During the year, 127 mergers were notified to the Minister under the Mergers Act. None were referred to the Authority for investigation and none were prohibited.

In **Italy**, the Competition Authority pronounced on 25 agreements, 14 cases of alleged abuse of dominant position and 597 concentrations between companies. It ascertained seven infringements of the prohibition on agreements restricting competition within the scope of Section 2 of the Act and five cases of abuse of dominant position by companies in breach of Section 3. None of the concentrations examined by the Authority during the year was prohibited. In the same period, the Authority submitted 78 opinions concerning the enforcement of the Act to the Bank of Italy and to the Broadcasting and Publishing Authority. In the first quarter of 1995, the Authority completed the examination of another 184 procedures relating to seven agreements, six cases of alleged abuses of dominant position and 171 concentrations, and issued 18 opinions to the Bank of Italy and to the Broadcasting and Publishing Authority.

In order to gather information on the existence and nature of any distortion of competition in particular economic sectors, the Authority completed three general fact-finding investigations into the dairy industry, cinemas and liquefied petroleum gas for heating purposes, and began another four investigations into methane gas, fuel distribution for vehicles, pharmaceuticals and professional services. It also ruled on 213 cases of alleged misleading advertising, finding 105 breaches of Legislative Decree No. 74 of 25 January 1992. In the period from January 1994 through March 1995, the Authority submitted opinions on laws and regulations dealing with telecommunications, electricity, vehicle fuels, vehicle components, harbour services, insurance, cinemas, retailing of newspapers and professional services. In July 1994, it issued a report on "Competition and Regulation in Public Utility Services". In recent years, demand and technological developments have created the conditions for increased competition in the provision of public services. The Authority emphasised that, even though in some cases a monopoly may be more efficient than a competitive market, market access should not generally be restricted by legislation.

In **Japan**, the Fair Trade Commission (FTC) investigated a total of 243 cases of alleged violation of the Antimonopoly Act. Of these, 81 were brought forward from the preceding year, while 162 were initiated during this period. The FTC concluded its investigations in 161 of these cases, and the

remaining 82 cases were carried over to 1995. Among the 161 cases completed, the FTC issued orders to cease and desist illegal practices in 30 cases by recommendation decision, and gave warnings in 21 cases of suspected violations. The 30 cases in which recommendation decisions were handed down in 1994 included 21 cases of bid-rigging, seven cases of price-fixing cartels and one other case. In 12 of the recommendation decision cases, the violations were committed by trade associations. The FTC ordered 482 enterprises involved in 23 cartel cases to pay a total of approximately 7.8 billion yen in surcharges. The FTC filed criminal accusations with the Prosecutor General against nine electrical equipment manufacturers who engaged in bid-rigging in the installation of electrical equipment commissioned by the Japan Sewage Works Agency. The FTC initiated hearing procedures under the Antimonopoly Act in a total of six cases. These included: the restraints imposed by a trade association on the method of selling gasoline by its members; the trade association's action to raise retail prices of gasoline; collusion to raise the sales prices of certain types of corned beef; a surcharge payment order pertaining to a conspiracy to set the minimum sales price of microcomputer-controlled gas metres for household use; and two cases of bid-rigging in certain electrical work projects ordered by Shiga local government and others. Major cases on which the FTC rendered recommendation decisions involved manufacturers of and dealers in marine paints, manufacturers of and dealers in canned corned beef, surveyors and geological surveyors located in Kagawa Prefecture, designated painters located in Tokushima Prefecture, trade associations of builders in the Yamanashi Prefecture, the National Co-operative of Mosaic Tile Manufacturers, the Kinki Chapter of the Japan Hospital Bedding Association, manufacturer-dealers and dealers in fire engines in Hokkaido and painting work ordered by offices in the Tohoku Regional Construction Office of the Ministry of Construction.

Pursuant to the Subcontract Act, the FTC conducted written surveys on 20 470 parent companies and the 73 440 subcontractors with whom they had transactions. Meanwhile, during the same period, the Small and Medium Enterprise Agency also conducted the same surveys on 40 083 offices of parent companies and 42 028 offices of the subcontractors with whom they had transactions. Under the Act Against Unjustifiable Premiums and Misleading Presentations, the FTC investigated 1 509 cases. The FTC received 1 983 merger notifications under Section 15 and 1 224 acquisition notifications under Section 16 of the Antimonopoly Act. During that period, there were no cases of mergers or acquisitions of business, etc. in which the FTC took formal measures. Major merger cases involved the second among Japanese cement manufacturers and the sixth, the fourth among Japanese cement manufacturers and the seventh, the holder of the top position among Japanese general chemical manufacturers and the top petrochemical company in Japan two companies engaged in the manufacture and marketing of various high-pressure gases, the joint venture of Mitsubishi Steel and Nippon Steel.

In **Mexico**, a total of 45 cases were investigated, comprising 21 *ex officio* investigations and 24 complaints. Of the total, 14 cases were decided. The cases involved the sectors of ferries, airport services and the functioning of duty-free shops at the nation's airports, purified water producers, an airline company, the National Trucking Chamber and Pemex-Petroquímica (the state oil company). A total of 122 merger cases were analysed, following 109 notifications and 13 *ex officio* investigations. The legal acts that gave rise to the notifications were 23 mergers, 55 acquisitions of assets, six joint investments, one notification made in compliance with a previous Commission resolution, one trust, two administrative restructurings and 21 participations in public biddings. Of all the notified cases, 81 were brought to a conclusion. Of these, conditions were placed on four and an objection was made to one. The rest were approved as filed. The merger cases involved beer producers and distributers; companies that manufacture, process and install metallurgical products, produce cables and wires for electricity, telephony and telegraphy, and manufacture other electrical articles; sugar mills; radio stations; and cable television.

In the **Netherlands**, decisions in individual cases (and appeal proceedings) involved branch protection: "Het Trefcenter" shopping centre in Venlo and the provisional supply requirement for

pharmaceutical wholesalers. The following cases were settled through intervention: Wadden Island ferry charge differentials, refusal to supply filter systems, agreements on shop opening hours, professional practitioners, auction monopoly (exclusive trading agreement between notaries and estate agents) and the gaming machines sector. The following cases are under investigation: pharmacies; prices charged for the anti-migraine drug Imigran; Postkantoren BV's policy of contracting the establishment of new postal agencies or the extension of existing agencies only with a certain commercial partnership; the standard increase in the uninsured risk for storm damage introduced by a large number of insurers as of 1 January 1994; the largest association of estate agents; an institution that organises conferences filed a complaint about potential distortion of competition by educational institutes; two opticians' organisations filed complaints regarding bilateral contracts between a regional health care insurer and a number of opticians; unfair competition in leasing of fairground sites; unfair competition from privatised government service; interbank settlements; funerals/cemeteries; the glass sector; artificial insemination; a commercial radio station; the CD market; and the beer market.

In **New Zealand**, with regard to authorisation by the Commerce Commission of restrictive trade practices, four cases were registered during the year, one was authorised and one was withdrawn by the applicant. The Commerce Commission initiated three further court actions, accepted four administrative settlements and issued 27 warnings. The court actions involved allegations of price fixing by moteliers, resale price maintenance by a car manufacturer and use of a dominant position for exclusionary purposes by an insulation manufacturer. In the period from 1 July 1994 to 30 June 1995, 18 mergers were notified to the Commission, of which eleven were cleared within ten working days and eight were cleared after extension of time. The Commission initiated 98 merger investigations.

In **Norway**, two cases were decided in court in 1994. In one case, the four largest producers of corrugated cardboard were fined a total of NOK 20 million. In four other cases, enterprises and persons involved accepted fines for infringement of the prohibitions against horizontal price fixing agreements within the markets for storage batteries, roofing paper, wholesale of tubes and services rendered by contractors of heavy equipment. Two new infringements which concerned illegal price maintenance in the market for electrical machinery and apparatus and horizontal price fixing within a local craft guild were further reported to the police. Intervention was made only in one merger case, which involved the acquisition of shares in Frionor AS by Orkla AS. Three cases of intervention also occurred against restrictive arrangements or abuse of dominant market position in banking, the silverware market and the flower market. Two important cases also occurred concerning exemption in the aviation market and one rejected exemption in the power utility market. Restraining effects of public measures in the pharmaceutical market were dealt with by the Authority during the period.

In **Portugal**, the Directorate-General for Competition and Prices investigated 126 cases in the last 18 months (1 January 1994 - 31 July 1995), but only a relatively small percentage was initiated by complaints (25 per cent). In 1994, 39 preliminary investigations were finished, ten of which gave rise to formal procedures for infringement of competition law. In the first half of 1995, although only ten preliminary investigations were completed, the number of infringement procedures opened was substantially greater (21). Only six cases were referred to the Competition Council (CC) for final decision, under Article 26(1) of DL 371/93. This relatively small number may be explained by two factors: the entry into force of the new antitrust statute and the reorganisation of the internal procedures of the DGCP. The cases sent to the CC concerned, mainly, selective distribution in the markets for sportswear and soft drinks, abusive conduct in the markets for tachograph disks and television advertising, and restraints on access to the bullfighting market as a result of a decision taken by an association of undertakings. In 1994, the DGCP analysed three preliminary notifications concerning two distribution agreements (current consumption goods and retail distribution) and one sales agreement (flat glass). The

last case was referred to the CC only in 1995. In the first semester of 1995, only one notification was submitted to the DGCP (distribution agreement in the ice cream market).

Notwithstanding the substantial increase of the turnover threshold for mandatory notification (from Esc five to Esc 30 billion), the number of notifications is the same as in previous years. During 1994, DGCP examined 25 merger operations, one of which had been notified under the former merger legal framework (DL 428/88). Five of these mergers were not subject to compulsory notification: three of them did not fulfil any of the requirements set out by the law (i.e. market share exceeding 30 per cent or turnover exceeding Esc 30 billion), and the other two were considered to be co-operative joint ventures, which do not satisfy the definition of merger given by Portuguese legislation. The remaining operations were given favourable opinions, and were approved by the Minister of Trade, even though one case involved the attachment of formal conditions. In the first half of 1995, ten merger notifications were registered, eight of which have presently already been dealt with and authorised by a governmental decision. The activity of the undertakings involved in the mergers notified during the two periods mentioned above were as follows: 24 in manufacturing, seven in retail distribution, one port handling services/rail transportation/electricity, one in telecommunications and two in software/hardware services. As far as the form or type of operation and the "nationality" of the undertakings that took part in these mergers are concerned, most were horizontal and most involved acquisition of shares, and most were purely domestic.

In **Sweden**, 200 new merger cases, 247 new agreements and 1 177 other cases were registered during 1994 and 186 decisions were taken with regard to mergers, 550 concerning agreements and 1 030 concerning other cases during the same period. A total of 31 Competition Authority decisions were appealed to the Stockholm City Court. The Swedish Competition Authority has examined several agreements concerning the exchange of information between competitors. Generally these exchanges have been initiated and handled by trade associations. Swedish trade organisations have traditionally distributed price-lists containing recommended selling prices to their members. In Sweden, it is customary that suppliers issue price recommendations for their retailers, i.e. vertical price recommendations which appear either in price-lists or in product catalogues handed out to consumers. The Competition Authority has taken decisions in a number of cases regarding vertical price recommendations where companies have applied for negative clearance or an individual exemption.

In **Switzerland**, the investigations carried out by the Cartels Commission during the period under review dealt with: sand, gravel and ready-mix concrete; the motor vehicle market; automatic switches; the market for bread flour; the Berne medical services market; regulation of the cheese market; cantonal banks; and codes of conduct for selected firms in the media sector. During the year 1994, 33 preliminary investigations were opened and 16 were completed. At the end of the year, 27 were still in progress. These preliminary investigations focused *inter alia* on medical services (activities, health insurance funds, etc.), specialised trade (sporting goods and children's articles), media (books, advertising consultants and advertisements) and monopoly public services. In 1994, the Price Surveillance Office took action with regard to: private hospital fees; pricing policy for postal and telecommunications services (internal subsidies); cantonal monopolies over real estate insurance; dentists' fees; architects' fees; repercussions of the introduction of VAT (on 1 January 1995); radio and television licence fees; and motor vehicle liability insurance premiums.

In the **United Kingdom**, details of 1 280 agreements were sent to the OFT in 1994, compared with 1 251 in 1993. In 1994, 581 agreements were added to the register (15 per cent fewer than in 1993). The DGFT was able to advise the Secretary of State that 1 261 agreements (77 per cent more than in 1993) did not contain significant restrictions on competition. Some 80 new investigations were started, Section 36 notices were issued in respect of nine investigations and a number of less formal letters of enquiry were

also sent. In 1994, the OFT received 34 complaints alleging contravention of the Resale Prices Act 1976, compared with 45 in 1993. In six cases, the DGFT obtained written assurances from suppliers that they would not seek to impose minimum prices at which dealers could resell their goods. The DGFT published one report on business practices that were in contravention of the Competition Act 1980

The DGFT made three references to the MMC pursuant to his monitoring responsibilities under the Fair Trading Act 1973. They involved the supply of video games, the supply of bus services in the North East of England and the supply of the services of administering performing rights and film synchronisation rights. The MMC in turn issued seven monopoly reports in 1994 involving private medical services, ice cream, contraceptive sheaths, residential mortgage valuations, historical on-line database services, recorded music and films. Action was also taken on matters that had been reported in earlier years, such as structural warranties for new homes, electrical contracting services at exhibition halls in London, animal waste, matches and disposable cigarette lighters, bus services in mid and west Kent, contact lens solutions, fine fragrances, national newspapers, petrol and beer. The Office of Fair Trading resolved a number of informal enquiries without the need for an investigation or a monopoly reference. The more significant cases involved vertical integration in the travel industry and price cuts of *The Times* and *Daily Telegraph*. In the field of retail financial services, the main event of 1994 was the establishment of a new regulator, the Personal Investment Authority (PIA). Recognised by the Chancellor of the Exchequer in June, the PIA takes over responsibility for the regulation of bodies retailing financial services to private investors. Another major development was the introduction of new product and commission-disclosure rules on investment-linked insurance products. The new rules reflected a Treasury direction to SIB, following a report from the DGFT that had criticised earlier proposals. As the year closed, the OFT was in discussion with the PIA about disclosure rules for non-life products. On the wholesale side, dealing with financial markets, the DGFT published reports on applications for recognition from four overseas investment exchanges. In the domestic financial markets, attention focused on the rules of the London Stock Exchange, and a report was produced on the Exchange's arrangements for publishing information on large trades.

The total number of mergers considered by the OFT rose from 309 in 1993 to 381 in 1994. This represented a year-on-year increase of around 23 per cent, and followed a rise of some 50 per cent in 1993. Only seven of the cases were considered under the voluntary pre-notification procedure. The DGFT advised on 113 requests for confidential guidance, an increase of 65 per cent on the 1993 total of 76; 61 received favourable guidance (that is, were not likely on present information to be referred), and 15 received unfavourable guidance. The remaining 37 requests were found not to qualify or were abandoned. Another nine cases remained outstanding at the end of the year. The Secretary of State made eight references to the MMC in 1994, compared with three in 1993. All except one (British Aerospace/VSEL) were on competition grounds and, in all these cases, in accordance with the DGFT's advice. In the exceptional case, the DGFT recommended against reference on competition grounds, but suggested that the Secretary of State consider whether the bid raised other public interest issues that might merit reference. Two merger reports were published by the MMC in 1994. There were three cases where undertakings were given in lieu of reference, bringing to eleven the total number of cases in which this procedure has been used since its introduction in 1990. All three cases related to mergers involving independent television (ITV) companies, and in each case the undertakings were designed to remedy possible adverse effects of the mergers in the market for the sale of television advertising air-time. The Secretary of State made two references to the MMC in 1994.

In the **United States**, the Antitrust Division of the Department of Justice opened 366 investigations and filed 78 antitrust cases, both civil and criminal, in federal court. The Division was a party to 13 U.S. antitrust cases decided by the federal Courts of Appeals, and filed *amicus curiae* briefs in one Supreme Court case and two Court of Appeals cases. Nine of the cases involved criminal appeals, and

four were civil matters. Most of the appeals involved criminal procedure, sentencing or evidentiary issues, and none had major international policy implications. The Division filed 57 criminal cases against 55 corporations and 50 individuals. Ninety-two corporate defendants were assessed fines totalling $40 236 000 and nine defendants were sentenced to a total of 1 497 days of incarceration. Another 22 individual defendants were sentenced to spend a total of 2 475 days in some form of alternative confinement. The Division opened 84 civil investigations, both merger and non-merger, and issued 1 135 civil investigative demands (a form of compulsory process). During the year, the Division filed 21 civil complaints and 19 proposed consent decrees or final judgements. In the non-merger area, the Federal Trade Commission (FTC) brought 13 enforcement cases involving allegedly anti-competitive conduct by, among others, medical professionals, interpreters, automobile dealers and cable television systems. Nine of these case concerned cases of alleged horizontal restraints that were settled by consent agreements. The FTC also accepted two consent agreements settling charges of alleged monopolisation activities. According to the annual report of the Director of the Administrative Office of the U.S. Courts, 748 new civil and criminal antitrust actions, both governmental and private, were filed in the federal district courts. From 1 January to 30 September 1994, the Antitrust Division responded to 18 requests for review of written business proposals, indicating in each of the 18 responding letters that it would not challenge the proposed conduct.

During 1994, the Antitrust Division of the Department of Justice and the Federal Trade Commission received 4 403 filings for 2 301 reported transactions under the notification and filing requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act). This represents a 25 per cent increase over the number reported in the previous fiscal year. The Division investigated 105 mergers and challenged 22. The FTC investigated 46 transactions with second requests for information and initiated 20 enforcement actions in a wide variety of industries. The Commission authorised the staff to seek preliminary injunctions in federal district court to block three proposed mergers, accepted 15 consent agreements for public comment to settle anti-competitive concerns raised by proposed transactions and issued two administrative complaints. In addition, acting on cases begun during previous years, the Commission found antitrust violations in two cases and dismissed one complaint on jurisdictional grounds. The Commission obtained a record of 2.6 million dollars in civil penalties against a US Company for failure to observe premerger notification requirements, and waiting periods.

In the **European Union**, three prohibition rulings were issued against Community-wide cartels in 1994, which is a record in the field. Further, the fines imposed were the highest on record. It was decided in 1994 to create an anti-cartel division whose sole mission will be to detect cartels and draft decisions prohibiting them and imposing fines. The Commission examined agreements restricting parallel trade and agreements and practices aimed at closing or limiting access to markets by Microsoft and in the tennis ball industry. With regard to strategic alliances in markets such as telecommunications that are rapidly opening up to global competition under the twin effects of technological progress and trade liberalisation, the Commission is, as a rule, in favour of such agreements. This was the position adopted in the BT/MCI and Olivetti/Digital cases. The Commission also tends to rule in favour of R&D and production joint ventures, as was the case in the joint ventures that occurred in the high technology sector, the telecommunications and aerospace equipment sectors, and with respect to plastic linear polyethylene, human vaccines, lead glass used in the manufacture of lamps and double-layered products to be used mainly in the manufacture of glass for automobiles. In the transport sector, the Commission handed down four decisions granting exemptions regarding international rail transport. All four cases involved joint marketing of new international services and, in all but one, services between the United Kingdom and continental Europe following the opening of the Channel tunnel.

In 1994, the number of operations notified to the Commission under the Regulation on Concentrations rose sharply. The figure rose from 58 cases in 1993 to 95 in 1994, i.e. an increase of

64 per cent. A detailed investigation was carried out in five cases where serious doubts had been raised as to the operation's compatibility with the Common Market. One of these operations, MSG Media Service in the German market for pay television, was prohibited. Two others were significantly modified before the go-ahead was given, and two others were cleared with no changes. This is the largest number of decisions issued in cases involving the full five-month procedure since 1991. In 1994, there were six cases in which a full investigation was ordered, compared with four in 1993. The percentage of operations cleared after an initial one-month period remained almost unchanged: 88 per cent in 1994, compared with 86 per cent in 1993, despite the major increase in the number of cases. Among the decisions adopted after an initial one-month period, 57 per cent concerned industrial sectors, 18 per cent consumer goods and 25 per cent service industries. Many cases involved either heavy industry or chemical products (notably manufacture of fibres), representing over 25 per cent of all cases. There were also numerous operations involving the banking and insurance sectors. For the first time, the Commission declared that two notifications were incomplete, and demanded that additional information be provided by the parties. In three cases, the Council agreed to authorise the operations without a detailed investigation only after the parties gave undertakings that they would modify the operation to eliminate some problems with competition noted by the Commission. In two of these cases (Unilever/Ortiz Miko and Tratebel/Distrigaz), the parties abandoned their project and withdrew their notification. In both cases, a reworked version of the project was notified and was subsequently cleared by the Commission. In addition, in two further cases (Unilever/Ortiz Miko and Elf Atochem/Rütgers), the Commission agreed to undertakings by the parties aimed at resolving possible competition issues.

In the **Czech Republic**, the Ministry examined a total of 601 initiatives of various kinds, 77 of which resulted in administrative proceedings. Fifteen of the rulings concerned anti-competitive agreements, 16 cases dealt with abuse of dominant position and 36 cases concerned company mergers. The most frequent, and the most serious, anti-competitive practices are price cartels or price-fixing agreements and agreements to limit market access. Most cases of abuse of dominant position dealt with the application of different conditions when identical or comparable services were provided, thus placing competitors at a disadvantage. In 1994, the MEC authorised 36 mergers of competing companies. All petitions for merger were approved without limitation, except in one case where the Ministry set certain time limits and prevented personal interlinking of the owners. One administrative proceeding was interrupted.

In **Hungary**, since the adoption of the competition law in 1990, some 30 requests for authorizing concentrations were submitted to the OEC. Only one was dismissed by the Competition Council because it found that such a merger would significantly reduce competition in the Budapest student catering market and would produce insufficient offsetting advantages. Concerning the application of the cartel provisions, the OEC launched investigations *ex officio* in 1992/93 and in 1994 regarding sugar industry companies and large coffee distributors ; both ended with finding an infringement of the competition statute. In addition, there were three applications for exemption or negative clearance, which were permitted by the OEC. Abusive practices formed the majority of antitrust cases, a large proportion of this kind of cases was connected to local public services.

In **Korea**, the KFTC took corrective measures and imposed surcharges on 122 cases after investigating 22 large business groups that were suspected of unfair internal trade, such as discriminatory trade between affiliated and non-affiliated companies, etc. In January 1994, the KFTC designated and notified the 332 enterprises encompassing 140 specific goods and services, as market-dominating enterprises. Among them, the KFTC reviewed the agency contracts of the 48 enterprises which were newly designated. The KFTC also ordered 12 enterprises suspected of illegal contracts to follow its recommendations for correction. The KFTC exerted great efforts to stamp out cartel and bid-rigging. For the 16 large construction companies charged with bid-rigging in the Paekjae Bridge construction project,

the KFTC has ordered the companies to discontinue their collaborative activities and make their illegal actions known to the public through the newspapers. The KFTC also issued complaints to the prosecutor against those corporations and their staffs.

In **Poland**, during year 1995, the AMO did not prohibit any mergers. It answered a number of enquiries submitted by enterprises regarding interpretation of amended provisions of the Antimonopoly law. AMO considered applications submitted by more than ten large foreign companies which decided to invest in Poland. In addition, the AMO performed reviews of concentration and pricing under conditions of limited competition notably in the press distribution sector and in the hotel management sector. It surveyed concentration on the local markets in selected sectors, as well as enterprise behaviour in some others. In 1995, the AMO also received 66 requests to review decisions , of which 56 were forwarded on appeal to the Antimonopoly Court and eight returned to the relevant Department or regional branch for amendment. The Antimonopoly Court dealt with 34 of the 56 appeals received.

In the **Slovak Republic**, from its incorporation through 1 January 1995, the Antimonopoly Office handled 207 cases of anti-competitive practices in administrative proceedings. One hundred twenty-four cases involved abuse of dominant position in the relevant market, and 83 cases involved anti-competitive agreements. During the period under review, the Supreme Court reviewed four cases violating the Act on the Protection of Economic Competition (namely OMV-Benzinol, Incheba, Slovnaft-Benzinol and a cartel agreement among Slovak cement producers). The total fines amount to SKk 25 010 million, including fines on the abuse of dominant position and for anti-competitive agreements of SKk 1 050 million and SKk 23 960 million respectively. The Antimonopoly Office also examined certain matters on its own initiative. Anti-competitive agreements concerned in particular price-fixing, market sharing and barriers to market entry. To date, the most significant case has been the cartel agreement among the Slovak cement producers on market-sharing and exchanges of information, which resulted in concerted practices in price-fixing. In this case, the Office imposed the highest fine ever of SKk 19 960 million. In the period under review, the most common cases of abuse of dominant position that were examined by the Antimonopoly Office concerned the imposition of unreasonable contract conditions, tied sales and application of different conditions to different parties for equivalent transactions.

During 1991-1994, the Antimonopoly Office evaluated a total of 123 concentration projects. Thirty-five of them were completed by issuing decisions. From the number mentioned, there were two cases where concentrations were not approved, three cases where concentrations were conditionally approved, three cases in which the proceedings were terminated because the concentrations were not subject to the approval of the Authority and one case in which a preliminary measure was issued. In the other 26 cases, the concentrations were approved without conditions. On the whole, in the 1991-1994 period, 30 concentration operations were approved, of which 20 were horizontal concentrations and 28 were undertakings with foreign participation (joint ventures). Since 1991, the number of notified concentrations was conspicuously influenced by the privatisation of old state-run enterprises. In the privatisation process and the entry of foreign capital, the cases examined represent proposals of concentrations of undertakings or parts of undertakings and the establishment of joint ventures. The proposed Slovnaft-Benzinol merger, entries of foreign capital into the engineering, chemical, tobacco and telecommunications industries can all be regarded as concentrations in that category.

IV. Deregulation, privatisation and competition policy

In **Australia**, in February 1994, the Council of Australian Governments (COAG) agreed to the establishment of a competitive electricity market in south-east Australia. The market was originally due to commence on 1 July 1995. This has been delayed, however, and it is now expected to commence in 1996.

At the same time, COAG agreed to implement a comprehensive package of reforms for the natural gas industry by 1 July 1996, aimed at stimulating a more competitive framework for the industry. From January 1995, additional competition was introduced into the mail services market arising from the government's consideration of the 1992 Industry Commission review of the postal market. Access to the facilities of the international satellite systems INTELSAT and INMARSAT has been liberalised. Other regulatory features of the telecommunications industry include full resale of network capacity (domestic and international), separation of the regulatory and operational functions and competitive safeguards. Amendments were made to the Telecommunications Act 1991 to clarify government policy with regard to price discrimination. These amendments clarified the nature of price discrimination which was to be permitted and extended the time in which AUSTEL could make a determination on the acceptability of a proposed tariff. On 1 August 1995, the government announced that full and open competition would be introduced to the telecommunications industry from 1 July 1997. Under the new regulations, no restriction will be placed on the number of providers or installers of network infrastructure. The government announced its strategy to sell long-term leases of all the airports owned by the Federal Airports Corporation, which includes all capital city and most important regional airports. The government is developing a regulatory regime for airports to ensure that no lessee is able to abuse market power arising from the monopoly characteristics of airports services. The regulatory regime will include: cross-ownership restrictions, restrictions on airline leasing of the airports and price capping of aeronautical services at the major airports. The government announced on 3 June 1995 plans to bring interstate rail track under single management control through the establishment of a new authority (Track Australia).

The Australian Government has introduced measures to improve the efficiency and financial performance of port authorities through the Council of Australian Governments. In the period 1989-1990 to 1993-1994, port authority workforces have been reduced by around 50 per cent, prices of port services have fallen by 14 per cent and operating sales margins have increased. Government shipping reform programmes achieved a significant reduction in average crewing levels, from 33 to 18 since 1983. In May 1995, the government endorsed a further shipping reform package including an annual taxable grant for shipping employers to offset the impact of income tax on seafarers' earnings on Australia's international ships. Existing capital assistance measures are being extended from 1997 until 2002, and shipowners and unions agreed under the Maritime Industry Restructuring Agreement to implement complementary industrial reforms to further reduce crewing costs. The national competition policy agreed to by the Council of Australian Governments (COAG) in April 1995 will affect the legal profession by bringing this largely unincorporated sector of the economy within the scope of the competitive conduct provisions of the Trade Practices Act 1974.

In **Austria**, in areas that have so far been the exclusive or predominant domain of the state, deregulation -- particularly in the field of environmental protection -- has created new problems in connection with cartel law. The companies that have taken over responsibility for these tasks sometimes restrained competition through co-operative activities between enterprises. In particular, there were two cartels in the field of environmental protection: a nation-wide disposal system in the waste management industry, the ARA system, and a system specialising in the disposal of used refrigerators. The latter is designed to provide a nation-wide disposal system within the scope of the Ordinance on Refrigeration Systems. By participating in the nation-wide disposal system, commercial sellers of refrigerators are exempt from the obligation (under the Ordinance on Refrigeration Systems) to require every refrigerator buyer to pay a deposit for the disposal of the refrigerator. Beginning in 1996, the government plans to restructure and privatise postal services and bus transport, which had been supervised by the Ministry of Transport. Within the framework of a stock company, these services will be offered on the marketplace in a competitive environment in compliance with European competition rules. Also in 1996, a second GSM operator will be licenced.

In **Belgium**, no developments were reported in this area.

In **Canada**, the energy sector is undergoing a thorough examination at several levels to determine the benefits that could flow from increased reliance on market forces.

In **Finland**, measures taken by the Office of Free Competition for the dismantling of public restraints on competition aimed at the reduction of structural competition-restraining regulations (entry barriers and exclusion from markets), particularly in the food production, transport, insurance, energy and construction sectors. The Office also emphasised the promotion of the introduction of competitive practices in public services and the prevention of the competition-distorting effects of public subsidies. In 1994, the Office of Free Competition took three initiatives concerning deregulation. In addition, the Office gave various public authorities a total of 41 statements of preventing anti-competitive provisions from being included in regulations. The new Electricity Market Act will enter into force on 1 June 1995. The Electricity Market Centre will be established to supervise enforcement of the Act. The new Electricity Market Act will open production, distribution and foreign trade of electricity to competition. The law will dismantle the monopoly enjoyed by electricity distribution plants. Major users, regardless of their location, will be able to buy electricity from any producer or distributor. Completely revised alcohol legislation came into force at the beginning of 1995. The exclusive rights granted by former alcohol legislation were contrary to EU and EEA competition rules and the principle of free movement of goods. The reform abolished the Finnish state-owned alcohol company Alko's import, export and wholesale monopolies. The company's exclusive right to manufacture alcohol beverages was also terminated. Alko's retail sale monopoly, which it retained, was modified so that food shops may now sell cider and other fermented beverages with a maximum alcohol content of 4.7 per cent, in addition to medium-strength beer. The Office of Free Competition has initiated a project in which the effects of state subsidies on competition will be examined, as part of the Office's efforts to eliminate restrictions and distortions of competition created by public authorities.

In **France**, no new developments were reported.

In **Germany**, in the field of privatisation, the government has an impressive track record. Since 1982, the number of government shareholdings and special assets has been cut by more than half from 958 to under 400 as of the end of 1994. Receipts from privatisation over that period amounted to DM 12.5 billion. At the end of 1994, the Treuhandanstalt successfully completed its task of restructuring and privatising the formerly state-owned firms in the new federal laender. Through the privatisation of firms, the Treuhandanstalt obtained investment pledges from the new owners worth more than DM 207 billion and guarantees for 1.5 million jobs. Since 1 January 1995, the Treuhandanstalt's remaining tasks have been carried out by several successor agencies. The reduction of federal real estate, particularly in the new laender, forms an integral part of the government's privatisation policy. The reporting period saw an acceleration in the sale of such real estate. The three postal enterprises Telekom, mail service and postbank were converted into legally independent stock corporations on 1 January 1995. Subsequent partial privatisation of those companies is envisaged. Shares in Deutsche Telekom AG are intended for sale as early as 1996. Railway reform and "Post Reform II" have been two very significant steps in Germany towards injecting more competition into these fields. Essentially, the two reform acts provide for the conversion of the various divisions of state enterprises into stock corporations, enabling the privatisation of postal and railway services and freeing them from the constraints imposed by the law governing public service.

In **Greece**, no developments were reported in this area.

In **Ireland**, no developments were reported in this area.

In **Italy**, in June 1994, the Authority submitted a report under Section 22 of the Act, containing a number of proposals for the structural reorganisation of the electricity industry. The Authority pointed to the need to thoroughly review the whole system created by the 1962 Nationalisation Act, with particular reference to the statutory monopoly covering the production, import and export, transport, transformation, distribution and sale of electricity. In 1994, state-controlled telecommunication companies were incorporated into a single carrier, Telecom Italia S.p.A., resulting from the merger of Sip, Italcable, Sirm, Iritel and Telespazio. At the time Telecom Italia was incorporated, the Authority submitted a report under Section 22 of the Act to emphasise the need to hasten the liberalisation of access to telecommunication markets.

In **Japan**, the FTC has been reviewing government regulations from a medium to long term perspective for quite some time, and has requested the ministries and agencies concerned to review their respective systems. The FTC also has been asking the relevant ministries and agencies to reduce cartels exempted from the Antimonopoly Act. In 1994, 12 exempted cartels were eliminated. As for the Resale Price Maintenance (RPS) exemption, by the end of 1998, the FTC intends to revoke RPM for all designated items (certain cosmectics and pharmaceuticals) and to circumscribe and identify the scope of copy-righted works.

In **Mexico**, several ordinances and regulations have been enacted that allow the opening up of railroads, basic telephone services and natural gas distribution to competition and the strengthening of competition in air transportation and other areas of telecommunications. These regulations are the following: the Railroad Service Regulatory Law, the Federal Telecommunications Law, the amendments to the Regulatory Law of Article 27 of the.Constitution and the Civil Aviation Law.

In the **Netherlands**, a proposal for a new Notaries Act presented to the Second Chamber of Parliament on 2 May 1994 is based on free pricing. By way of a transitional arrangement, there are plans to adapt the current private law regulation of charges of the Royal Fraternity of Public Notaries in such a way as to increasingly realise the operation of the market step by step. The draft of the temporary Freight Allocation on North-South Shipping Routes Act has been presented to the Council of State for advice. The minimum milk price was abolished as of 1 October 1993 (Royal Decree of 21 September 1990, Statute Book 493).

In **New Zealand**, as a result of consultation with the public, the government has agreed to introduce information disclosure regulations in accordance with the government's light-handed regulatory policy for natural monopolies. The objectives of airport regulation are to ensure that airports do not abuse their monopoly power, and that prices reflect those that would arise if the market were competitive. The regulations will focus on those airport services subject to monopoly power, while ensuring that compliance costs are not excessive. The government has instructed officials to draft the necessary legislative amendments and regulations to the Airport Authorities Act, which are likely to be tabled in Parliament by the end of 1995.

In **Norway**, no activities were reported in this area.

In **Portugal**, the privatisation programme officially began in 1989, under favourable economic and social conditions. The privatisation of one brewery, one bank and insurance companies, the first state-owned enterprises to be sold, occurred in 1990, after the amendment of the Portuguese Constitution, which until late 1989 had expressly reduced the sale of state-owned companies to a maximum share capital of 49 per cent. In April 1990, the Parliament authorised the government to privatise companies and assets which had been nationalised without further restraints, establishing the main objectives to be pursued as well as the general framework of privatisation (Act 11/90, of 5 April 1990). By the end of the current

legislature in September 1995, most of the public companies included in the privatisation programme will have already been transferred to the private sector, the majority of which were sold in the last year and a half, since the beginning of 1994. The Portuguese privatisation programme showed the clear preference of the Portuguese Government for public offerings in the Stock Market, immediately followed by competitive tenderings, as far as methods are concerned, as well as a deliberate political choice to intervene as little as possible in the shareholding structure of the privatised companies. Privatisation activities occurred in the following sectors: cement, banks, insurance, naval repairs, iron and steel industries, transport, telecommunications, pulp and paper production and the chemical industry.

With regard to deregulation, during 1994 and the first half of 1995, new efforts were developed in order to liberalise economic activity as far as price control and market access are concerned. As a result of this policy, several products of different natures were excluded from the declared price regime: the extraction of minerals such as iron, stain, uranium, precious metals, non-metallic minerals and industrial rocks; gas production, pulp and paper production, health-care services, medical and dental services, film production, radio and television, and the sterilisation and packaging of milk. In search of increased flexibility as concerns price controls, the sugar industry, at the stage of production or importation, was subject to the regime of price surveillance as was the industrial gas used to supply hospitals and similar units, when produced or imported, which was formerly under a stricter price regime.

In **Sweden**, the Swedish Competition Authority gave competition views on a large number of government reports covering different areas, such as environmental protection. National requirements in the environmental domain may result in trade hindrance effects that are in conflict with international commitments thereby limiting competition. Sweden has adopted a number of regulations on packaging and packaging waste. The regulations lay the responsibility for the achievement of recovery and recycling goals on economic operators. Even though the regulations do not expressly force economic operators to co-operate over recycling systems, they nevertheless constitute an incentive for co-operation. There is a risk that such types of environmental regulations might lead to activities restricting competition on the market, although they do not expressly provide for it.

Two state-owned companies, Systembolaget AB and Vin & Sprit AB, have held a monopoly on the market for alcoholic beverages. Due to the EEA Agreement and Swedish membership in the EU, conditions regarding these monopolies have changed greatly. On 1 January 1995, a new act on the sale of alcohol entered into force. Among other things, the new act states that only the retail monopoly will remain. All other monopolies are replaced by a new licensing system. Thus the market for alcoholic beverages is being opened up to competition in several respects.

Parliament decided in October 1995 that the legislation reforming the electricity market should come into force by 1 January 1996. The decision was preceded by a broad analysis of the consequences of deregulation, e.g. for smaller distributors and consumers. This analysis was carried out by the Energy Commission, following a Parliament decision in 1994.

In **Switzerland**, no developments were reported in this area.

In the **United Kingdom**, in 1994, Scottish Hydro-Electric did not accept the proposals of the Director General of Electricity Supply (DGES) for changes in its distribution and supply price controls, which had been set in 1990. The DGES therefore asked the MMC to report on whether continuation without modification of the controls operated, or might be expected to operate, against the public interest and, if so, whether it could be remedied or prevented by modification to the licence conditions. The MMC is expected to report in May 1995. Following the first full review of price limits since privatisation, the Director General of Water Services (DGWS) referred the price limits for South West Water Services

Ltd. and Portsmouth Water plc to the MMC. Both companies had, under the terms of their licences, requested a referral of the limits set by the DGWS. The MMC was asked to report on the disputed price limits by March 1995. Considerable progress was made in 1994 towards implementation of the rail privatisation plans. A government-owned company, Railtrack, was set up to own and manage the railway infrastructure; it will be sold by stock market flotation in due course. The sale process for the first passenger service franchises began in 1994, and contracts are due to be awarded by the end of 1995. Plans for the sale of the three rolling stock leasing companies also proceeded during 1994.

In the **United States**, during 1994, the Division filed comments in the following areas: Federal Energy Regulatory Commission proceedings involving electric power transmission pricing and oil pipeline rulemaking; Interstate Commerce Commission proceedings on the rate-making authority of motor carrier rate bureaus; Federal Maritime Commission proceedings that focused on the criteria to be used by the Commission in determining whether shipping conference agreements unreasonably raised prices or decreased service; and Department of Agriculture proceedings relating to the economic effects of marketing orders for citrus fruit, tart cherries and milk. The Division reviewed five applications for new Export Trade Certificates submitted under the Export Trading Company Act and its implementing regulations and concurred in the issuance of five new certificates. The goods and services covered by the certificates included fruit, wood and trade facilitation services. In 1994, the Office of Consumer and Competition Advocacy of the Commission submitted staff comments or *amicus* briefs to federal and state entities on competition issues in such areas as the Federal aviation administration proceeding on policies as to govern setting airport rates and charges; ATT's petition to the Federal Communications Commission to remove its classification as a dominant carrier; and the California Public Utilities Commission's proposal to permit retail "wheeling" of electric power.

In the **European Union**, one of the fundamental preconditions for liberalisation in the telecommunications sector is ensuring that opening up the market to competition will not prevent telecommunications companies from continuing to carry out their legitimate public service roles. Over the last seven years, however, the Community has implemented a gradual programme of liberalisation which will lead to the complete opening up of the markets for telecommunications services in 1998. The Commission adopted a Directive on Satellite Communications. This Directive opens up to competition the market for the sale of equipment (satellites and ground-based stations) and the supply of satellite services. The Commission published a draft directive which, if it is adopted, will lift all restrictions on the use of cable television networks for the provision of liberalised telecommunications services. The main aim of this draft legislation is to encourage new projects in the multimedia field throughout the entire European Union from 1 January 1996 onwards. The Commission also proposed, following consultations centred on the Commission's Green Paper on Mobile/Personal Communications, the elimination of special and exclusive rights in the field of mobile services and their related infrastructures by 1 January 1996. This proposal should completely transform the mobile telephony sector before the end of the decade, making what is currently only a showroom or professional service available to all current subscribers. Finally, a draft directive providing for the complete liberalisation of telecommunications services between now and 1998 is currently being drafted. During 1994, the Commission tabled some proposals before the Council and the Parliament, under Article 100A of the Treaty, to introduce uniform rules for the electricity and gas sectors. The aim of these proposals is to open up national monopolies so that the regulations of the internal market will apply to the energy sector without compromising the provision of universal services.

In the **Czech Republic**, in November 1989, the private sector produced 4.1 per cent of the GNP and employed 1.2 per cent of the workforce, and only two per cent of property was privately owned. After four years of privatisation efforts, the private sector produces 50 per cent of the GNP, and, of the more than one million registered undertakings, 84 per cent belong to private entrepreneurs, possessing

approximately 40 per cent of the registered property. From the viewpoint of competition, the following can be regarded as markets that offer satisfactory conditions: electrical engineering; textile products; manufacture and processing of glass; meat and dairy products; leatherworking; construction; and haulage. The following branches rank among the industries with a medium degree of concentration: medium-class passenger cars; paper and printing; banking; manufacture and distribution of pharmaceutical products; and long-distance coach transport. The competitive environment remains relatively undeveloped in the markets dominated primarily by natural monopolies, such as power generation and distribution, natural gas processing and distribution, heat generation and supply, waterworks, telecommunications and certain types of mail services, as well as in the oil refineries and the petrochemical industry in general, metallurgy, transport, tobacco products (particularly cigarettes) and insurance. The new Act on Rail Transport was adopted in December 1994. It separates the operation of the rail lines from transport on these lines, and applies completely independent legal regimes, thus abolishing the state monopoly in rail transport. After 1993, the beer market truly opened to competition. The slight deterioration of the competitive environment has been caused by the increase of the share of the largest brewery in the total volume of beer production in the Czech Republic. In 1994, the minor breweries succeeded in seeing through Act No. 260/1994 Coll., which established a lower consumer tax rate for small breweries, in effect since 1 January 1995 (with the exception of the tax rate applicable to small independent breweries which is to come into effect on 1 July 1995). The number of competitors in the market for cigarettes has gradually expanded due to Act No. 303/1993 Coll. on the abolishment of the state tobacco monopoly. Tabak a.s. Praha still occupies a dominant position in the market. At present, the privatisation process is nearing its end. It is expected that after concluding the second wave of coupon privatisation, 85 per cent of the GNP will be produced by the private sector, and its share in the property will amount to 80 per cent.

In **Hungary**, the remaining state-owned companies are vested in the State Privatisation and Holding Company Ltd (SPHCo) which is subject to the Competition Act. It assures that the State exercises its property rights in a non-discriminatory fashion. In some fields, the State interferes too as a regulator. Since 1990, the Hungarian Parliament has passed acts regarding natural monopolies in a number of sectors including concessions, postal services, telecommunications, management of broadcasting frequencies, railways, gas supply, mining and the generation, transmission and supply of electricity. Common features are now appearing, notably, exclusive rights have been restricted and market participants enjoying monopolies or exclusive rights are mostly regulated by statutes.

In **Korea**, no developments were reported in this area.

In **Poland**, The AMO issued opinions on all draft laws submitted to the Council of Ministers specially these related to industrial relationship rights; tariffs; economic self regulations; tax advisors; notary public activities; merging and grouping certain state-owned banks, to ensure conformity with the Antimonopoly Law.

In the **Slovak Republic**, the application of effective deconcentration in the privatisation process and liberalisation of foreign trade have led to positive changes in the competitive market structures of the Slovak economy. Gradually, the number of monopoly and dominant entities is decreasing. Similarly, as in foreign countries, monopoly positions are gradually narrowed into the area of so-called natural monopolies. Many legislative changes were made in the deregulation and privatisation process, including the act abandoning the state monopoly of the tobacco and salt enterprises, the Act on the Regulation of Natural Monopolies, the draft of the definition of the main principles for licensing by auction, initiative concerning the government's resolution on public procurement and passive legislation, in which the Authority comments on bills and other legal regulatory proposals that are prepared for approval by the government and by the National Council and other state administrative bodies (e.g. the Price Act, the Act Governing the Activities of Accident Insurance Companies, the proposed Act on Legal Executors and

Executory Activities). The Authority also analysed legal regulatory proposals amending activities of some professional associations and chambers. The Authority came to the conclusion that some of them contained two practices that restricted competition: restraints on entry into the relevant profession and restraints on the freedom of pricing. For instance, in the case of counsels, commercial lawyers and patent attorneys, unequal conditions for entry into the market existed (in the form of required practice, citizenship and exclusions).

AUSTRALIA*

(1994-1995)

Executive Summary

Recent Annual Reports presented by Australia gave details of ambitious policy reforms being considered as part of the process of developing an integrated national competition policy. The catalyst for this policy debate had been the Hilmer Committee Report which was published in August 1993. This process culminated in an agreement in April 1995 between all governments in Australia's federal system to implement a detailed reform package consisting of legislation and intergovernmental agreements. National legislation under this agreement became law on 20 July 1995 and comes into operation progressively over 1995 and 1996. This report provides a summary of the changes to the legislation, and the process for further reforms set out in the agreements.

These reforms will see the merger of the Trade Practices Commission and the Prices Surveillance Authority into a new institution, the Australian Competition and Consumer Commission late in 1995. Also, a new high level advisory body, the National Competition Council, will be established at the same time.

The significance of competition law in Australia is reflected in the level of penalties which the Court has been prepared to impose on firms which contravene the competitive conduct rules in the national competition statute, the *Trade Practices Act 1974*. Recently these penalties have increased substantially. This coincides with the 1993 change raising the maximum penalty levels under the national competition statute from A$ 250 000 to A$ ten million for each contravention. While the cases decided by the Court over the past year are in respect of conduct subject to the previous penalty regime, the Court has imposed penalties of up to A$ six million against individual firms and has awarded the previous maximum penalty in relation to more than one contravention by the same firm. Another feature of some high penalty awards is that the awards are the result of negotiations between the firms involved and the enforcement authority, the Trade Practices Commission, and have avoided protracted litigation. When imposing penalties in these cases the Court reflected favourably on that process, noting that a lower penalty can be expected where a firm admits a contravention and avoids a full trial.

Scrutiny of merger activity continued to require significant Trade Practices Commission resources and the Government is still considering whether a pre-merger notification scheme is warranted in Australia. The Commission successfully opposed in Court the proposed acquisition of a grocery wholesaler by the nation's largest retail chain and, in another matter, obtained undertakings to protect competition when two of Australia's five oil refiners merged their vertically integrated operations.

Over the past year, reform processes have continued in the electricity, gas, telecommunications and transport sectors of the economy.

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* The original language of this report is English.

Participants in the electricity sector are currently developing a code of conduct to be underpinned by the Trade Practices Act, which will facilitate a competitive electricity market in South East Australia. Similarly, a code of conduct is also being developed to provide for a national third party access regime for gas supply networks.

The Government recently announced its plans to introduce full and open competition into the telecommunications industry from 1 July 1997. Maximum reliance will be placed on general competition law but with some telecommunications specific market conduct safeguards which will be administered by the new Australian Competition and Consumer Commission.

In the transport sector the Government has announced its plans to privatise capital city and major regional airports by way of long term leases. A regulatory regime will be established to safeguard against anti-competitive activity. Plans are also being developed to bring interstate rail under control of a national authority in order to facilitate a national regime for access by both public and private rail freight operators.

I. Changes to competition laws and policies

The most significant development during 1994-1995 was the National Competition Policy Package agreed between Australian Governments.

Agreement on the reform of national competition policy

In April 1995, the Council of Australian Governments (COAG), consisting of the Commonwealth, state and territory governments, agreed to a national competition policy based on the Hilmer Report. This section discusses the principal elements of the policy.

Background

In October 1992, the Prime Minister established the National Competition Policy Review, and in August 1993, the Hilmer Report on "National Competition Policy" was released. The Report is the most comprehensive review of competition policy in Australia to date, extending beyond the competitive conduct rules in the Trade Practices Act 1974 (TPA), to wide-ranging principles of micro-economic reform.

As noted in last year's report, following its release, the Hilmer Report received in principle support from the COAG. However, there was some concern about the potential effect of the reforms on state and territory revenue, particularly dividends from state-owned utilities. In response, the COAG commissioned[1] the Industry Commission to conduct a study of the likely effect of the reforms on economic growth and on governments' revenue.

The Industry Commission's report, released in March 1995, projected that consequential productivity improvements resulting from the reforms would ultimately increase Australia's GDP by 5.5 per cent, which translates to a benefit of approximately A$ 1 500 per year per household. In its view, these gains are compatible with a three per cent increase in real wages and 30 000 extra jobs. This report also projected an increase in government revenue (A$ 5.9 billion to the Commonwealth and A$ three billion to the states, territories and local government).

The April 1995 COAG agreement to proceed with the national competition policy reforms also included a consequential revenue sharing agreement which will involve the Commonwealth providing "Competition Payments" to the states and territories. These payments are ongoing, but conditional upon the states and territories implementing the reforms set out in the package, and related reforms in the electricity, gas, water and road transport sectors of the economy. By the 2005-2006 financial year, it is estimated that these annual payments will cost the Commonwealth A$ 2.4 billion in 1994-1995 dollars. As part of the agreed package of reforms, the Commonwealth has also given the states and territories a formal role in future amendments to the competitive conduct rules and in appointments to the new competition institutions.

The policy package

The national competition policy package consists of the Competition Policy Reform Act 1995, three inter-governmental agreements (the Conduct Code Agreement, the Competition Principles Agreement and the Agreement to Implement the National Competition Policy and Related Reforms) and state and territory application legislation. The Competition Policy Reform Act amends the Trade Practices Act and the Prices Surveillance Act 1983, which remain the centrepiece of Australian competition law. In addition, state and territory legislation will supplement the Commonwealth legislation, extending the competitive conduct rules to the entire Australian economy. A number of transitional provisions have been included in the Competition Policy Reform Act to allow previously protected sectors of the economy a short transitional period of adjustment.

The Conduct Code Agreement sets out the processes for appointments of persons to the new Australian Competition and Consumer Commission (the ACCC) and for future amendments to competition laws. It also sets out a new transparency process for regulatory exceptions from the competition laws. The Competition Principles Agreement sets out principles and processes to guide future micro-economic reform. It also sets out processes for appointments to the new National Competition Council and for the determination of its work programme. The Agreement to Implement the National Competition Policy and Related Reforms deals with the "Competition Payments".

Institutions

The Competition Policy Reform Act amends the Trade Practices Act to establish a new body, the ACCC, which is essentially a merger of the Trade Practices Commission and the Prices Surveillance Authority (the PSA). The existing functions of these bodies will be retained, and new functions relating to third-party access will be added.

A new recommendatory and advisory body, the National Competition Council, will also be formed. The Council will have a legislated role under the access and price oversight regimes. It will also be able to assist governments with other micro-economic reform issues.

The Trade Practices Tribunal will be renamed the Australian Competition Tribunal, maintaining its existing review functions in relation to determinations by the Trade Practices Commission/ACCC under the Trade Practices Act, and gaining new review functions in relation to the new access regime.

Recent amendments to Australia's competition laws

Trade Practices Act

Extension of the Trade Practices Act

The National Competition Policy provides for the competitive conduct rules in Part IV of the Trade Practices Act to be extended to all businesses operating in the Australian economy. The TPA already applies to the vast majority of commercial transactions, but certain transactions involving unincorporated businesses and state and territory government businesses are outside the current coverage of the TPA.

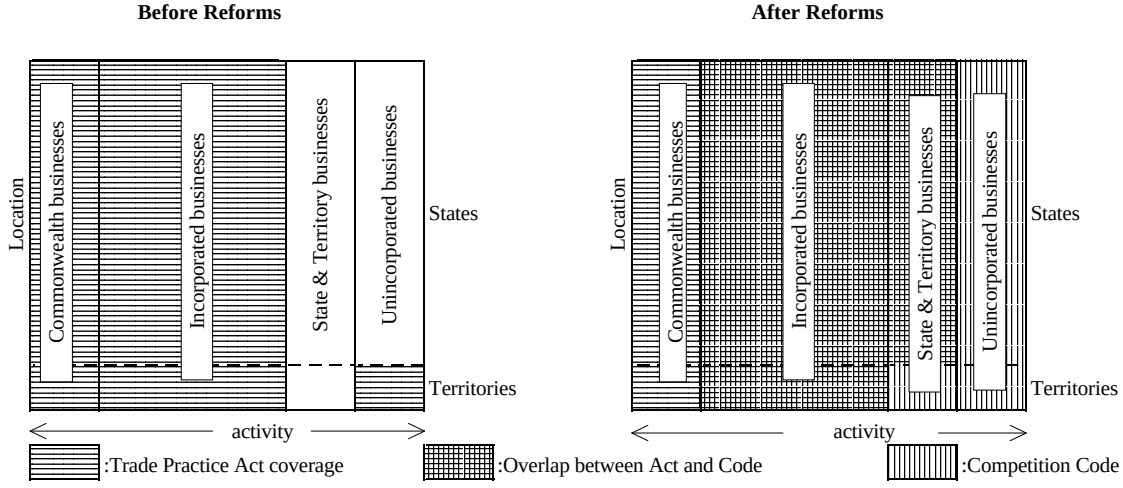
As a result of the division of constitutional powers between different levels of government in the Australian Federal system, the mechanism for extending coverage of these rules to these businesses involves both Commonwealth, and state and territory legislation. The Commonwealth has extended coverage of Part IV of the Trade Practices Act to state and territory government business activities. The states and territories will enact legislation which extends the coverage of the competitive conduct rules to persons within their legislative competence. Those rules will be the same as in Part IV of the Trade Practices Act (modified to apply to the persons) and will be found in a body of law known as the "Competition Code" which has been enacted by the Commonwealth and will be applied by state and territory law.

As a result, there will be overlapping Commonwealth and state laws dealing with anti-competitive conduct (as illustrated in Figure 1). In essence, state and territory laws will bring the unincorporated sector within the purview of the competitive conduct rules. The ACCC will administer the Commonwealth and state/territory laws. There will be no doubling up of penalties if conduct contravenes both Commonwealth and state/territory laws.

The following diagram provides a visual representation as to how the Australian economy will be covered by the competitive conduct rules.

Figure 1

Coverage of competitive conduct rules



The Commonwealth will be responsible for amendments to the Competition Code text which will automatically flow through to state and territory law. For this reason, the Conduct Code Agreement contains a voting arrangement under which the Commonwealth needs the support of at least three states/territories before amending the Competition Code text.

Transitional rules

Contracts which are in existence when the new legislation commences, and which were previously immune from the competitive conduct rules because of the Trade Practices Act's limited coverage, will be "grandfathered" (i.e. they will continue to be exempt from the Trade Practices Act and the Competition Code). Such contracts cannot be extended.

Exemptions from the competitive conduct rules

The National Competition Policy reforms do not entirely remove the ability of governments to exempt specific conduct from the competitive conduct rules in the process of establishing regulatory arrangements for particular industries. However, the reforms will restrict the manner in which exemptions may be made. New restrictions on the ability of governments to exempt conduct from the competitive conduct rules are:

-- Laws which purport to exempt conduct from the competitive conduct rules must expressly refer to the Trade Practices Act and/or the Competition Code and explicitly authorise the specific conduct.

-- Exemptions from the provisions relating to mergers and acquisitions may only be made by Commonwealth act.

-- Exemptions made by subordinate regulations will only be effective for two years, and cannot be extended or re-enacted to continue beyond the initial two years.

-- Only those states and territories that continue to participate in the co-operative scheme for applying the competitive conduct rules will be able to make exemptions. If a state or territory ceases to participate, any existing exceptions will cease to have effect after one year.

-- Exemptions made by states and territories may be over-ridden by Commonwealth regulations, as is currently the case.

-- Exempting laws must be notified to the Commonwealth, and a listing of all exemptions will be published each year in the ACCC Annual Report.

Exempting laws which are in existence when the new exemption criteria commence, and which do not comply with the new criteria, will cease to provide immunity from the competitive conduct rules after 20 July 1998. This period is intended to allow governments time to review their exemptions and make appropriate amendments and/or for authorisation of the conduct under the procedures set out in the Trade Practices Act.

Amendments to the Competitive conduct rules

Re-supply of services

The Competition Policy Reform Act extends the competitive conduct rules to deal with the re-supply of services. The wide definition of "service" in the Trade Practices Act and the Competition Code embraces a range of "services" which are capable of re-supply, such as telecommunications services or the provision of information.

Authorisation for price-fixing and resale price maintenance

While extending the *per se* prohibition against price-fixing and resale price maintenance (i.e. these forms of conduct are prohibited without any enquiry into their effects on competition), the amendments made by the Competition Policy Reform Act provide for the ACCC to authorise such conduct when there is sufficient public benefit.

Repeal of anti-competitive price discrimination provision

The Competition Policy Reform Act repeals the prohibition against anti-competitive price discrimination. The Hilmer Report concluded that other provisions of the Trade Practices Act, dealing with anti-competitive arrangements or misuse of market power, are capable of dealing with cases in which price discrimination reduces economic efficiency. It also concluded that to the extent that the existing provision has had any effect it seems to have been to diminish price competition.

Third-line forcing

Currently, third-line forcing is prohibited, regardless of its effect on competition. Authorisation is permitted where there is sufficient public benefit. Notification, however, is not available. The amendments made by the Competition Policy Reform Act allow for notification to the ACCC. When the notification "comes into force", the organisation can engage in the conduct set out in the notice.

On receiving notification, the ACCC will have a period of time (initially 21 days) in which to consider the likely public benefit and detriment of the proposed conduct. If the detriment is not outweighed by the benefit, the ACCC will be able to issue a notice to that effect, and prevent the notification from coming into force.

National access regime

The importance of access to certain key facilities, such as electricity grids or gas pipelines, in encouraging competition in related markets, such as electricity generation or gas production/distribution, is recognised in the National Competition Policy. Vertical separation is generally preferable to regulation of access terms and conditions, but for a variety of reasons vertical separation might not occur, and in these cases regulated provision of third-party access might be appropriate.

Arbitration of disputes over access to declared services

The Competition Policy Reform Act inserts new Part IIIA into the Trade Practices Act which establishes a legal regime providing for third-party access to a range of facilities of national importance. A single facility might provide a number of services, to which access may be essential for enhanced competition in some cases but not in others. For this reason, the legislation focuses on a service provided by means of a facility.

There are two mechanisms for the provision of third-party access:

-- a potentially compulsory process, whereby the service is "declared" and then is the subject of arbitration if the parties cannot agree on any aspect of access; and

-- a voluntary process, whereby a service provider can offer the ACCC an undertaking which sets out the terms and conditions on which it will offer third-party access.

Compulsory declaration process

Any person may apply to the National Competition Council to consider whether the service should be declared. The Council must be satisfied on a number of matters before it can recommend the declaration of a service. These are:

-- access to the service would promote competition in a market (other than a market for the service);

-- it would be uneconomical for anyone to develop another facility to provide the service;

-- the facility is of national significance with regard to its size, the importance of the facility to interstate or overseas trade and commerce, or its importance to the national economy;

-- access to the service can be provided without undue risk to health or safety;

-- access to the service is not already subject to an effective access regime; and

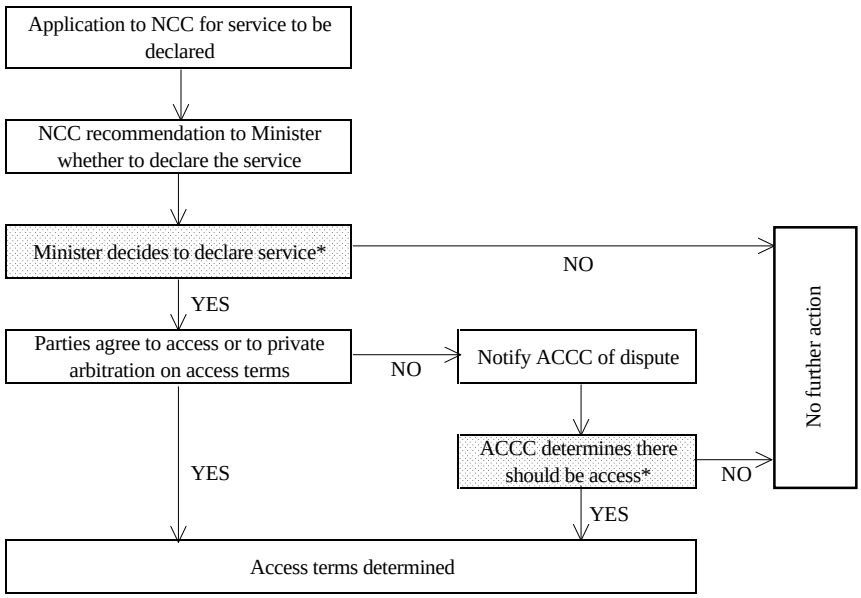
-- access to the service would not be contrary to the public interest.

The compulsory process is shown diagrammatically in Figure 2.

Threshold criteria exist which must be met before the Council can recommend that the service be declared. Mere satisfaction of these criteria does not, however, automatically lead to a recommendation to declare. The Council can consider any other relevant matter. It must then recommend to the "designated minister" whether or not the service be declared. (The designated minister is a state or territory minister in the case of a facility owned or operated by a state or territory government body, and the Commonwealth minister otherwise.) Following receipt of the recommendation, the minister must then decide whether or not to declare the service, and must give reasons for the decision.

Figure 2

Compulsory (i.e. declaration) access process



* subject to review by the Tribunal

The minister cannot declare the service if the service is the subject of an operative access undertaking. Further, the minister cannot declare a service unless satisfied of all of the matters set out above. The Trade Practices Tribunal has a right of review of ministers' decisions, exercisable within 21 days of their publication.

Declaration of a service does not mean that there is an automatic right of access to the service for third parties. Rather, it represents a right for third parties to negotiate terms of access backed up by compulsory ACCC arbitration if the parties cannot agree on any aspect of access. Where the parties cannot agree on access (or the terms of access), they may decide to refer the dispute to private arbitration. If they do not agree to refer the dispute to private arbitration, an access dispute may be notified to the ACCC. The ACCC can then determine whether access should be provided and, if so, the appropriate terms for access.

The Trade Practices Tribunal has rights of review of determinations by the ACCC, exercisable within 21 days of the determination.

The ACCC must take into account a number of matters when making a determination, including the interests of the service provider, users and the public. Also, there are a number of constraints on the terms of determinations. The ACCC must not make a determination that would have any of the following effects:

-- prevent an existing user from being able to obtain its reasonably anticipated requirements for the declared service as at the time the dispute was notified;

-- prevent a person from using the service by the exercise of a right under a contract or determination that was in force at the time the dispute was notified (a "pre-notification right") insofar as the person will actually use the service;

-- deprive a person of a protected contractual right under a contract that was in force at the beginning of 30 March 1995;

-- result in a third party becoming the owner, or part-owner, of the facility or extensions to it without the consent of the provider; and

-- require the provider to bear some or all of the costs of extending the facility to meet the access requirements of the third party.

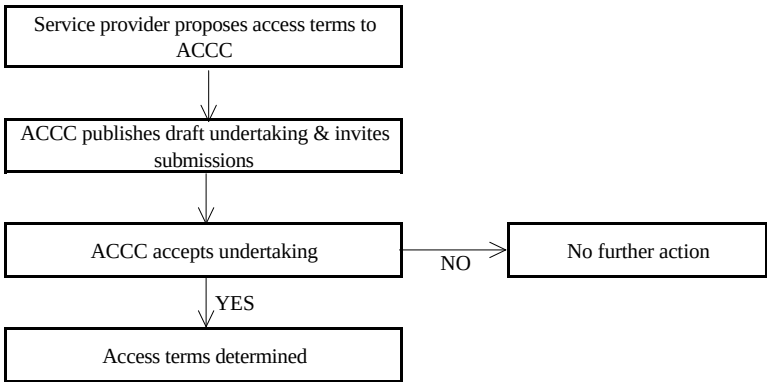
There is a provision which prohibits anyone from engaging in conduct for the purpose of preventing or hindering another person's access to a declared service under a determination.

Voluntary (access undertakings) approach

This voluntary approach, which is shown diagrammatically in Figure 3, allows service providers to offer to the ACCC an access undertaking which sets out the terms and conditions on which it will offer access to third parties. If accepted by the ACCC, this will foreclose the possibility that the service will be declared, thus removing uncertainty as to what the access arrangements for the service might be under the declaration route. The reform processes in the telecommunications, electricity and gas industries in Australia are developing access regimes which will most probably be established through this undertakings route.

Figure 3

Voluntary (access undertaking) process



The ACCC need not accept an undertaking. It might decline to accept an undertaking if, for example, it was uncertain about future conditions and preferred to preserve the possibility of future declaration. Before accepting an undertaking, the ACCC must publish a draft of the undertaking for public comment. At the end of the period for public comment, the ACCC can decide whether to accept the undertaking. In making this decision, it must consider submissions received during the public comment period and have regard to a number of matters, including the interests of the service provider, users and the public, and whether there is an existing access regime.

The ACCC can accept an undertaking in respect of services which are already covered by an access regime. This may be desirable where for example the existing regime is not fully effective. The ACCC cannot, however, accept an undertaking in respect of declared services.

Enforcement

The new Part IIIA also includes provisions for the enforcement of access determinations, the prohibition on hindering access to a service and access undertakings. Enforcement action is taken in the Federal Court. In the case of a breach of an undertaking, only the ACCC has standing to sue, whereas, for contraventions of determinations, any party may sue.

Recognising that in some instances, once a service has been declared, the third party and the provider may negotiate an access agreement or refer the matter to private arbitration, the legislation contains a provision for registration by the ACCC of access contracts for declared services. The ACCC may decide whether to register the contract; in exercising this discretion it must take into account the interests of the public and users. Once registered, the contract can be enforced as if it were an access determination of the ACCC.

Price oversight

In Australia, at the Commonwealth level, there are three levels of price oversight (not control): surveillance, monitoring and enquiries.

Price surveillance is a system whereby firms are declared. Currently 31 organisations, supplying 12 goods and services, are subject to declaration. The PSA (soon the ACCC) considers notifications from declared firms and indicates to notifying firms whether it supports the proposed price increase. Firms are not required to comply with the PSA's recommendations, the system relying on moral suasion. Since the PSA's inception, declared firms have on all occasions followed the PSA's recommendations. The outcomes of notifications are placed on the public register.

The Prices Surveillance Act will be amended to provide a time limit for declaration and to extend the surveillance provisions to potentially apply to state and territory government businesses. The PSA will also be required to place the reasons for its notification decisions on the public register. Price monitoring is a less intrusive form of oversight. Currently, the PSA undertakes monitoring on an informal basis. The reforms will formalise this monitoring role. The price enquiries provisions will not be amended.

The Competition Principles Agreement indicates that price oversight of state and territory government businesses is generally the responsibility of the particular government concerned. Some states have their own price oversight legislation. For example, the New South Wales Government Pricing Tribunal investigates and reports on the determination of maximum prices for government monopoly suppliers and the pricing policies of such suppliers, including electricity, rail and water authorities in New South Wales. The Victorian Office of Regulator-General is responsible for the economic regulation of a range of government business enterprises, including electricity, gas and water, with the power to regulate prices of prescribed goods and services supplied by or within a regulated industry. These arrangements will continue as part of the national competition policy. Price surveillance under the Prices Surveillance Act will, however, apply to state and territory government businesses, where the state or territory concerned has agreed or the Council has, on the request of an Australian government (Commonwealth, state or territory), recommended declaration of the business on the basis that the business is not subject to effective oversight and the Commonwealth minister has consulted the appropriate minister of the state or

territory concerned. The details of, and information on, this process are set out in the Competition Principles Agreement.

Principles for future reforms

The Competition Principles Agreement sets out principles agreed between the Commonwealth, state and territory governments to establish and guide future reforms.

Legislation review

Each government has agreed to develop a timetable by June 1996 for the review and, where appropriate, reform of all existing legislation that restricts competition by the year 2000. All legislation is then to be reviewed at least once every ten years.

The guiding principle in review is that legislation should not restrict competition unless it can be demonstrated that the benefits of the restriction to the community as a whole outweigh the costs and the objectives of the legislation can only be achieved by restricting competition. Each government will also ensure that proposals for new legislation that restricts competition are accompanied by evidence that the legislation is consistent with the above principle. Each government will publish an annual report on its progress towards achieving its timetable for review.

Competitive neutrality

Each government has agreed to abide by principles of competitive neutrality. The objective of competitive neutrality policy is the elimination of resource allocation distortions arising out of the public ownership of entities engaged in significant business activities: government businesses should not enjoy any net competitive advantage simply as a result of their public sector ownership.

These principles apply to significant government businesses or business activities undertaken by government for profit and in competition with other firms and require the neutralisation of any net competitive advantage arising from public sector ownership.

In order to neutralise this advantage, the Competitive Principles Agreement sets out a number of measures: corporatisation; imposition of full taxes (or tax equivalents); debt guarantee fees; and imposition of regulation on an equivalent basis to the private sector. In some instances, pricing principles can be used instead of these measures. Each government will publish a policy statement on competitive neutrality by June 1996. The policy statement will include an implementation timetable and a complaints mechanism. Each government will also publish an annual report on the implementation of this principle.

Structural reform of public monopolies

Each government has agreed to abide by various principles in the reform of public monopolies. Before introducing competition into a sector traditionally supplied by a public monopoly, governments have agreed to remove from the public monopoly any responsibility for industry regulation and to re-locate industry regulation functions so as to prevent the former monopolist from enjoying a regulatory advantage over its rivals.

Also, before introducing competition into a market traditionally supplied by a public monopoly and before privatising a public monopoly, governments will undertake a review into a range of matters, including: the appropriate commercial objectives of the business; the merits of separating any natural monopoly elements from potentially competitive elements of the public monopoly; the merits of separating potentially competitive elements of the public monopoly from the community service obligations undertaken by the public monopoly; regulation to be applied to the industry; and ongoing financial relationships between the owner and the public monopoly. Part 3 of this annual report looks at various structural reforms which have been undertaken consistent with this principle.

Public interest

These principles recognise that competition is not an end in itself but rather a means for improving welfare. With this in mind, the Competition Principles Agreement adopts an holistic approach, setting out other factors (including ecologically sustainable development, social welfare, consumer interests and efficient resource allocation) which must, where relevant, be taken into account in implementing the principles.

Administrative arrangements

Overall responsibility to the Commonwealth Parliament for competition policy and law enforcement lies with the Assistant Treasurer[2]. Policy and enforcement functions are split between the other bodies involved in the administration of the law and policy in the following manner:

-- The Department of the Treasury, in particular its Competition Policy Branch within the Structural Policy Division, advises the Assistant Treasurer on competition policy issues generally.

-- The Trade Practices Commission (soon to be the ACCC)[3] is the government's independent competition enforcement body. It adjudicates on authorisation and notification issues, prepares reports and is also responsible for the enforcement of consumer protection laws. As noted above, the ACCC will also exercise functions under the legislated access regime.

-- The Trade Practices Tribunal[4] hears appeals against Commission authorisation and notification decisions. It will also have a review role in respect of ministerial and certain ACCC decisions under the legislated access regime.

-- The PSA (soon to be the ACCC) is the government's price oversight body.

-- The Federal Court of Australia determines whether the Trade Practices Act has been contravened and determines the appropriate remedy[5].

-- The new National Competition Council will have a legislated role in the government's access and price oversight regimes. It will also be able to assist governments with legislation review, competitive neutrality and structural reform issues in accordance with its agreed work programme.

A co-operation and co-ordination agreement was negotiated during 1993-1994 and signed on 29 July 1994 between the Trade Practices Commission and its New Zealand counterpart, the Commerce

Commission. The agreement recognises that business between the two countries is increasing as a result of closer economic relations and formalises arrangements which had been developing.

II. Enforcement of competition laws and policies

The primary focus of this section is enforcement of the competitive conduct rules in the Trade Practices Act 1974. This section also deals with certain competition functions given to the Trade Practices Commission (the Commission) under broadcasting legislation.

Trade Practices Act

The Trade Practices Act prohibits mergers and acquisitions which substantially lessen competition, price-fixing and boycotts, misuse of market power, resale price maintenance and arrangements which substantially lessen competition, including exclusive dealing. The Commission may, however, confer immunity from court action by "authorising" certain forms of conduct which would otherwise contravene the Trade Practices Act. Authorisation, which may only be granted where the public benefits of the authorised conduct outweigh the anti-competitive detriments, may be granted conditionally or subject to a time limit and may be revoked if a material change of circumstance has occurred. Authorisation is not available for misuse of market power or resale price maintenance. Commission determinations may be appealed to the Tribunal. Exclusive dealing conduct may also receive immunity from court action under a simple notification scheme until it is revoked by the Commission.

Authorisation is a very public process, involving submissions from interested parties and, except for mergers, publication of a draft determination with the opportunity for a conference of interested parties, before the Commission makes a final determination. All documents relating to an authorisation[6] decision are kept on a public register. Details of authorisations processed in 1994-1995 appear in Table 1. Three authorisation review notices were issued in the same period where the Commission believed that a material change of circumstances had occurred since the original grant.

Table 1

Authorisation applications processed 1994-1995

Previously under consideration	16
Received	22
Finalised	21
Unresolved	17

In the same period, three exclusive dealing notifications were received, and one draft notice proposing to revoke an existing notification was issued[7]. Review of one Commission authorisation is being sought from the Tribunal in one merger matter, and the Tribunal made a determination covering newspaper distribution arrangements in the State of Victoria.

Mergers and acquisitions

Since January 1993, Section 50 of the Trade Practices Act has prohibited mergers and acquisitions which substantially lessen competition, whereas, previously, the section had prohibited

mergers and acquisitions which had created or enhanced market dominance[8]. Authorisation may be sought from the Commission where the public benefits of the proposed merger or acquisition outweigh the anti-competitive detriments.

Australia does not operate a pre-merger notification scheme. The government released a discussion paper on the subject in October. Comments are currently being evaluated.

The Commission[9] may seek an injunction to prevent a merger which is likely to contravene Section 50. Any person, including the Commission[10], may seek divestiture after a merger has occurred. Any person who has suffered damage as a result of a prohibited merger may seek a compensatory award of damages.

During 1994-1995, 151 proposed mergers were considered by the Commission, compared with 132 in the previous period. The Commission reviewed these mergers against the concentration thresholds set out in its Draft Merger Guidelines to determine whether it should undertake a more detailed investigation. The draft merger guidelines set out certain concentration thresholds below which the Commission is unlikely to investigate a matter. The thresholds are the following:

-- the merger would result in the merged entity having 40 per cent or more of the market; and

-- the merger would result in the four largest firms having more than 75 per cent of the market and the merged entity more than 15 per cent of the market.

These thresholds allow for a quick and simple clearance of mergers which are unlikely to ever raise competition issues and for the Commission to focus its resources on mergers in more highly concentrated markets. In markets facing effective actual or potential import competition or low barriers to entry, a Commission investigation is likely to be limited. Extensive investigations are undertaken in relatively few matters. The role of the thresholds as an administratively simple way to clear non-contentious mergers appears to be well understood and does not appear to have deterred parties approaching the Commission in relation to mergers even in highly concentrated markets. Brief details of the mergers considered appear in the following tables.

Table 2

Results of mergers considered by the Commission

New mergers referred to the Commission	151
Considered by both the Commission and the Foreign Investment Review Board	20
Considered by both the Commission and the Insurance and Superannuation Commission	0
Not proceeded with or amended following Commission concern	8
Court action	2
Authorisation sought	1

Table 3

Types of acquisitions/mergers considered

Horizontal	115
Vertical	20
Changed shareholding	5
New entry to market	18

(Because of overlaps these total more than 151)

Where a merger raises competition concerns, the parties may apply for authorisation or offer the Commission a statutory undertaking under Section 87B of the Trade Practices Act to remove any competition concerns. There has been increasing discussion and awareness of the potential use of Section 87B undertakings in the administration of Section 50.

Undertakings may also offer the opportunity for a merger proponent to restructure its proposal so as to address the structural aspects of concern to the Commission[11]. It is only in a few cases, however, that undertakings can be accepted as a way of addressing competition concerns. Ongoing behavioural undertakings, such as price, quality and service guarantees, are unlikely to adequately address anti-competitive effects arising out of a particular merger. In 1994-1995, the Commission accepted such undertakings to address a range of procedural and substantive matters[12]. Undertakings should be distinguished from the authorisation process. With statutory undertakings, the object is to remove competition concerns, whereas with authorisation the competition concerns may remain but the Commission can determine that public benefits[13] are present which outweigh the anti-competitive detriments.

Significant mergers and acquisitions considered

Rank Commercial/Coles Myer/Foodland Associated Ltd.

This case was the first litigation under the new merger provision which prohibits mergers and acquisitions which substantially lessen competition. As a result of this litigation, the Commission prevented the acquisition of Foodland by Coles Myer. In June 1994, Rank, a New Zealand firm, announced its intention to make a takeover bid for Foodland, a grocery wholesaler and retailer in both Australia and New Zealand. Terms of the bid provided for the Australian assets of Foodland to be acquired by Coles Myer, a substantial Australian retailing and wholesaling conglomerate.

The Commission formed the view that such a takeover would substantially lessen competition, particularly in Western Australia where roughly 50 per cent of retail outlets were supplied by Foodland and 25 per cent by Coles Myer. On 12 July 1994, the Federal Court found that the case raised serious triable issues and granted the Commission an interim injunction to prevent the merger from proceeding until the matter could be heard more fully. An appeal against this decision by Rank and Coles Myer was dismissed by the Full Court on 26 July 1994, and Rank and Coles Myer subsequently announced their decision not to proceed with the bid.

Notable in this case was the Court's case management technique designed to ensure speedy consideration of the matter. While the matter did not proceed to full trial, the Court demonstrated a willingness to be flexible in procedural matters in an attempt to avoid the lengthy and expensive litigation of recent mergers, such as Santos/Sagasco and Arnotts/Nabisco.

Caltex Australia Ltd. and Ampol Ltd.

A merger of two major oil companies proceeded after each gave extensive undertakings to the Commission. Changes in the ownership of oil refineries and market concentration as a result of the merger are shown in Table 4. Approximately 9 800 retail petroleum sale sites exist in Australia, down from 20 000 in 1975 as a result of industry rationalisation. Independently owned sites possess a minor share of the retail market and, except for Western Australia where some petrol is imported, are reliant on the major oil companies for supply.

Table 4

Oil refinery ownership and retail market share -- Caltex/Mobil merger effects

	Oil refineries owned (No.)		Retail market share (%)	
	Before	After	Before	After
Shell	2	2	27	27
BP	2	2	20	20
Mobil	2	2	19	19
Caltex	1		17	
Ampol	1	2	13	30
Independent			4	4

Since the 1970s, substantial rationalisation has occurred in the number of oil refineries operating in Australia, from nine in the 1970s to four after the merger. At the same time, there has been a substantial reduction in excess capacity so that in the mid-1990s, demand is likely to equal supply and in the late 1990s, demand is likely to exceed supply.

On 2 February 1995, the Commission advised the parties that it considered the acquisition was likely to substantially lessen competition in the Australian petrol market, in contravention of Section 50, and that the merger as proposed would reduce the degree of independent operation among the major oil companies, and that it was likely to result in an increase in petrol prices to consumers as well as an increase in the profit margins of the major oil companies. Ampol and Caltex subsequently approached the Commission for further discussions and offered to provide Section 87B undertakings which the Commission accepted. On 28 March 1995, the Commission announced that it would not oppose the merger.

The undertakings offered met the Commission's concerns and were consistent with the firms' own objectives. The main undertakings included:

-- the sale by Caltex and Ampol of large oil terminals in four states which would allow the importation and storage of petrol supplies and distribution of those supplies to independent wholesalers and retailers;

-- agreement to offer to supply at least 1 billion litres of petrol per annum on reasonable commercial terms to independent wholesalers, distributors and retailers;

-- guaranteed direct access by independents with supply agreements to Ampol and Caltex terminal facilities throughout Australia; and

-- the honouring of all existing supply agreements.

The undertakings introduce a considerable measure of structural change to the petroleum industry and significantly strengthen the capacity of independents to compete with the major oil companies.

Goodman Fielder Ltd./Bunge Industrial Pty Ltd. joint venture

On 20 June 1995, the Commission announced that it would oppose a proposed joint venture between Goodman Fielder Ltd. and Bunge Industrial Pty Ltd. The joint venture would have merged the milling, baking, pre-mix and starch/gluten operations of the companies. Goodman Fielder is a publicly listed food company which produces a wide range of consumer foods and food ingredients for the retail, industrial and food service and hospitality markets, whilst Bunge is the Australian subsidiary of an international food group.

In arriving at its conclusion, the Commission particularly took into account that the proposed joint venture would remove two large competitors from the flour market and combine them into one, and that a high level of concentration would result in the southeastern Australian flour market (in the order of 65 per cent).

Davids Distribution Pty Ltd./Independent Holdings Ltd.

In 1993, the Court, at the suit of the Minister, had restrained Davids from making a takeover bid for the only other grocery wholesaler operating in Queensland, Queensland Independent Wholesalers, on the grounds that it would result in the domination by Davids on the market for grocery wholesale services in Queensland (the test at that time was dominance).

Davids is the largest grocery wholesaler in Australia and operated, at that time, in Queensland, New South Wales and Victoria. Independent is the owner of a 30 per cent interest in Composite Buyers Ltd., a direct competitor of Davids and the only other significant grocery wholesaler operating in Victoria and New South Wales.

Davids made a takeover offer for Independent and, on 15 July 1994, gave a statutory undertaking that, should the Commission form the view that the indirect acquisition of Independent's interest in Composite Buyers Ltd. would substantially lessen competition between Davids and Composite, Davids would cause Independent to dispose of such shares in Composite. The Commission was concerned about the possible effect on competition as a result of the acquisition of a significant interest in Composite. To date, the Commission has not needed to determine conclusively whether a substantial lessening of competition would result in this case because Davids obtained authorisation to acquire Composite. That authorisation has, however, been appealed in the Tribunal[14].

Hoover Australia Ltd./Southcorp Holdings Ltd.

The sale of Hoover, a manufacturer of whitegoods, to Southcorp Holdings, a manufacturer of different whitegoods, was not contested by the Commission after investigation. One issue was whether the relevant market should be defined broadly, as one for whitegoods generally, or narrowly, as markets for each specific type of appliance. It was concluded that, as the supply-side substitution possibilities were limited, the narrower definition would more accurately reflect the realities of competition. Therefore, the lack of overlap between Southcorp and Hoover products reduced the possibility of increased prices to

consumers following the acquisition and also made it unlikely that the Hoover product line would be rationalised. Some degree of imports was also present in each of the relevant product areas.

Australian Wheat Board/GrainCorp joint venture

On 18 January 1995, the Commission announced its opposition to a proposed joint venture between the Australian Wheat Board and GrainCorp for operations in the State of New South Wales. The Board is a Commonwealth statutory marketing body and the largest wheat trader in Australia with a statutory monopoly over the export of wheat. GrainCorp manages approximately 270 grain storage and handling facilities in New South Wales with permanent storage capacity of six million tonnes and two export terminals. Under the proposal, a joint venture company, United Grain, would assume the Board's trading activities and would buy and sell New South Wales grain in the domestic market. The Board would not run independent trading activities in the State but would continue to export.

The Commission considered that the joint venture would substantially lessen competition in the state markets for grain storage and handling as well as trading. Enquiries indicated that there were substantial barriers to sustained and successful entry into the grain trading and storage and handling markets. Other concerns included ownership links with the potential for exchange of commercially sensitive price information, that the joint venture would remove GrainCorp as a potential entrant to the grain trading market and the market impact of the removal in the future of the Board's statutory monopoly over the export of wheat. The undertakings proposed by the parties were rejected. There was little real prospect that concerns with structural issues would be satisfactorily resolved by these undertakings which dealt solely with behavioural matters.

Queensland Pathologists

The Commission announced on 8 March 1995 its opposition to the proposed merger of the two largest private pathology practices in Queensland and Northern New South Wales, accounting for 85 per cent of the market. Enquiries suggested that significant competition existed between the two on price, service and quality and that in the absence of adequate competition, patients who are not bulk billed may be subjected to higher fees. It was also considered that, as pathology practices are not compelled to bulk bill[15] particular categories of patients, the level of bulk billing accepted by pathology practices might be reduced if competition were lessened.

Melbourne taxis

On 13 July 1995, the Silver Top Taxi Services and Northern Suburbs Taxis lodged an application for statutory authorisation following opposition by the Commission late in 1994 to an acquisition by Melbourne's largest metropolitan taxi company (Silver Top, with around 1 300 taxis using its depot and communications facilities) of the third largest depot (Northern Suburbs, used by around 260 taxis and concentrated mainly in the Northern suburbs). The acquisition would raise Silver Top's market share to 50 per cent.

The loss of the Northern Suburbs communications network would result in fewer taxi firms competing for, and providing, radio booking services to taxi drivers. It was also considered that significant barriers existed preventing a new company from seeking to set up a new depot and radio network. The authorisation application, which claims resulting public benefits, is still under consideration.

Authorisation of mergers and acquisitions

Davids Ltd./Composite Buyers Ltd.

An authorisation was granted on 29 May 1995 for Davids to acquire grocery wholesaler Composite. However, as mentioned above, it is currently subject to review by the Tribunal on application by a rival bidder.

Davids and Composite are the sole wholesale suppliers in Victoria, and hold 94 per cent of the independents in New South Wales and a small share of the wholesale market in Tasmania. A merger would merge David's independent grocery wholesaling and retailing in New South Wales, Victoria, the Australian Capital Territory and Queensland, and the wholesaling activities of Composite in Victoria, New South Wales and Tasmania. The Commission was concerned that Davids would be able to increase prices and/or reduce services to a number of its customers following the merger. The impact of these price increases would not, however, be evenly felt. Prices charged to independent supermarkets in close competition with the vertically integrated chains would be significantly constrained by that downstream competition. Prices charged to smaller convenience stores and country supermarkets not in competition with the chains would be less constrained.

In support of authorisation, Davids had indicated that it would use some of the merger's savings to improve services provided to independent retailers to improve the "shopping environment", product range and value-added services for customers. To that end, Davids gave statutory undertakings which included improved rebates for retailers, with special arrangements to ensure country retailers are not disadvantaged. The undertakings address concerns that the merger would be anti-competitive and limit any such effects. It was accepted that significant public benefits would arise from the proposed acquisition, in particular cost savings from rationalisation of warehousing, banner groups, generics, transportation and overheads. These cost savings are likely to be passed on to independent supermarkets who are in direct competition with the chains, enabling them to compete more effectively, increasing retail and consequently wholesale, sales.

Anti-competitive practices

Court enforcement action by the Commission

General anti-competitive arrangements

i) TNT Australia Pty Ltd., Ansett Transport Industries (Operations) Pty Ltd. and Mayne Nickless Ltd.

The pecuniary penalties of A$ 11.9 million and costs of A$ 2.4 million imposed in this case were nearly a 50-fold increase on the previous highest award in proceedings previously brought under the Trade Practices Act -- and the conduct occurred when the maximum penalty for each contravention was only A$ 250 000, not A$ 10 million as is now the case. This case was also significant because the Court endorsed joint submission of the parties as to the appropriate level of penalties and costs without a trial.

Proceedings were initially filed against the three companies and 19 of their current and former executives in October 1992. The case involved allegations of an arrangement over many years, in contravention of Section 45 of the Trade Practices Act, between the three major companies in the express freight industry in Australia not to compete with each other. Together these companies accounted for approximately 90 per cent of all sales in the industry's estimated A$ one to two billion annual turnover.

As may be judged by the costs award, this case involved the gathering of vast amounts of evidence dealing with separate but often inter-related events throughout Australia in relation to each of the three companies' various express freight businesses over at least a six-year period. The case relied heavily on computer technology in the investigation and case preparation stages.

On 25 July 1994, TNT Australia Pty Ltd., Ansett Transport Industries (Operations) Pty Ltd. and eight of their current and former senior executives withdrew their defences and subsequently admitted to the evidence contained in the 175 witness statements. The companies were ordered to pay A$ 4.1 million and A$ 0.9 million respectively. Penalties of A$ 50 000 were imposed on seven of the individuals, whilst a former General Manager of TNT Australia Pty Ltd. was penalised A$ 75 000. Subsequently, Mayne Nickless Ltd. and seven of its former and current executives followed the same course. The Court ordered that Mayne Nickless pay a penalty of A$ six million and that seven of the personal respondents pay penalties ranging from A$ 40 000 to A$ 75 000.

The Court provided its written reasons for the penalties on 31 January 1995 and endorsed the efficacy of parties negotiating and proposing the amount of penalties jointly to the Court as the basis of an arrangement for the withdrawal of defences by respondents and the "effective admission" of allegations made against them. In its view, such a course saved Commission expenses and court time.

As to the quantum of the penalty, the Court noted that between 1987 and mid-1991 the market shares of the companies were systematically protected from the effects of competition and that not only were the arrangements in flagrant breach of the law, but the means for effecting the intended illegal results, including deliberately providing poor service in order to compel customers to turn or return to a supplier with whom they might be dissatisfied, were particularly pernicious. The Court also noted that the contraventions were serious, deliberate and systematic and that arrangements so fundamentally affecting the operations of the companies could not have been reached, and maintained for such a lengthy period, without the involvement of senior management.

ii) Mobil Oil Australia Ltd., BP Australia Ltd., The Shell Company of Australia Ltd.

The three largest oil refining companies in Australia are defending actions in relation to the alleged exchange of information about proposed or anticipated petrol price changes at commission agent[16] (CA) retail petrol outlets between December 1988 and June 1992. Allegedly, upon learning of a proposed or anticipated price rise by one company, the others would increase their CA station prices to approximately the same level and on receiving such information the companies would cause prices at franchise sites[17] to move.

iii) Monier Roofing Ltd., Boral Hollostone Masonry (South Aust.) Pty Ltd., Hallett Roofing Services Pty Ltd.

A 1996 trial is now expected for penalty proceedings commenced on 30 June 1994 against three roofing materials manufacturers and a number of their executives for alleged contraventions of Section 45. It is alleged that between 1987 and 1993 the companies agreed: on the rates that they would pay to tile fixers, to acquire fixing services only from members of the South Australian Roof Tilers' Association (SARTA) and that for tiles in excess of 100, they would supply only on a supply and fix basis.

iv) Brisbane pre-mixed concrete

On 25 August 1994, penalties totalling A$ 250 000 were awarded against Goodmix Concrete Pty Ltd. and Hymix Industries Pty Ltd., two related companies, for alleged price-fixing and market-share arrangements in the Brisbane concrete market. Company representatives admitted that the arrangements had provided for the fixing of prices for pre-mixed concrete, allocation of jobs to maintain stable market shares, a "no poaching" agreement concerning the participants' "pet" customers and collusive tendering to local authorities.

On 25 November 1994, the Court imposed penalties of A$ 250 000 against Amatek Ltd., a relatively small supplier with approximately four to five per cent of the Brisbane market, and A$ 30 000 against an executive after admissions of similar anti-competitive conduct.

v) Collusive tendering for major construction contracts

In the early 1990s, allegations about collusive tendering surfaced in the course of a Royal Commission enquiry into productivity in the building industry in New South Wales. On 30 August 1994, proceedings were commenced against four firms, four present or former executives, the Australian Federation of Construction Contractors (AFCC) and a former National Executive Director of the AFCC. It was alleged that parties agreed, prior to the close of tenders for a Commonwealth Government office project in 1988, that the successful tenderer would pay AFCC a special fee of A$ one million and the unsuccessful tenderers A$ 750 000 each, with the tendered quotations being loaded accordingly.

The AFCC and a former National Executive Director announced they would not defend the proceedings, and the individual consented to a penalty of A$ 10 000. Later, the successful tenderer, whose ownership had changed, and its former chief executive withdrew their defences and consented to penalties of A$ 400 000 and A$ 50 000 respectively. Subsequently, the second and third firms involved withdrew their defences, and maximum penalties then applying of A$ 250 000 for two contraventions each were imposed, as well as costs of A$ 75 000 each. In addition, each firm made restitution to the tender authority of the A$ 750 000 "unsuccessful tenders' fee" which each had received from the successful tenderer. Two executives were also fined a total of A$ 75 000. The fourth firm is defending the action. Penalties and costs already imposed in this action now exceed A$ 1.7 million, and restitution of A$ 1.5 million has been made.

vi) Perth Toyota dealers

On 18 November 1994, the Court imposed penalties of A$ 644 000 on 11 of the 12 Perth Toyota dealers and 12 individuals involved in their management, after admissions were made over a "fidelity pledge" to fix minimum prices for new vehicles and accessories and delivery fees.

vii) Pay television -- anti-competitive conduct issues

A number of competition issues came before the Commission during 1994-1995 as various arrangements were entered into and strategic positions taken in the developing pay television industry.

No action was taken against an agreement between two pay television operators, Foxtel and the Australis Media group (trading as "Galaxy"), which involved cross-equity and arrangements for the

carriage of each other's programmes on their respective delivery systems (cable in the case of Foxtel and MDS/satellite in the case of Australis). Both Foxtel and Australis indicated that, despite a common carriage of core programmes on each other's systems, they would compete in relation to price, range of programmes and delivery systems. However, one likely effect of the agreement would be to tie-up the means of delivering pay television in the short to medium term. It was difficult to make a retail market assessment as the product is not fully developed because of the relatively recent introduction of pay television to Australia. On the basis of limited evidence, it was considered that free-to-air would materially constrain the exercise of power by pay television operators. Television broadcasting is a dynamic industry, and free-to-air and pay television may evolve into separate markets. Should pay television evolve separately and any pay television operator begins to obtain and exercise market power, then it would be entirely appropriate for the Commission to take action upon the basis that the boundaries of the market in which pay television operates should be narrowly defined as excluding free-to-air broadcasters.

Action was also not taken against certain forms of proposed co-operation between Australis Media and Continental Century, two satellite pay television licensees[18], in relation to the provision of their pay television services to subscribers under the "Galaxy" banner. The firms had sought approval for an agreement to jointly contribute to the costs involved in setting-up and operating the necessary pay television infrastructure. The concern was that the co-operation may have anti-competitive consequences in the delivery of pay television services to consumers, particularly in regard to price and the available choice of programmes. Evidence from the market showed that sports and movies are the drivers of pay television subscriptions and that pay television operators without them cannot as effectively compete for subscribers. Given that the rights to many movies and mass-appeal sports have largely been tied up, the commercial reality facing other pay television operators in Australia such as Continental Century is that they must provide a variety of programming that is of a more complementary rather than a directly competitive nature. In such circumstances, it was not considered that the co-operation between Australis and Continental Century would substantially lessen competition.

The Commission investigated a number of complaints it had received about alleged co-operation between the free-to-air television networks in relation to the purchase of certain programming and sports television broadcasting rights. However, each time there was insufficient evidence to pursue investigations further.

In addition to the Commission's enforcement work under Part IV of the Trade Practices Act, it has specific statutory reporting powers under Section 97 of the Broadcasting Services Act 1992 in relation to the allocation of pay television licences. The final section of this Part explains the Commission's role in the allocation of pay television licences under that legislation.

Third-line forcing

i) Football club launch

Action began in September 1993 over alleged third-line forcing involving the sale of the L & G Umbrella Financial Savings Plan, in conjunction with the promotion of the proposed club. About 2 800 Plans were sold in the promotion after it was alleged that consumers were told that they would receive benefits if they "invested" in the proposed Logan Lions rugby league club and that this "investment" could be undertaken only through an L & G Umbrella Financial Savings Plan.

Legal and General withdrew authority to sell the policies in conjunction with the promotion and offered to refund or transfer premiums paid once it became aware of problems with the Trade Practices Act. On 20 October 1994, court proceedings against Legal & General Life of Australia were discontinued as part of a settlement with Legal & General, in which it is to develop and promote an education compliance programme for the life insurance industry. Action against other defendants and certain individuals is continuing, alleging that the they had engaged in third-line forcing and made false and misleading representations over share options in Logan Lions Ltd., a company seeking to launch a football club in Queensland.

The firm has estimated that the cost of refunds and cancelled plans has been A$ 1.4 million and that the cost of the proposed compliance programme will be in the order of A$ 200 000.

Additional proceedings were instituted on 16 June 1994 against National Mutual Life Association of Australasia Ltd. for alleged third-line forcing involving the sale of National Mutual Life Protection Investment Only Policies, in conjunction with the promotion of the same club. About 430 National Mutual policies were sold in the promotion in which it is alleged that the IMB Group Pty Ltd., as agents of National Mutual, offered share options in a proposed football team and clubhouse on the condition that one invested in the National Mutual policy. It is further alleged that National Mutual's agents made a number of misrepresentations in relation to development approval for the club, future value of the shares, expected earnings of the policy, and the sponsorship, affiliation or approval of a football association.

ii) Tepeda Pty Ltd. (trading as Metro Motor Market) and Chris Koukoutas

On 30 June 1995, the Federal Court imposed penalties totalling A$ 80 000 against Sydney motor dealer Tepeda Pty Ltd. and ordered it to pay A$ 25 000 costs. Penalties totalling A$ 20 000 were imposed on Tepeda's business and finance manager. Third-line forcing was alleged when the dealer specified that financing must be secured with Ford Credit Australia Ltd., in order to obtain a discount, rebate or allowance. The Court found that consumers had been offered special deals with a lower price or increased trade-in price on the condition that they obtained financing to buy their cars from Ford Credit Australia Ltd., rather than some other finance provider. The dealer was at all relevant times an agent of Ford Credit Ltd. and received commissions from those finance transactions.

Resale price maintenance

i) James N. Kirby Ltd.

On 6 July 1995, the Court imposed penalties of A$ 140 000 on refrigeration company James N. Kirby Pty Ltd. and two senior executives for engaging in resale price maintenance. The firm and executives admitted that late in 1992 the firm attempted to stop certain wholesalers from supplying refrigeration parts to its major competitors at prices better than those specified. The case was important in emphasising that the prohibition against resale price maintenance applies in any situation where a company is reselling goods, even if the company is reselling goods to its competitor.

Administrative enforcement action by the Commission

In many cases, the Commission negotiates settlements of matters on the basis of undertakings to cease alleged offending conduct and/or to provide some form of redress or compensation for affected

parties. These undertakings have been enforceable in court under the Trade Practices Act since 1993 and have been used widely and effectively.

Private actions

A corporation or natural person may seek an injunction to prevent or require future conduct or seek an award of damages where loss or damage was suffered as a result of a contravention. No significant private actions were decided in 1994-1995.

Authorisations

Tribunal decision covering Victorian newsagents

In November 1994, the Tribunal refused to grant an authorisation covering proposed new arrangements for newspaper and magazine distribution in Victoria because the Tribunal was not satisfied that there would be any benefit to the public. Distribution was being carried out under arrangements authorised in 1982 under which newsagents (i.e. newspaper and magazine retailers) were granted exclusive territories but were also required to operate morning home delivery services. The new arrangements would have allowed for the development of delivery-only agents, direct supply by publishers to all types of retail outlets, reduced involvement of the Newsagency Council in the retail side of newsagencies and flexibility in commission sharing.

The new arrangements came before the Tribunal after the Commission had proposed to grant an authorisation and the decision was "appealed" by convenience store operators and newsagents in the State of Queensland. The Tribunal indicated that it was open to the Commission to revoke its 1982 authorisation and that it would be appropriate to reform the arrangements over the next three years.

Qantas Airways Ltd. and British Airways Plc

On 10 August 1994, Qantas and British Airways (BA) applied for authorisation of a wide-ranging and rather open-ended operating agreement which provided for the co-ordination of various key aspects of their Australia/Europe, Australia/South-East Asia and South-East Asia/Europe services. At the time of the application, the Commonwealth had sold a 25 per cent interest in Qantas to BA and was preparing to float the remaining 75 per cent of shares.

A draft determination issued on 17 November 1994 proposed to deny authorisation whereupon a pre-decision conference was held on 13 and 20 December 1994 which led to a granting of authorisation for five years on 12 May 1995.

The applicants submitted that their joint determination of prices would not have any significant effect on the overall level of competition in the relevant markets while it would benefit the Australian aviation industry, Australian consumers and the Australian tourism industry. The Commission initially took the view that competition, especially on price, came from a small number of carriers and that BA was a significant competitor of Qantas. Therefore, the loss of one of the major competitors on Australia/Europe routes might have a significant detrimental effect on competition. This view was also influenced by concerns that opportunities for expansion by competitors were seemingly limited by factors such as capacity rights under bilateral agreements. Moreover, it seemed that cost savings claimed by the applicants were largely private benefits, that the benefits to Australian tourism were limited and that some

of the benefits to consumers were not significantly greater than those available in the absence of the agreement.

The pre-decision conference led the Commission to revise its views on a number of issues, and its final evaluation concluded that the relevant markets exhibited a greater level of competition than had been apparent from the original data provided by the applicants but that the agreement would result, or would be likely to result, in a lessening of competition. Against this, material provided by the applicants, the Commonwealth and other interested parties subsequent to the draft determination strengthened the arguments relating to public benefits. Overall, the Commission considered that the weighting of anti-competitive detriment against public benefit was finely balanced in favour of a conditional grant for five years, subject to concerns being satisfied by appropriate conditions. After intensive negotiations over a number of months the applicants and the Commission agreed to a set of such conditions, including that the applicants would exercise price restraint so that certain passenger air fares would not increase in real terms over the next three years and that between 1 April 1995 and 31 March 2000, the average aggregate weekly available capacity for freight from Australia to the United Kingdom on eastern hemisphere routes will not be less than 100 tonnes.

Australian Wool Exchange Ltd.

The Australian Wool Exchange Ltd. (AWEX) sought authorisation of its articles of association, code of conduct and business rules on 1 December 1993 in response to the Commonwealth Government's decision to withdraw from its involvement in the administration of the marketing of wool. Authorisation was granted on 29 August 1994 for three years, subject to a number of conditions.

The application raised similar issues following the withdrawal of government support in other rural industry marketing schemes. It has accepted that in most cases there is a public benefit in allowing some form of continued restriction in the transition to a deregulated market regime to help avoid the dislocation that could result from too sharp a transition from regulation to deregulation. The wool industry makes a substantial contribution to the Australian economy, and there was a need to ease the move from a regulated to a deregulated environment to help avoid the dislocations to the functioning of the market that deregulation can cause.

Commission concern was that a public company gaining such a large share of the market would be in a position to stifle innovation and competition. It was satisfied, however, that AWEX had not sought to enhance its market position and that the public benefits would outweigh any lessening of competition, provided that AWEX accept certain conditions.

Review of past authorisations

An authorisation may be revoked if the Commission is satisfied that:

-- it was originally granted on the basis of false or misleading information;

-- a condition to which it was subject has not been complied with; and

-- a material change has occurred in relevant circumstances.

In the current climate of rapid economic and regulatory change, such a material change in relevant circumstances may often occur. Furthermore, most authorisations granted in recent years have

been subject to time limits or have had review processes built in. Reviews of past authorisations are a lower priority task dependent on the volume of the non-discretionary work flowing from new applications for authorisation, authorisations whose time limits are expiring and other higher priority work.

Cooper Basin natural gas arrangements

A review began in September 1994 of the authorisation granted in 1986 to the Australian Gas Light Company (AGL) in respect of its supply arrangements with the Cooper Basin Producers in South Australia (the Producers). The review, which has not been concluded, was commenced because it appeared that a material change of circumstances had occurred since the authorisation was granted.

Under the arrangements, producers charge AGL the same price for gas sold separately by each, AGL consults with a representative of all the producers to negotiate price revisions and the producers are represented as if one party at arbitrations. The arrangements also include take-or-pay provisions and provide for supply by the producers of all amounts up to the maximum contract quantities. The producers have first right of refusal to supply AGL's requirements of LPG, and its requirements of natural gas above the contract volumes. The arrangements run for an initial term of 30 years (until 2006).

Media Council of Australia

The Commission is reviewing the authorisation granted in 1978 by the Tribunal covering the Media Council of Australia (MCA) accreditation system for advertising agencies. Under the system, accreditation is granted to agencies that satisfy certain technical and financial requirements, including a requirement that they pay all media accounts placed with an MCA media proprietor within a specified time. In return, the agency can place advertisements for clients with all MCA members in Australia without further credit checks. Accredited agencies must remain independent of advertising principals and media proprietors.

Since the authorisation was granted, a number of circumstances appear to have changed which may have increased the anti-competitive effects of the accreditation system and reduced the public benefits that it offers. These changes include agency specialisation and the encouragement and preservation of small- and medium-sized agencies. A decision is anticipated in the third quarter of 1995.

Australian Payments Clearing Association Ltd.

The Association was formed in February 1992 to oversee and reform payments clearing processes[19] in Australia. On 20 April 1994, it lodged three applications for authorisation of its proposed regulations and procedures for the Bulk Electronic Clearing System modelled on the regulations for the Australian Paper Clearing System, which already have received authorisation. It is intended that the proposed system replace the three existing direct entry payment systems which, prior to March 1994, were not integrated.

Authorisation was granted in recognition that the payments system is the core of the financial system and is vital to the functioning of the overall economy. A review is proposed in four years, when consideration can be given to the operation of the system in light of the operation of the other clearing systems that have been, or are to be, established.

Other legislation

Pay television legislation

In addition to general enforcement functions under the Trade Practices Act, the Commission has specific statutory reporting powers in relation to pay television under the Broadcasting Services Act 1992. This legislation contains a range of licencing and regulatory requirements on broadcasting services within Australia. In particular, satellite delivered services are restricted to the holders of licences A, B and C until 1 July 1997. The legislation also places restrictions on who may hold interests in such licensees. This Act also provides for the issue of MDS[20] and cable subscription television broadcasting licences, while the Radiocommunications Act 1992 provides for the sale of MDS apparatus (i.e. transmitters) licences.

Section 97 of the Broadcasting Services Act 1992 requires the Australian Broadcasting Authority (ABA), before it allocates any of these subscription television broadcasting licences, to request a report from the Commission as to whether the allocation of the licences would contravene Section 50 of the Trade Practices Act and not be authorised under Section 88 of the Trade Practices Act.

The Commission reported on several proposed allocations in the reporting period.

Star Vision Pty Ltd.

This firm, part of the Australis Media group, sought 20 pay television broadcasting licences for the delivery of pay television services via MDS. Australis controls satellite licence B and, through its subsidiary companies and franchisees, the majority of MDS transmitter licences currently issued. A particular issue raised by this firm's application was the potential effect in the retail market given Australis' control of licence B and the MDS transmitter licences. The Commission looked closely at the issue but came to the conclusion that, to the extent that Australis had any market power, this reflected its control of licence B and the MDS transmitter licences and that allocation of pay television broadcasting licences to the firm would not in itself significantly enhance any market power Australis Media may already have following its control of MDS transmission capacity and, hence, would not be likely to substantially lessen competition in the retail market.

Vinatech Pty Ltd. and Selectra Pty Ltd.

Vinatech and Selectra sought 50 licences each to deliver pay television services via MDS and cable as Australis Media franchisees formed primarily to distribute the Galaxy package in certain regional areas of Australia. Both firms controlled the majority of MDS transmitter licences issued in their franchise areas. The Commission considered that the allocation of pay television licences to the firms would not be likely to substantially lessen competition despite their control of a significant proportion of MDS delivery capability in their franchise areas. The market power that they may possess would not derive from, nor would it be significantly enhanced by, the allocation of the pay television broadcasting licences. Rather it would derive from control over the use of transmission capacity. This would remain largely unchanged whether or not they were allocated the pay television broadcasting licences.

Other licence allocations

During the year, the Commission reported in confidence to the ABA on a number of other applications by various companies for pay television broadcasting licences. Subsequently, 13 firms were issued with a total of 548 pay television licences by the ABA. Licence coverage ranged from high population density areas and apartment blocks to nationwide.

III. Structural reform of the Australian economy

Utility reform

Electricity

In February 1994, the Council of Australian Governments (COAG) agreed to the establishment of a competitive electricity market in South-East Australia. The market was originally due to commence on 1 July 1995. This has been delayed, however, and it is now expected to commence in 1996.

Governments remain committed to electricity reforms. A key element of this commitment is a series of competition payments from the Commonwealth to the states -- conditional on effective implementation of competition policy and related reforms, including those on electricity.

The basic characteristics of this competitive market are:

-- generators competing for the right to supply electricity;

-- open access to the grid for new generation (including co-generation and renewables);

-- customers being free to choose who supplies their electricity; and

-- a short-term forward electricity market, which will allow participants to fine-tune their risk exposure.

At its meetings last year, COAG agreed to a regulatory approach encompassing an industry code of conduct consistent with overall national competition policy and some transitional arrangements. The National Electricity Market Management Company will be responsible for managing the operation of the market, while the National Electricity Code Administrator will be established to administer the code. The soon to be established Australian Competition and Consumer Commission (ACCC) will be responsible for oversight of some regulatory aspects, including access to the high voltage transmission network.

To date, most of the benefits of reform in the electricity industry have come from state governments corporatising their utilities, with some jurisdictions separating their utility into generation, transmission and distribution businesses. As a result, benefits include: real price reductions of 2.3 per cent since 1989-1990 for electricity purchased; improved reliability in the electricity system; significant returns to governments in the form of taxes and dividends; and significant improvements in labour productivity.

Gas

In February 1994, COAG agreed to implement a comprehensive package of reforms for the natural gas industry by 1 July 1996, aimed at stimulating a more competitive framework for the industry. The competition payments from the Commonwealth to the states are also a key element of this commitment.

The major features of the agreed reforms are the removal of legislative and regulatory barriers to trade in natural gas, and a uniform, national framework for third-party access to supply networks. In addition, publicly-owned gas utilities are to be placed on a more commercial footing, and, where presently vertically integrated, transmission and distribution activities are to be separated. Legislation is to be introduced to ring fence these activities in private sector firms. There has been agreement to adopt uniform national pipeline construction standards and gas franchise arrangements consistent with free and fair competition in gas markets and third-party access.

The implementation of these reforms is being pursued co-operatively by industry representatives and officials through the Gas Reform Task Force which will report to COAG. The task force is to prepare a scoping study in which it will identify (and recommend the removal of) impediments to free and fair trade in the industry. In parallel with this process, the industry is also preparing a code of conduct with a view to developing an effective third-party access regime for the industry.

Communications

Postal services

From January 1995, additional competition was introduced into the mail services market arising from the government's consideration of the 1992 Industry Commission review of the postal market. The government reaffirmed its commitment to maintaining the public ownership of the national mail service, Australia Post, and maintaining a universal postal service at a uniform price. The reforms involve:

-- reducing the minimum price that a private sector courier must charge for postal delivery to A$ 1.80 (which is four times Australia Post's standard letter rate);

-- the weight limit subject to the monopoly being reduced to 250g;

-- bulk mail customers being permitted to interconnect at designated points with Australia Post's network and receive discounts based on avoidable costs of so doing; and

-- outgoing international mail having been deregulated with interconnection allowed on the same basis as for domestic mail.

These reforms also involve continuation of Prices Surveillance Authority/ACCC surveillance with a price freeze on the standard letter rate of 45 cents being in place until 1997. A review of the introduction of further competition will be conducted in 1996-1997.

Broadcasting

The Broadcasting Services Act 1992 (BSA), which came into effect on 5 October 1992, contains a range of licencing and regulatory requirements on broadcasting services within Australia. All radio and television broadcasting services, other than national broadcasting services, must be licenced. Commercial broadcasting services, subscription television broadcasting services and community broadcasting services are individually licenced by the Australian Broadcasting Authority, whereas narrowcasting services (services of limited appeal, but still within the scope of "broadcasting services", as defined) operate under "class licences" (statutory licences applicable to all services that comply with the relevant definitions).

Commercial and community broadcasting service licences must be held by companies formed within Australia or its territories. New commercial radio and television broadcasting licences are allocated by the broadcasting regulator, the Australian Broadcasting Authority (ABA), using a price-based system. Community broadcasting licences are allocated by the ABA using a merit-based system.

The regulatory regime affecting ownership and control requirements includes:

-- Commercial television broadcasting licences: limit of three per licence area, foreign control prohibited and foreign interests limited with no person controlling: *i)* more than one licence in the same licence area; *ii)* licences with licence area populations of more than 75 per cent of the Australian population; or *iii)* both a commercial television broadcasting licence and either a commercial radio broadcasting licence or a newspaper associated with the licence area of the television licence.

-- Commercial radio broadcasting licences: no person may be in a position either to control more than two licences in the same licence area or to control both a commercial radio broadcasting licence and either a commercial television broadcasting licence or a newspaper associated with a licence area of the radio licence.

-- Community broadcasting services: no specific ownership and control restrictions, although in deciding whether to allocate a community broadcasting licence the Australian Broadcasting Authority is to have regard to the undesirability of one person being in a position to exercise control of more than one such licence in the same area.

-- Pay television broadcasting services: until 1 July 1997, only three licences to be issued (licences A, B and C, with C being reserved for the national broadcaster, the Australian Broadcasting Corporation) for satellite delivered services. No person who is in a position to control newspapers, commercial television or communications carriers may hold company interests exceeding two per cent in licence A. Limitations also exist on cross-ownership between licences A and B.

-- Narrowcasting and subscription radio broadcasting services are not subject to ownership and control under the Broadcasting Services Act.

A person cannot be a director of a licensee if that person is also a director of a company that could not be in one of the above relationships (in terms of audience reach, multiple licences in the same licence area or foreign interests) with the licensee companies. Foreign directors cannot hold more than 20 per cent of the directorships of a licensee.

The decision of the Full Federal Court in *Austereo v. Trade Practices Commission* in May[21] 1993 confirmed that the competitive conduct rules of the Trade Practices Act apply to all broadcasters in Australia.

Pay television services commenced in early 1995 and are expected to provide consumers with the option of acquiring a greater range and diversity of programming than is currently available on free-to-air television. As noted above, two four-channel satellite pay television licences were allocated by tender, and a two-channel licence (licence C) is to be operated by a subsidiary of the Australian Broadcasting Corporation.

A joint venture (Foxtel) between the government-owned telecommunications carrier Telstra Corporation and News Corporation was formed in late 1994 to install and provide services including pay television on a broadband cable network. A competing broadband network is to be operated by Optus Vision, based on the second telecommunications carrier Optus Communications. The Foxtel cable network is expected to surpass four million homes by 1999 while the Optus Vision cable network is projected to surpass three million homes in the same timeframe. The Optus Vision cable network will also provide telephone services.

These developments in pay television provision will provide audiences with a wider choice of programmes than previously available, and will enhance competition in the delivery of broadcasting services in Australia.

Telecommunications

Access to the facilities of the international satellite systems INTELSAT and INMARSAT has been liberalised. New arrangements will enable customers to acquire customer services directly from the INTELSAT organisation if they wish, without having to organise such access through the signatory body (the government-owned national telecommunications organisation Telstra Corporation).

Currently, two general carriers operate mobile and fixed telecommunications services (Telstra and Optus) with another carrier operating a mobile telephone service (Vodafone). Other regulatory features of the telecommunications industry include full resale of network capacity (domestic and international), separation of the regulatory and operational functions and competitive safeguards. The competitive safeguard provisions prohibit a dominant carrier from imposing a tariff which in AUSTEL's opinion is likely to materially and adversely affect the development and/or maintenance of commercially sustainable competition. Amendments were made to the Telecommunications Act 1991 to clarify government policy with regard to price discrimination. These amendments clarified the nature of price discrimination which was to be permitted and extended the time in which AUSTEL could make a determination on the acceptability of a proposed tariff.

During 1993-1994, Optus extended its provision of domestic long-distance and international voice services. Pre-selection by consumers of a preferred long-distance carrier is being progressively offered throughout Australia by way of a ballot, with the telecommunications industry regulator, AUSTEL, overseeing the process. Following Optus' success in gaining market share, initial interconnection charges have now been renegotiated on a commercial basis against principles determined by government.

Since 1994, the number of mobile subscribers has increased from 1.2 million to 2.3 million by June 1995 (a rise of almost 100 per cent -- with one Australian in eight now subscribing). Vodafone

commenced operations as the third GSM service operator in September 1993. AUSTEL concluded in May 1994 that Telstra was no longer dominant in the mobiles market, and in August 1995 that Telstra continued to dominate the international telecommunications services market.

On 1 August 1995, the government announced that full and open competition would be introduced to the industry from 1 July 1997. Under the new regulations, no restriction will be placed on the number of providers or installers of network infrastructure. Maximum reliance will be placed on general competition law but with some telecommunications specific market conduct safeguards which will be administered by the ACCC. There will be an effective third-party access regime under which carriers controlling access to network facilities will be required to interconnect any other carriers and service providers. Carriers will be subject to the competitive conduct rules. However, in light of the fact that competition in telecommunications markets is still evolving, special provision will be made to prevent carriers with a substantial degree of market power from taking advantage of that power where such conduct would substantially lessen competition.

Transport

Waterfront

Building upon the 1989-1992 reform of the stevedoring sector, improvements in cargo handling and faster ship turnaround have resulted in better service and lower stevedoring charges for waterfront users. For example, the Prices Surveillance Authority reported in May 1995 that average container terminal charges are 23 per cent lower than 1990 levels. A recent benchmarking study by the Bureau of Industry Economics reports that Australian bulk commodity ports are amongst the most efficient in the world. However, stevedoring and port performance in containerised and break bulk cargo is still below the world's best performing comparable overseas ports.

Port authorities are primarily the responsibility of the states and the Northern Territory. The Australian Government has introduced measures to improve the efficiency and financial performance of port authorities through the Council of Australian Governments. In the period 1989-1990 to 1993-1994, port authority workforces have been reduced by around 50 per cent, prices of port services have fallen by 14 per cent and operating sales margins have increased.

Shipping

Government shipping reform programmes achieved a significant reduction in average crewing levels, from 33 to 18 since 1983. In May 1995, the government endorsed a further shipping reform package including an annual taxable grant for shipping employers to offset the impact of income tax on seafarers' earnings on Australia's international ships. Existing capital assistance measures are being extended from 1997 until 2002, and shipowners and unions agreed under the Maritime Industry Restructuring Agreement to implement complementary industrial reforms to further reduce crewing costs.

Review of special treatment of Outbound Liner Conferences

Following the 1994 release of the Brazil Report on Liner Shipping and Cargo Conferences, the government adopted the report's principal recommendation that outbound shipping conferences retain certain exemptions, with limited amendments, from competitive conduct rules in the Trade Practices Act.

These exemptions are granted to conferences meeting certain requirements on service and conditions of carriage.

Aviation

In October 1990, domestic interstate aviation was deregulated with the end of the two airline policy. Since deregulation, average airfares have fallen appreciably, and in the March 1995 quarter were around 26 per cent lower than they were just prior to deregulation. Over the same period, passenger numbers have increased by 70 per cent.

In 1992, the Australian and New Zealand Governments signed a Memorandum of Understanding which provided the policy framework for the implementation of a single aviation market by November 1994. In October 1994, the Australian Government notified New Zealand that it had decided not to allow New Zealand airlines access to the Australian domestic market, or to grant additional beyond rights. Multiple designation on all trans-Tasman city pairs and the beyond rights which had already been agreed remain in place.

In March 1993, the government sold 25 per cent of its equity in Qantas to British Airways. The remaining 75 per cent of the government's equity was sold in a public float in July 1995.

Airports

The government in its 1995-1996 budget announced details of its strategy to sell long-term leases of all the airports owned by the Federal Airports Corporation, which includes all capital city and most important regional airports. With the exception of Sydney Kingsford Smith and Sydney West airports, which are to be packaged together, the airport leases will be granted individually. The airports will be leased in two stages. In the first stage, the leases for Sydney (including Sydney West), Melbourne, Brisbane and Perth airports will be granted in simultaneous, separate trade sales. The remaining federal airports will be leased in a second stage by mid-1998.

The government is developing a regulatory regime for airports to ensure that no lessee is able to abuse market power arising from the monopoly characteristics of airports services. The regulatory regime will include: cross-ownership restrictions, restrictions on airline leasing of the airports and price capping of aeronautical services at the major airports

Rail

The government announced on 3 June 1995 plans to bring interstate rail track under single management control through the establishment of a new authority (Track Australia). The establishment of Track Australia would require a commitment from all states to combine the rail track under single management control. A study is currently under way to assess whether the economies of scale and scope enjoyed by a vertically integrated rail operator can be reproduced by Track Australia. The charter for Track Australia would require it to invest on the basis of priorities established by users and to set pricing on a competitively neutral basis. This development follows the establishment in 1991 of the National Rail Corporation (NR) to operate interstate rail freight across the five mainland states. Consistent with the national competition policy reforms, a single access system will foster competition between NR and private operators. Some firms have already sought the right to compete in interstate rail services or have commenced operations.

Legal profession

The legal profession is organised and regulated at the state and territory level. A 1993 study by the Commission identified many areas where competition was restricted. Measures to open the profession to competition have started within each jurisdiction. For example, wide-ranging reform legislation commenced in July 1994 in the State of New South Wales enabling a more businesslike and competitive legal services market such as by removing prohibitions on advertising and specialist accreditation schemes, abolishing rules against barristers (specialist advocates) contracting directly with their customers, abolishing set fee regimes and allowing multi-disciplinary practices and contingency fees on a no-win/no-fee basis but with a limited fee uplift[22], if successful.

The national competition policy agreed to by the Council of Australian Governments (COAG) in April 1995 will also affect the legal profession by bringing this largely unincorporated sector of the economy within the scope of the competitive conduct provisions of the Trade Practices Act 1974. As a part of the agreement, member governments of COAG have also agreed to review all legislation (including that covering the legal profession) to remove restrictions on competition where appropriate. In addition, work is being undertaken which will be recommending to COAG ways to achieve further reforms in the legal profession, including on detailed arrangements to facilitate a national legal services market whereby lawyers will be able to practise anywhere in Australia while licenced in only one state or territory.

In its May 1995 Justice Statement, the government also announced major changes at the Commonwealth level to increase the community's access to justice, based on the findings of the Sackville Report. The Justice Statement was directed to resolving and preventing disputes by simple and accessible means, reforming key legal institutions to achieve greater efficiency and consumer focus and ensuring access and equity across the legal system.

IV. Studies

Industry Commission report on benefits of national competition policy

The Industry Commission was requested to prepare an assessment of the benefits to economic growth and revenue from competition policy and related reforms. The report was released on 10 March 1995 and concluded that the reforms are overwhelmingly good for the Australian economy. It predicted that real GDP would be 5.5 per cent higher (i.e. A$ 23 billion), households would increase their real spending by an additional A$ 1 500 per year on average, real wages would increase by three per cent and 30 000 extra jobs would be created.

The report estimates that real Commonwealth Government total revenue is estimated to be A$ 5.9 billion (or six per cent) higher, and real state, territory and local government total revenue is estimated to be A$ three billion (or 4.5 per cent) higher. In terms of own-source revenue (abstracting from grants received from other levels of government), this is equivalent to increases of 5.8 per cent and over 7 per cent respectively.

The Industry Commission chose the ORANI model of the Australian economy, which is able to provide information at the Commonwealth/state level as well as for several industries. The analysis compares the effects of the reforms with a baseline based on 1993-1994 data (but with the ORANI structure based on 1989-1990 input-output tables). The estimates do not include any potential dynamic growth benefits engendered by the more competitive environment and are sensitive to a range of assumptions, which are spelled out in the report.

Industry Commission report on the gas industry

The Industry Commission undertook an enquiry into the gas industry in South Australia (with particular reference to the Cooper Basin and to the period since 1986), in order to assist the Trade Practices Commission's review of existing authorisations. The enquiry examined changes in the production and supply chain; changes in the market, including changes in ownership, market power and competitive behaviour; changes in government policy and government involvement in the industry; and the effects of these changes on competition, efficient resource allocation and the delivery of benefits to gas users and to the Australian community generally.

The changes which have occurred or are in prospect and which lay the basis for gains in both allocative and technical efficiency include the reforms to the structure and operations of gas and electricity utilities, the expiry of long-term contracts and technical changes affecting the demand for and supply of gas. Within this framework, several issues assume greater importance in determining whether effective producer competition will occur, including the effectiveness of access regimes for creating a contestable market, the extent of horizontal integration both within and between geographic basins which has the potential to inhibit competition and existing long-term contracts which may prevent new producers from supplying distributors and end users.

Review of electricity industry access arrangements for the State of Victoria

The Trade Practices Commission was requested to determine whether the access regime principles and related regulation arrangements being implemented in the Victorian electricity industry could be considered consistent with the Competition Principles Agreement and would be considered effective. The report was released in June 1995.

The report concluded that, when viewed from the perspective of its effects within the boundaries of Victoria, the Victorian access regime for electricity appeared to be largely consistent with the relevant provisions of the Competition Principles Agreement and so the proposed regime could be expected to be judged effective from this perspective. However, in the context of inter-state trade in the proposed national electricity market, the report identifies a number of issues that warrant attention and resolution before it could be satisfied that the regime is effective.

Does Pacific Power have market power? A report on the implications for the National Electricity Market of New South Wales Generation

The Industry Commission was requested to undertake a review of the electricity generation industry in the State of New South Wales to determine the implications for competition of the market power that could be exercised by Pacific Power operating as a single entity. The report was released on 14 August 1995 and concludes that the market power available to Pacific Power operating as a single entity, if exercised, would seem inconsistent with the goals of the Competition Principles Agreement and with the effective operation of a competitive national electricity market. The report has been used in conjunction with other studies forming part of the New South Wales Government's review into its electricity generation industry.

Appendix

Publications and relevant articles

Trade Practices Commission publications

The "Bulletin" and "Fair Trading" are widely circulated regular publications designed to keep the community informed of Commission activities and trade practices developments generally. In addition, various ad hoc guides in various formats (including leaflets for wide distribution) dealing with the Trade Practices Act or particular aspects of it are published together with major reports and discussion papers.

Other publications released include:

Corporate Plan 1994-1996.

Outlook 1995-1996.

Summaries of the Trade Practices Act and the Prices Surveillance Act (August 1995).

Section 155 of the Trade Practices Act (November 1994).

Information Paper: Safeguarding the Consumer Interest in Reformed Public Utilities (March 1995).

Guideline on Section 87B of the Trade Practices Act (August 1995).

Special publication

The Australian Trade Practices Act 1974: Proscription and Prescription for a more Competitive Economy, Kluwer, Netherlands 1994 (reprint of Review of Industrial Organisation, Special Issue October 1994, Vol. 9, Issue 5) commemorating the 20th anniversary of the Trade Practices Act.

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NOTES

1 An independent statutory body charged with reviewing and inquiring into industry matter generally.

2 Vesting responsibility for competition law and policy within the Treasury porfolio is part of the Government's continuing microeconomic reform agenda to bring an increased economic focus to competition policy. The responsible Minister varies over time according to the Goverment's own arrangements - for example, from 1983 until 1992 the Attorney-General was the responsible Minister.

3 The TPC comprises nearly 200 staff, half located in Canberra with the balance located in the States and the Northern Territory - its litigation is undertaken by a Branch of the Australian Governments Solicitor co-located in Canberra and in State capitals, with specialist advocates being engaged from private practice as required In light of the reforms, extra staff will be appointed to the ACCC over the forthcoming year.

4 When the Tribunal rehears a matter it is constituted by a Federal Court Judge (presiding) and two lay members, usually being an economist and a retired business person.

5 Cross-vesting legislation allows actions under the Trade Practices Act to be heard by state and territory superior courts in restricted circumstances.

6 Other than commercially sensitive material for which confidentiality may be granted.

7 Following a pre-decision conference the Commission allowed the notification to stand.

8 The dominance test was used between 1977 and 1993 - between 1974 and 1977 the substantial lessening of competion test was in force.

9 The Minister could also seek an injunction until October 1995.

10 But not the Minister after October 1995.

11 See the Ampol/Caltex matter below.

12 See the Davids/IHL and AustereoVillage matters referred to below.

13 Factors to be taken into account include industry efficiency and international competitiveness.

14 For details refer to next section.

15 A mode of payment under the national healthcare program.

16 Retailers who do not acquire product, but instead are paid a commission based on volume of sales.

17 Retailers who lease branded sites and who acquire title in the product which is then resold.

18 Apart from licence C (which is controlled by a subsidiary of the public broadcaster), these two licences are the only way Pay TV may by low be distributed by satellite until July 1997.

19 The payments system is to be organised into four separate clearing systems: paper, bulk electronic (direct entry payment instructions), consumer electronic (ATM, EFTPOS and card payment instructions) and high value.

20 Microwave Distribution Services.

21 (1993) ATPR, para. 41-246.

22 Rather than a proportion of any court awarded damages, compensation, etc.

AUSTRIA*

(1994-1995)

I. Practices, laws and policies

Economic background

On 1 January 1995, Austria joined the European Union. This means that bureaucratic hurdles for imports and exports as well as sectoral exemptions (such as trading monopolies and the agricultural sector) no longer apply. Furthermore, Austria's participation in the Common Agricultural Policy, which caused wholesale price decreases for bread and grain of 46 per cent to 57 per cent, for beef about ten per cent and for pork about 20 per cent. Prices for dairy products fell by about one-third. At the same time, a number of farmers started to produce organic health food according to strict and precise regulations for large food retail chains. Nevertheless, it seems inevitable that small producers of farming products will be forced to leave the market.

During this year, problems with parallel imports became particularly drastic in a competition law context, even though the situation had already existed to a certain extent within the EEA. Due to the abolition of customs duties and formalities for direct imports by customers, a considerable amount of purchasing power was lost to neighbouring member states. This effect was reinforced by the different levels of purchasing power and prices and was particularly strong with Italy. Calculations showed an additional loss of purchasing power in the order of Sch three to Sch four billion so far this year. In order to stem this loss of purchasing power, Austrian companies, especially in the border regions, tried to react through cheap imports or through price reductions for previously imported goods. Price differentiation strategies and even market foreclosure policies of large international producers of brand name articles gave rise to an informal complaint by the Austrian Economic Chamber before the European Commission.

The low inflation rate of 2.1 per cent in August 1995 shows that this initiative, price comparisons and information campaigns carried out by the Chamber of Labour and the adjustments companies made in order to obtain low import prices are beginning to bear fruit. Through the application of European competition rules, the competitive environment has begun to change and as a consequence the expected price reductions occurred.

The most evident structural changes can be seen when looking at the number of businesses and employees. In spite of a relatively good economic situation, the number of insolvency cases was extremely high (3 801 throughout the first three quarters of this year). Liabilities involved in these insolvencies are estimated at about Sch 50.7 million for the first three quarters of this year, which is about 88 per cent higher than in the respective period the year before. Bankruptcies of major companies play the most important role in this context.

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* The original language of this report is English..

The Austrian economy is characterised by small- and medium-sized firms. In the formerly protected sectors (such as food), a great number of companies survived due to little pressure from competition. A study by the Austrian Economics Research Institute (WIFO) estimated that 12 per cent of retailers will have to leave the marketplace. For the food industry, even higher estimates were given. In fact, 312 food retailers closed down in 1994.

However, the most serious structural change took place with the demise of the retail food group Konsum, which, with a market share of 18.5 per cent, was the second largest player in the retail food market. This insolvency led to a considerable shift in market shares. The network of branches is in the process of being sold to former competitors. The two remaining market leaders will represent almost 50 per cent of the market, compared to Germany, where the two leading food chains together hold 41 per cent, or France with 35 per cent or Italy with 20 per cent. At the same time, the number of employers increased by about 2 000 compared to last year and throughout the first three quarters of this year 7 264 companies were registered in the official register, which is two per cent more than in 1994. After Austria's accession to the EU, a number of foreign businesses chose Austria as a location. Productivity in industry and trade rose to a new record level.

Abuse of dominant position

The Joint Committee for Cartels, an expert body of the Austrian social partners responsible for cartel matters, formulates its opinion on cases of abuses of dominant position on behalf of the Cartel Court. During the period under review, two cases in particular were brought to the attention of the committee. The first involved the alleged abuse of purchasing power by a large retail chain which unilaterally altered the terms of payment for its supplies. Considering the mainly small- and medium-sized suppliers, the Committee found the purchasing power of the retailer to be considerable. The unilateral shortening of the period for payment to 60 days was considered by the retailer to be an "offer". Enquiries are still in progress.

The second case involved the alleged abuse of dominant position by a supplier of liquid gas by way of an exclusivity clause in its contracts with its customers. The dominant supplier argued that because of the market conditions (competition with other energy sources), it would regularly be forced to subsidise the building of the customer's liquid gas installations and would use the exclusivity clause as a compensation. The Joint Committee for Cartels recommended to the Cartel Court to further analyse this matter in order to get an indication of the cost of building the liquid gas installations and to possibly accept the exclusivity clause if it expires after a certain period of time.

Refusal to deal/sell

Another case involved the alleged abuse of a dominant position by a manufacturer of car starter batteries by refusal to supply a car accessories retailer. The Committee concluded that the manufacturer seemed to have a dominant position in a segment of the starter batteries market (maintenance-free batteries with enhanced starting capacity -- with just a few models of this product almost the whole car fleet can be supplied). Small retailers in particular would need to be able to serve this market segment. The refusal by the manufacturer to supply a retailer under these circumstances was considered by the Committee to be abusive. Of course, any reason the manufacturer might put forward to justify its behaviour should be taken into account accordingly (the violation of the terms of payment was one of the reasons mentioned by the manufacturer; this allegation, however, is disputed by the retailer). The case is still pending.

Mergers

Since the introduction of merger control in November 1993 through the end of 1994, 238 cases were filed. From January to September 1995, 182 cases were announced or registered (announcements and registrations in a ratio of 1/2). The mergers concerned the following sectors:

Table 1

Mergers

	1993/1994	1-9/1995
Manufacturing/industry	87	71
Construction, building materials, real estate, waste management	42	37
Energy	12	7
Co-operatives	13	6
Media	18	5
Trade and commerce	14	17
Banks	17	7
Insurance, various services	29	27
Hotels, tourism	6	5
Total	**238**	**172**

(The table shows horizontal mergers [the majority of cases] as well as vertical mergers)

In 1994, one application for an investigation concerning possible market dominance was filed with the Cartel Court. The merger was approved.

In the first half of 1995, the Cartel Court received an application to review the merger of the American battery manufacturer Exide with the French-Italian company CEAC. In 1994, Exide acquired the Spanish company Tudor and its Austrian subsidiary (the Elba Group). The Austrian subsidiary of CEAC, Sonnenschein, is also involved in this merger. As a consequence, Exide/CEAC will have a combined market share in excess of 50 per cent on the Austrian market for traction batteries. During the course of the investigation, it became clear that the relevant geographic market in this case is Europe where severe price competition can be observed. Batteries and cells can be traded across Europe without restrictions, and transport costs are negligible. The reinforcement of the already strong market position was deemed to be relatively insignificant, since under the prevailing market conditions a change in prices or conditions of supply to the detriment of customers was not expected. This merger should lead to further specialisation (e.g. at Elbak) and improved economies of scale. The consequent cost and price reductions

could improve the competitiveness of the merger partners. The Committee for Cartel Matters saw no reason to prohibit this merger.

Horizontal agreements

Cartels

Due to the strict requirements under European competition law, which came into force in Austria when it joined the EEA, governing the extent to which cartels are permissible, the number of registered cartels decreased by half and currently amounts to less than 30. The policy of medium-sized enterprises, i.e. to defuse competition by price and quota cartels instead of making necessary structural adjustments (including mergers), can in principle no longer be pursued. The few remaining cartels relate to market information systems, streamlining and specialisation agreements, etc., and play no major role in the overall economic context. As a rule, they are confined to the traditional sectors and industries (e.g. welded wire mesh, carbonic acid, corrugated board and woodwool building slabs).

Vertical agreements

The reporting requirement as specified under the 1993 Amendment to the Austrian Cartel Act concerning vertical agreements has thus far resulted in more than 600 reported cases. Since Austria joined the EEA on 1 January 1994, these agreements have also been reviewed with respect to their compatibility with EU competition law. This situation has not changed since Austria joined the EU. On the basis of the ordinance issued by the Ministry of Justice on 28 February 1995, the four main block exemption agreements, i.e. exclusive dealing agreements, exclusive purchasing agreements, motor vehicle agreements and franchising agreements, were incorporated into Austrian law. Requirements under European law have entailed various prohibition proceedings and the adjustment of some of the agreements. The far-reaching reporting requirement has led to a comparatively high degree of transparency in this field of competitive restraints.

Enforcement

Investigative procedures

In order to be able to conduct searches on the premises of enterprises in the course of proceedings pending before the European Commission, the legal background had to be created within the framework of the Austrian legal system. The right to enter premises in the course of investigations for officials of the European Commission and members of the Austrian competition unit was created by an amendment to the European Competition Act in Austria. A formal search warrant issued by the President of the Cartel Court is necessary. Throughout this year, three investigations on premises of enterprises suspected of having violated European competition law have been conducted in Austria. In each of the cases, the investigators were given access to the premises without having had to show search warrants.

II. Sectors

Air transport

Intense competition exists between the privatised Austrian airline Austrian Airlines (AUA) and Lauda Air, in which Lufthansa holds a 37.9 per cent stake. This has to be looked at in the context of the negative economic results and the parallel time schedules, as well as from a competition law perspective. Austrian Airlines filed notifications about Lufthansa with the European Commission and with the German Bundeskartellamt. In the complaint, AUA asked if Lauda Air was predominantly controlled by Lufthansa and if Lufthansa took over unjustifiable financial burdens. In the case of a positive answer, Lauda Air would have had to be dealt with as a purely German airline according to air transport law, which in turn would have allowed Lauda Air only to serve flight connections between Germany and the country of destination and not between Austria and the flight destinations. However, the German Bundeskartellamt did not ascertain dominant control of Lufthansa.

In 1993, Austrian Airlines prepared to merge with Swissair, SAS and KLM under the name Alcazar. However, this co-operation never became effective. Presently, Lufthansa is closely co-operating with SAS and Finnair, the former AUA partners. AUA, on the other hand, intensified its co-operation with Swissair and Sabena.

The rivalry between the two airlines could also be observed on the upstream market for travel agencies with Touropa-Austria, Itas and TUI.

Competition and environment

In areas that have so far been the exclusive or predominant domain of the state, deregulation -- particularly in the field of environmental protection -- has created new problems in connection with cartel law. The companies that have taken over responsibility for these tasks sometimes restrained competition through co-operative activities between enterprises. In particular, there were two cartels in the field of environmental protection: a nation-wide disposal system in the waste management industry, the ARA system,* and a system specialising in the disposal of used refrigerators. The latter is organised by a company called Umweltforum Haushalt (UFH) and is designed to provide a nation-wide disposal system within the scope of the Ordinance on Refrigeration Systems.

By participating in the nation-wide disposal system, commercial sellers of refrigerators are exempt from the obligation (under the Ordinance on Refrigeration Systems) to require every refrigerator buyer to pay a deposit for the disposal of the refrigerator. The UHF system was approved after modification of one item in the agreement which was criticised by the Committee for Cartel Matters since no competitive restraints could be identified. Following an appeal by one of the litigant parties (challenging the decision of the Cartel Court), the proceedings are being continued. The case has not been concluded yet.

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* For more details, see OECD Document (OCDE/GD(96)22) on “Competition Policy and Environment”; also available on the OECD web site (http://www.oecd.org/)

Regulation

Regulatory reform

Post and telecommunication services

Beginning in 1996, the government plans to restructure and privatise postal services (including letter mail, parcel services and telecommunications) and bus transport, which had been supervised by the Ministry of Transport. Within the framework of a stock company (Post und Telecom Austria AG -- PTA), these services will be offered on the marketplace in a competitive environment in compliance with the European competition rules. (A holding company, which will be specifically set up for this purpose and which is owned 100 per cent by the Austrian state, is to take over part of the current debts of the "Post-und Telegraphenverwaltung"; dividends from the PTA will have to be paid in return to the holding company.) Talks concerning alliances for the different services (e.g. bus services and parcel services) are currently being held with strategic partners to prepare for free competition.

Also in 1996, a second GSM operator will be licenced. Decisions regarding the granting of the licence and the respective fee will be made shortly.

BELGIUM*

(1994-1995)

I. Changes to competition laws and policies adopted or envisaged

With the entry into force on 1 April 1993 of the Economic Competition Protection Act of 5 August 1991 (the Competition Act) and the repeal of the Act of 27 May 1960 on the abuse of dominant position, Belgian competition policy legislation is now largely based on the principles of EC law. The 1991 Competition Act paved the way for major reforms which are further testimony of Belgium's commitment to ensuring that competition will be the major force in the operation of the Belgian market. This was the single most important amendment to Belgium competition law in 1993.

No amendments were made to the Competition Act in 1994.

The Royal Decree of 29 September 1994 replaced the Competition Service by the Pricing and Competition Inspectorate.

II. Enforcement of competition laws and policies

The Competition Act

Competition

In 1994, 39 concentration notices were filed, the Competition Council rendered decisions on 42 cases and one concentration was prohibited.

Negative clearance and/or exemption

Nine notices were filed in 1994.

Complaints

20 complaints were referred, and the Competition Council rendered a decision in one case.

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* The original language of this report is French.

Interim measures

Five applications were filed, the President of the Council rendered decisions in five cases, including one decision on a 1993 application.

Enforcement of Community competition rules by the competent Belgian authorities

Section 53 of the 1991 Competition Act states: "Where the Belgian Authorities rule on the admissibility of agreements, concerted practices or the abuse of dominant position within the Common Market, in accordance with Article 88 of the treaty creating the European Economic Community, such rulings shall be made by the authorities designated under the Act, in accordance with Article 85(1) and Article 86 of the Treaty, according to the procedures and penalties set out in the Act". In 1994, the Competition Council made no rulings under the above articles of the Treaty. There were no legislative developments regarding jurisdiction over the application of Article 85(1) and Article 86 of the EC Treaty.

Application of Community competition rules in the Belgian courts

Under Section 42 of the Competition Act, any judgment or order handed down by the courts or tribunals in proceedings contesting the legality of competition practices must be reported to the Competition Council.

In 1994, roughly five orders referring to Articles 85 and 86 of the Treaty of Rome were notified to the Competition Council. They concerned primarily:

-- selective distribution systems and refusal to deliver;

-- abuse of market position;

-- price collusion and selective distribution; and

-- exclusive contracts and abuse of market position.

CANADA*

(1994-1995)

Introduction

The Bureau of Competition Policy is a part of Industry Canada, which was one of several federal departments identified as "most affected" by the current budget crisis. As such, Industry Canada is subject to a budget reduction of some 42.5 per cent over the three-year period of the Program Review initiative. While the Bureau was certainly not immune to the effects of these reductions, the government has continued to recognise competition and the Competition Act as key elements of Canadian business framework laws.

The Bureau is faced with increasing responsibilities, higher costs of litigation and the knowledge that as a government organisation, corresponding increases in resource levels are not to be expected. The Bureau is thus seeking to address this situation by reviewing its priority case selection criteria and by emphasising training and the use of technology in all aspects of its work. Internally, the Competition Policy Automated Support Systems (COMPASS) team provides the Bureau with information management and information technology services. COMPASS employs the latest imaging technology to support case work, and has recently implemented a system to capture complaints and service requests receive in the Bureau. This technology also permits fast retrieval of accurate copies of documents.

I. Changes to competition laws and policies adopted or envisaged

Modification of the Competition Act

A public consultation process was started in April as the Bureau works on amending the Competition Act. A discussion paper on the proposed amendments was issued in June 1995, inviting wide participation and comment from stakeholder groups. Accordingly, the Bureau has established a small Amendments Unit within the Bureau which will be gathering and distilling public input in this area.

Re-structuring the approach to marketing practices provisions

Over the past several years, as a result of concerns about efficiency, changes in the legal environment and resource constraints, the Marketing Practices Branch had to re-examine its mandate and role in the marketplace. A selective enforcement strategy was developed that focussed on cases with the greatest economic impact. Within the context of the federal government's Program Review, the Bureau

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* The original language of this report is English.

then undertook a comprehensive examination of the Branch's structure and its impact on operational efficiency and productivity. The study demonstrated that a disproportionate amount of scarce resources was required for administrative tasks associated with maintaining regional units. In some cases, the ratio of administrative overhead to enforcement resource expenditure exceeded 50 per cent. In addition, the study noted that the evolving marketplace and selective enforcement strategy imposed additional requirements on case officers which would be more effectively handled in a consolidated organisation. It also would produce operational synergies because of increased exposure to larger cases and general enforcement issues, as well as specialised training in modern law enforcement techniques.

The study also determined that because the vast majority of misleading advertising complaints (97 per cent) are made by telephone or by letter, the closing of local offices would have negligible adverse impact on the handling of complaints. Indeed, the study determined that the creation of a central complaints unit to handle all complaints, Bureau-wide, under the responsibility of the Compliance and Operations Branch, would result in a more consistent and streamlined treatment of complaints and a more strategic allocation of resources. Coupled with a nation-wide WATS (1-800) service, a central complaints unit would better serve the selective enforcement priorities of the Branch and help establish a national database free from the technical difficulties associated with the operation of regional offices.

Accordingly, the Director's formal announcement of the decision to close the Branch's field offices in seven cities (Halifax, Montreal, Willowdale [Toronto], Hamilton, Winnipeg, Edmonton and Vancouver) and the consolidation of all staff at the Bureau's headquarters in Hull followed slightly after the end of the year, on 19 April 1995. The Branch will replicate the organisational model used in other enforcement branches in the Bureau (i.e. Criminal Matters Branch, Civil Matters Branch and Mergers Branch). These branches have operated effectively over the years despite little or no regional presence. A central unit within the Compliance and Operations Branch will handle complaints and public enquiries for all enforcement branches.

Recovering costs

The Director intends to move forward on the cost recovery initiative that was begun in 1993. At that time, the Director issued a discussion paper on the subject. A substantial amount of comment questioned whether the authority existed to engage in such activity. With the passage of the Industry Canada Act, any uncertainty in this regard has been dispelled. It is the Director's intention to engage in further consultations on the subject with a view to implementing cost recovery for pre-notification filings, requests for Advance Ruling Certificates, photocopy costs and advisory opinions. In the past year, the Director surveyed a number of users of the Program of Advisory opinions in order to determine their views as to the usefulness of the Program, any changes that might be made and different approaches to instituting charges for opinions given under the Program.

II. Enforcement of competition laws and policies

Industries in transition

The trend away from regulation and towards competition certainly continued during 1994-1995 and shows no sign of diminishing. As was evident last year, the telecommunications sector saw a flurry of activity and occupied a significant amount of the Bureau's time and effort.

The telecommunications sector

Rogers Communications Inc. and Maclean Hunter Ltd.

On 31 March 1994, Rogers Communications Inc. (Rogers) agreed to purchase Maclean Hunter Ltd. (Maclean Hunter) for a total of approximately C$ 3.1 billion. The Director examined the likely impact of the proposed transaction on a number of markets, including cable television distribution, radio and television broadcasting, radio paging, newspaper and magazine publishing and commercial printing. As Rogers did not own any newspaper, magazine or commercial printing operations, the Director concluded that the addition of the Maclean Hunter operations would not affect concentration in these markets. Similarly, the proposed transaction did not raise concern in radio and television markets because each firm owns broadcasting stations that do not compete in the same geographic market. The Director also concluded there would be effective competition in radio paging remaining from Bell Mobility and from a number of other regional firms participating in the paging markets where Rogers and Maclean Hunter competed.

In cable markets, Rogers is Canada's largest cable television distributor with 14 systems in and around metropolitan areas of Southern Ontario, Alberta and British Columbia. Following the proposed transaction with Maclean Hunter, Rogers would increase its share of the total number of cable subscribers in Canada from 26 per cent to 36 per cent.

It was concluded that the proposed transaction was not likely to lessen or prevent competition substantially in any local cable market at this time. This finding was based in large measure on the long-standing policy of the Canadian Radio and Television Commission (CRTC) to grant cable licences on an exclusive basis, creating territorial monopolies for cable service across the country. As a result, Rogers and Maclean Hunter do not and cannot compete in the provision of cable services to consumers. This policy also ensures that Rogers and Maclean Hunter do not compete in the purchase of programming from program suppliers for any local market. The Director also noted that the potential emergence of competitive alternatives, both from wired competitors, such as telephone companies, and from wireless technologies, such as direct-to-home (DTH) broadcast satellites and multipoint distribution systems, was an important factor in his assessment of the long term competitive effect of the proposed transaction.

It is important to note, given the considerable public comment on this issue and the size of the companies involved, that neither the Competition Act in general, nor its specific merger provisions, deal with issues such as the concentration of media ownership.

The Director will closely monitor the effects of the Rogers/Maclean Hunter transaction on the delivery of programming services, non-programming services and other informational and transactional services to consumers and business customers during the three-year period for monitoring set out in the Act.

Balloting Proceeding (Telecom Public Notice CRTC 94-19)

On 20 May 1994, the Director provided a written submission to the CRTC regarding an application by Unitel Communications Inc. for a balloting process for long-distance telephone service. Under Unitel's proposal, telephone subscribers would select their preferred long-distance service provider in a public balloting process. Such balloting procedures for long-distance service have been held in the United States and Australia. The Director supported Unitel's application on the grounds that balloting could be an effective means of stimulating competition by facilitating the entry and growth of competitive

providers of long-distance service. In the view of the Director, the one-time costs of the ballot would be outweighed by the benefits to the public of increased competition and earlier forbearance from regulation of long-distance services. The Commission's decision was awaited at the end of the fiscal year.

Directory database information (CRTC 94-3)

In January 1994, the CRTC issued a public notice (CRTC 94-3) regarding the provision of directory database information. The Director intervened in the matter and made a submission in June 1994. Consistent with the Bureau's submission, the CRTC's March 1995 decision required that the telephone companies under CRTC jurisdiction make available non-confidential residential and non-residential information unbundled by geographic region. It also established interim rates for the information. In March 1995, an independent publisher filed an application for a limited variance of the order with respect to a subscriber opting out provision.

Direct-to-Home (DTH) Satellite Distribution Consortium -- Expressvu Inc.

On 17 May 1994, Shaw Communications Inc. (Shaw), Astral Broadcasting Group Inc. (Astral), Canadian Satellite Communications Inc. (Cancom), WIC Western International Communications Ltd. (WIC), Rogers Communications Inc. (Rogers), BCE Inc., CFCF Inc. and Labatt Communications Inc. (Labatt) announced their intention to form a consortium to deliver DTH satellite broadcast services. In July 1994, Tee-Comm Electronics Inc. (Tee-Comm) joined the consortium discussions. The Director commenced an examination of the proposed consortium under the merger provisions of the Act, because the consortium included many of the current and potential competitors within a single enterprise, including the major cable companies, thus raising concerns as to the state of competition in this emerging market.

On 17 October 1994, the consortium announced that Rogers, Shaw and CFCF Inc. were withdrawing from the arrangement. On 7 December 1994, agreement was reached among WIC, Cancom, Tee-Comm and BCE Inc. to form a DTH satellite distribution company called Expressvu Inc. The Director's examination was ongoing at the end of the fiscal year.

Long-distance competition -- Saskatchewan

On 4 June 1994, the Government of Saskatchewan released a White Paper outlining the potential conditions under which Saskatchewan would consider allowing competition in the long-distance telephone market. SaskTel, the provincially owned telephone company, will not be subject to federal regulation by the CRTC until October 1998. The Minister responsible for SaskTel invited comments on the discussion paper from all interested parties. On 5 August 1994, the Director provided written comments to the Saskatchewan Government encouraging the introduction of long-distance competition on terms and conditions modelled on those contained in Telecom Decision CRTC 92-12. On 20 September 1994, the Director made further written representations to Saskatchewan. A policy statement from the province on long-distance competition was awaited at the end of the fiscal year.

New Brunswick Telephone Company (NBTel)

The Director commenced an enquiry on 28 August 1994, following the receipt of information that the New Brunswick Telephone Company (NBTel) was engaging in the anti-competitive practice of restricting the use of fibre optic and coaxial cable owned or leased by the New Brunswick Cable Television Association (NBCTA) members so as to prevent their entry into telecommunications, data transmission and multi-media markets in potential or actual competition with NBTel in the province of New Brunswick. The Director's examination led to the conclusion that grounds existed for an application to the Competition Tribunal for a remedial order under the refusal to deal and abuse of dominant position provisions of the Act. Accordingly, on 23 September 1994, the Director wrote to NBTel to express his concerns with their restrictive use policies. The Director requested that NBTel reconsider its position on the continued use of restrictive covenants in its support structure agreements with cable companies and respond by 14 October 1994. In a letter dated 14 October 1994, NBTel advised that it undertook to remove immediately all restrictive use covenants on fibre optic and coaxial cable owned by provincial cable companies. At the same time, NBTel wrote each of the NBCTA members and advised them of its change in policy.

On the basis of NBTel's positive and timely response to resolving the concerns which gave rise to this enquiry under the Act, the Director concluded that it was not necessary to make an application to the Tribunal for a remedial order. On 6 January 1995, the Director advised NBTel in writing that he intended to keep his enquiry open and would monitor developments in New Brunswick to determine the effectiveness of the resolution of this matter pending a CRTC decision. Concern over restriction of access to necessary infrastructure was also significant in his review of the Edmonton Telephones Corporation/TELUS Corporation transaction.

Acquisition of Edmonton Telephones Corporation by TELUS Corporation

On 18 November 1994, the Edmonton City Council voted to accept an offer by TELUS Corporation (TELUS) to acquire Edmonton Telephones Corporation (ED TEL). TELUS controls AGT Ltd., the major telecommunications provider in the Province of Alberta. The transaction was reviewed under the merger provisions of the Act to determine whether the merger would prevent or lessen competition substantially. Since ED TEL and TELUS/AGT have overlapping operations in only a few geographic areas and on only certain product offerings, the Director was satisfied that it was unlikely that the proposed transaction would result in a substantial lessening of competition.

The primary focus of the examination was whether the proposed merger would result in a prevention of competition in either the local or long-distance telephony markets. As part of the examination, the Director considered the competitive implications of the possibility that, at some point in the future, ED TEL and TELUS could, in the absence of the merger, compete with each other and also that the changing regulatory environment will allow others to more easily enter these markets to compete with the incumbents during the same period. The fact that the telecommunications industry is currently emerging from an environment of substantial regulation into one which is relying increasingly on the disciplines of competitive forces was a significant factor in the assessment.

Another important consideration was that TELUS had indicated that it would allow access to its support structures so that coaxial and/or fibre optic networks owned by another party could be placed in or on any available space anywhere in Alberta. This access should encourage new entrants to compete within this market.

In light of these and other considerations, the Director announced on 28 February 1995 that he would not challenge the transaction. Given the rapidly changing regulatory and technological environment, the Director also announced that he intended to closely monitor the effects of this transaction, including access to support structures, during the three-year period set out in the Act.

DTH Policy Review Panel

During the year, the Director participated in the government's review of DTH satellite policies. In his view, a number of the terms and conditions of the DTH satellite distribution Exemption Order issued by the CRTC on 30 August 1994 substantially limited the prospects for meaningful competition among DTH service providers. The Director submitted detailed comments to the DTH Policy Review Panel charged with making recommendations to the government on DTH policy. On 6 April 1995, the DTH review panel issued its report, recommending that a competitive model be adopted for DTH services. The panel adopted many of the Director's recommendations, including the recommendation that DTH firms be allowed to use foreign as well as Canadian satellites in the delivery of their services.

Information highway proceeding (Telecom Public Notice CRTC 94-130)

On 11 October 1994, the government issued Order in Council 1994-1689 directing the CRTC to study and report on issues regarding facilities, content and competition as they relate to the government's policy for the development of Canada's information highway. On 20 October, the Commission issued a Public Notice establishing a public process involving two stages of written submissions by interested parties and an oral public hearing. On 16 January 1995, the Director filed a comprehensive written submission together with two expert reports, one by Professor Steven Globerman of Simon Fraser University and the other by Dr. Robert Crandall of the Brookings Institution and J. Gregory Sidak of the American Enterprise Institute for Public Policy Issues. On 13 February 1995, the Director filed with the Commission substantive comments in reply to the submissions of other interested parties and, on 16 March, appeared at the public hearing along with Professor Globerman and Dr. Crandall. This was an extremely important proceeding in which the Director advocated regulatory reform which would allow for an immediate market-driven transition to competition in the distribution of information highway and broadcast services. The Director also recommended that there be no mandated interconnection between cable and telephone networks, that foreign ownership restrictions in the communications industry be relaxed, that subscribers be given ownership of telephone and cable inside wiring, and that the present structure for promoting the production and distribution of Canadian cultural products be reviewed and replaced with a program of targeted subsidies. The CRTC's report to the government was issued in May 1995.

Forbearance of non-dominant carriers (Telecom Decision CRTC 94-19)

In response to CRTC Notice 94-19, the Director filed a submission on 12 December 1994 advocating that the Commission forbear from the regulation of non-dominant carriers. He advocated forbearance on the grounds that these carriers do not possess sufficient market power to warrant regulation, that they do not control essential bottleneck facilities and that forbearance would further the competition and regulatory efficiency objectives of the Telecommunications Act.

Satellite master antenna systems (Telecom Public Notice CRTC 94-20)

On 27 January 1995, the Director provided comments to the CRTC with respect to Notice of Public Hearing 94-20 regarding the operation of a satellite master antenna system (SMATV) at the Pacific Place site in Vancouver. The Director highlighted the benefits to the public arising from competition to the cable television industry from alternative service providers. He also encouraged the Commission to interpret its exemption criteria for SMATV and terrestrial relay distribution undertakings in a manner which would allow for increased competition in the distribution of broadcasting services. The Commission's ruling was awaited at the end of the fiscal year.

Long-distance competition and consumer choice

Another area calling for special attention in the period was the marketing practices of some providers of long-distance telephone services. As a result of information received by the Director, he has commenced various examinations and inquiries. The Director has also participated in conferences and encouraged increased industry awareness of the Act. In addition, the Director continues to explore means to provide practical consumer advice to encourage shopping for long-distance phone services like other products and to ensure that consumer expectations are satisfied. The Director hopes that these efforts will help ensure that it is informed consumer choice that determines the winners and losers in this newly competitive market, and not deceptive marketing practices.

Energy

While telecommunications certainly kept the Bureau busy, other business sectors also showed significant activity. The energy sector in Canada is undergoing a thorough examination at several levels to determine the benefits that could flow from increased reliance on market forces.

Ontario Hydro

In last year's Annual Report, the Director mentioned his intention of obtaining intervenor status in the hearing of the Ontario Energy Board (OEB) on structural reorganisation within Ontario Hydro and its proposed rates for 1995. Between May and July 1994, the Director participated in OEB hearing H.R. 22. Key issues considered included the need for further restructuring of Ontario Hydro as well as reforms to the Ontario electricity industry regulatory framework to promote more efficient and competitive electricity supply in the province. Expert evidence about the potential implications of reorganisation taking place within Hydro for competition in the Ontario electricity market was provided on behalf of the Director by Dr. Edward Kahn.

The findings of the OEB were generally pro-competitive and consistent with the directions suggested in the evidence provided by the Bureau and the Director's Final Argument. In particular, the Board concluded that "a review of the legislation governing the regulation of Hydro should be undertaken to address shortcomings in the current regulatory system which have emerged from the evidence in the hearing".

British Columbia Electricity Market Structure Review

In January 1995, the Director obtained intervenor status in the British Columbia Utilities Commission Electricity Market Structure Review. The purpose of this review is to provide policy advice to the Government of B.C. regarding the benefits of and options for further opening the B.C. electricity network. The Review will take place between April and June 1995.

Applications to the Competition Tribunal

Yellow Pages advertising

One of the Bureau's long-standing commitments has been the revitalisation of the Consent Order process. The Director's application under the abuse of dominance provisions concerning certain business practices of Yellow Pages publishers was the first opportunity to act on this commitment. Upon his application, the Competition Tribunal issued a Consent Order on 18 November 1994, in relation to the sale of national advertising in the Yellow Pages. This Consent Order is the first resulting from an application under the abuse of dominance provisions of the Act. This is also the first joint dominance case to be brought before the Tribunal. The Consent Order in this matter enables independent selling companies to enter the market for national advertising and allows for competition among publishers in the sale of national advertising in Yellow Pages directories. National advertising means advertising placed in the Yellow Pages of two or more publishers. This Consent Order was obtained in approximately two months from filing, signalling that the process can be both quick and effective. Together with the Tribunal's decision to review the rules of the Consent Order process, this will go a long way towards its revitalisation.

Tele-Direct (Publications) Inc. and Tele-Direct (Services) Inc.

The Director filed an application under Sections 75, 77 and 79 of the Act before the Competition Tribunal on 22 December 1994, alleging that two subsidiaries of Bell Canada Enterprises, Tele-Direct (Publications) Inc. and Tele-Direct (Services) Inc., each with market shares in excess of 90 per cent, control the publication of telephone directories in their territories, which includes the provision of advertising space in such directories and related advertising services. The application alleges that the two companies have tied the sale of advertising services to advertising space in the Yellow Pages and that this conduct has prevented advertising agencies from competing for the advertising services business of advertisers in a substantial part of the market. It also alleges that the respondents have refused to supply publishers of competing directories with current telephone subscriber listing information which is obtained on an exclusive basis from the telephone companies. The respondents are also alleged to have engaged in additional anti-competitive acts which have had an exclusionary effect on advertising agencies, advertising consultants and competing telephone directory publishers.

The application asks the Competition Tribunal to prohibit the two companies from tying the sale of advertising services to the sale of advertising space in the Yellow Pages and from engaging in other anti-competitive acts toward other participants in the market in the hope that this will result in more competitive product and service offerings for consumers of these products. The Competition Tribunal scheduled hearings to commence on 5 September 1995.

A.C. Nielsen Company of Canada

On 5 April 1994, the Director filed an application under the abuse of dominant position provisions of the Act before the Competition Tribunal, alleging that A.C. Nielsen Company of Canada (A.C. Nielsen) abused its dominant position in the business of providing scanner-based marketing research to consumer packaged goods manufacturers throughout Canada. The application alleged that A.C. Nielsen entered into exclusive contracts with the major retail chains for the purchase of scanner data and that the contracts prevent other firms from gaining access to scanner data and competing with A.C. Nielsen in the sale of scanner-based market tracking services. Between September 1994 and February 1995, there were a number of motions before the Competition Tribunal and the Federal Court. Hearings before the Tribunal were scheduled to resume in April 1995.

Action against anti-competitive agreements

Household goods removal services

During the year, the Director examined the terms and conditions in the tender used to procure household goods moving services for the Federal Government and provided recommendations to the Interdepartmental Committee on Household Goods Removal Services. In addition to promoting the benefits of encouraging competition, the Director had a particular concern that the terms of the tender should not induce a breach of the 1983 Prohibition Order against the major van lines. The Committee made a number of changes to its tender in response to the Director's recommendations. Other changes are pending.

Driving schools in Sherbrooke

On 17 June 1994, École de Conduite Tecnic Aubé Inc., École de Conduite Lauzon Inc., Le Groupe Lauzon Inc., 2172-3572 Quebec Inc., École de Conduite Tecnic Estrie Inc., André Comeau and Yves Dubé were committed to trial. They were charged with offences under the sections of the Competition Act relating to the price-fixing provisions (Section 45(1)(c)), the predatory pricing provisions (Section 50(1)(c)) and the breach of a prohibition order (Section 34(6)), all of which relate to the supply of driving courses in the Sherbrooke region. An appeal to quash the committal by way of *certiorari* by some of the accused was denied by the Superior Court of Québec on 9 March 1995.

Béton Régional Inc.

On 16 January 1995, an order of prohibition under Section 34(2) was issued against Béton Régional Inc. and Béton Carrière Ltée. by the Federal Court of Canada relating to conduct directed toward the commission of an offence under Section 45 in the sale and supply of ready-mix concrete in the Saguenay-Lac St-Jean region. An enquiry had been initiated concerning an agreement on the price of ready-mix concrete that had been arrived at with a competitor during the course of a proposed merger between these two companies.

Calgary real estate

On 28 October 1994, Royal LePage Real Estate Services Ltd. and Ted Zaharko, a former vice-president and regional manager, were convicted on three counts of horizontal price maintenance, one under Section 61(1)(a) and the other two under Section 61(1)(b). In addition, John Roche, a former branch manager, was convicted on the one Section 61(1)(b) count. On 20 December 1994, Royal LePage was fined a total of C$ 200 000; Ted Zaharko a total of C$ 25 000 or 60 days in jail; and John Roche was fined C$ 5 000 or five days in jail.

Australian mandarin oranges

In May 1994, the Bureau learned that three Western Canadian brokers of Australian mandarin oranges entered into an agreement with one another and with their Australian suppliers relating to the purchase, sale or supply of these oranges in the Canadian market. Acting on the Bureau's conclusion that the agreement would prevent or lessen competition unduly, the Attorney General applied for, and on 8 August 1994, obtained an interim injunction under Section 33(1) of the Act which prohibited the continuation of this agreement. This was the first injunction obtained under Section 33 of the Act. Subsequently, on 12 December 1994, the Federal Court Trial Division, on consent of all parties, issued an order of prohibition pursuant to Section 34(2) of the Act, which prohibits the continuation of the agreement. The outcome of this proceeding is important for the enforcement of the criminal provisions of the Act as the ability to obtain interim injunctions represents a significant alternative to prosecution. Section 33 provides an expedient and cost effective way to restore the benefits of free competition in a market affected by proscribed anti-competitive agreements or arrangements.

Pulp baling wire

On 20 February 1995, Tennant Wire Ltd. pleaded guilty to one charge of conspiracy under Section 45(1)(c) of the Act related to the sale and distribution of pulp baling wire and was fined C$ 100 000 in the Supreme Court of British Columbia in Vancouver, B.C. The Court also issued a Prohibition Order against Tennant under Section 34(1) forbidding it from engaging in criminal activities of this nature in the future. James Walker, a U.S. resident who was in a position to influence the conduct of Tennant in the market, was ordered to be subject to a Prohibition Order under Section 34(2) of the Act.

Alberta Ambulance

On 23 January 1995, the Alberta Ambulance Operators' Association and three of its directors, William Coghill, Andrew Moffat and Daniel Osborne, pleaded guilty to one count under Section 45(1)(c) for conspiring to lessen competition in the provision of ambulance services in Alberta between 1984 and 1991. The Association was fined C$ 25 000 and each of the three individuals was fined C$ 5 000. In addition, the court issued a comprehensive prohibition order designed to maintain and encourage competition in the industry.

Strategic approach to marketing practices

The misleading advertising and deceptive marketing practices provisions of the Act help to ensure an honest and effective functioning of the market, and thereby build consumer confidence in it.

Last year's report noted that the marketing practices business plan had reoriented activities towards cases of higher economic impact. It was predicted that these high impact, more complex cases would take longer to prepare and litigate, but should produce higher fines. Table 6 in the Appendix shows that while the number of cases the Bureau is taking on is decreasing, the total amount of fines has increased considerably over last year, and is in fact the highest of the past five years. In marketing practices cases, the average fine per case (C$ 61 191) and per accused (C$ 39 094) in 1994-1995 are roughly twice the previous highs within the last five years.

Wolverine Tube (Canada) Inc., Lloyd H. Kerr and Johnston B. Clarke

On 3 October 1994, the largest fine for a single charge under the misleading advertising and deceptive marketing practices provisions of the Act, C$ 525 000, was levied against Wolverine Tube (Canada) Inc. In addition, two individuals, Lloyd H. Kerr and Johnston B. Clarke, were fined C$ 10 000 each, following guilty pleas of all accused. The case involved misrepresentation of compliance with certain industry standards, required by various provincial building codes, directly on copper water tubing and in other promotional materials distributed in Vancouver, London and elsewhere in Canada. It is particularly important with goods of this nature, where consumers rely on compliance with standards, that misrepresentations be dealt with appropriately.

Color Your World Corporation

On 22 December 1994, the highest fine at that time under the ordinary selling price provision of Section 52(1)(d), C$ 225 000, was levied against Color Your World Corporation. The company had adopted a practice of continually promoting the sale of certain stain, paint and wall covering products through in-store signs, flyers and advertisements at sale prices compared to "after-sale prices" or "regular book prices". In fact, for more than 50 per cent of the period from November 1989 to November 1993, the products were ordinarily sold at the so-called sale prices and a substantial portion of the products were not sold at the quoted "after-sales" or "regular book" prices.

False bankruptcy sale claims

The Bureau has noted a disturbing trend in recent years towards an increasing number of instances of misleading claims in relation to bankruptcy sales. Its actions in pursuing these matters led the Bureau to undertake four cases, one of which, Thomas Liquidation, is reported in more detail below. These cases involved representations of bankruptcy or liquidation sale by persons acquiring the inventory of a bankrupt from trustees-in-bankruptcy or commingling bankruptcy inventory with other stock acquired in the normal course of business.

The other cases concluded this year were Gene Rosenberg Associates Canada Inc. in Montreal on 8 April 1994, in which the company was fined a total of C$ 40 000 on 25 charges, and Liquidators M.M. du Canada Ltée. in Sherbrooke on 3 March 1995, in which the company was fined a total of C$ 11 000 on two charges. In addition, on 29 March 1995, the New Brunswick Court of Appeal rejected the defendants' appeals from conviction for false bankruptcy-sale claims in the case of Dube's Furniture Warehouse (1984) Ltd. and Mario Charlebois. Fines of C$ 12 000 and C$ 3 600 on a total of 12 charges under Section 52(1)(a) each were registered against the company and the individual, respectively. These cases indicate increasing concerns with misleading bankruptcy sales in recent years and the Director's commitment to vigorously pursue the companies and individuals involved.

Sentences on individuals

The importance the Bureau places on charging individuals was also underscored in six marketing practices cases during the year. Experience confirms that personal liability, in appropriate cases as provided for in the Act, is a significant component of the deterrent objective of prosecutions. The Montreal case of Les Publications Groupe R.R. International Inc. (a.k.a. 2619-7533 Québec Inc.), Louis-Luc Roy and Danielle Ouimet involved misleading advertisements about the effectiveness of a cream to treat facial wrinkles. The company and the other accused pleaded guilty, and were fined C$ 8 000 and C$ 10 000 respectively on 3 October 1994, while on 6 July 1994, Ms. Ouimet, a public personality in the arts and entertainment community of Quebec, was found guilty in the only contested proceeding during the year. She was fined C$ 8 700 on eleven charges of misleading advertising under Section 52(1)(a) and C$ 1 100 on eleven charges of making a representation without adequate and proper testing under Section 52(1)(b) for a total of C$ 9 800. Apart from the importance of individual convictions for deterrence, the case underscores Bureau policies concerning the use of testimonials in advertising, and the Director's commitment to pursue their misuse.

Another case which involved the prosecution of an individual was that of Lando Lighting Inc. and Brian Whitelaw in Brampton, Ontario involving misleading ordinary selling price comparisons. The company was fined C$ 5 000, while the individual received a conditional discharge, with a prohibition on advertising lighting fixtures for six months.

Restitution order

Another noteworthy marketing practices case in the 1994-1995 fiscal year resulted in the obtaining of a restitution order. In the London, Ontario case of 962876 Ontario Ltd., c.o.b. as World Gym, the company was fined C$ 5 000 for failure to comply with the requirements for promotional contests, under Section 59(1)(b) and was required to pay C$ 6 000 in restitution to a winner of a promotional contest. The restitution order was directed at restoring to the winner of the contest the expected value of the prize, which was a car. The winner discovered that she had actually won the use of the car, encumbered by a lien, under certain conditions, including the displaying of advertising on the car for the accused's business.

Section 55

The new provisions concerning multi-level marketing became law in 1993. As anticipated in last year's report, the first case under this new provision was decided this year. On 4 August 1994, in Toronto, Lifestyles Canada Ltd. was fined C$ 35 000 on one charge under the amended Section 55 for making representations concerning the earning potential of potential participants, without the disclosure of typical earnings as required by the section.

Merger activity

Overall, the Bureau's examination activity of mergers has remained steady over the past five years, as will be noted in Table 5 in the Appendix. For example, in fiscal year 1994-1995, there were 193 examinations commenced, compared to 192 during the 1993-1994 period. No merger applications to the Competition Tribunal were filed during the year. Three merger proposals were abandoned by the parties as a result of concerns identified by the Bureau.

Wisconsin Central Transportation Corporation (WCTC)/Algoma Central Corporation

On 28 July 1994, it was publicly announced that Algoma Central Corporation would sell all its rail assets to a newly formed Canadian subsidiary of WCTC, the Algoma Central Railway Inc. On 23 September 1994, the Director filed a letter with the National Transportation Agency (NTA) in support of this proposed acquisition. The letter highlights three pro-competitive impacts which could result from the proposed transaction, namely: the maintenance of a competitive alternative for shippers; likely lower transportation rates enabling shippers to access and compete in new markets; and the fact that the new entrant would be well positioned to acquire segments of main lines which might otherwise be abandoned by Canadian National or Canadian Pacific, thus preserving intramodal competition. On 22 December 1994, the NTA announced that it would not prohibit the proposed transaction.

Asea Brown Boveri Inc./Westinghouse Canada Inc.

The Competition Tribunal issued a Consent Order under Section 105 of the Act on 15 June 1989 (as amended on 18 December 1989), in relation to the acquisition by Asea Brown Boveri Inc. (ABB) of the electric power transmission and distribution business of Westinghouse Canada Inc. (Westinghouse). The Consent Order, which was designed to alleviate the likely anti-competitive effects of the transaction, required that ABB divest certain assets obtained from Westinghouse if it was unable to attain specific tariff relief measures, including full remission of tariffs on imports of certain large power transformers for a period of at least five years. This provision of the order was complied with by virtue of the issuance of the Electrical Power Transformer Remission Order, SOR/90-23 which came into force on 1 January 1990.

At the time the Consent Order was made, the Director indicated that he would monitor market conditions and support the renewal of the customs duty remission if competitive conditions required it at the time of expiry. During 1993, the Director received submissions from a number of interested parties requesting assistance to obtain an extension of the Remission Order which was to expire on 31 December 1994. The examination of the submissions indicated that the Remission Order has been effective in maintaining competitive supply conditions for large power transformers. In particular, it has allowed overseas competitors which were previously precluded from competing in Canada, mainly because of a 15 per cent tariff, to submit bids to and obtain orders from Canadian Public Utilities. In addition, it was anticipated at the time of the merger between ABB and Westinghouse that, with the accelerated reduction of tariffs on imports from the United States under the Canada-U.S. Free Trade Agreement, McGraw Edison Company, a subsidiary of Cooper Industries Inc., would become an effective supplier of large power transformers to Canadian customers and replace the competition lost as a result of the merger. On the basis of available information, this does not appear to have happened. The Director concluded that the continuation of the Remission Order would be beneficial to the competitive environment in the Canadian market for large power transformers. Consequently, the Director made representations to the Department of Finance in support of an extension of the Remission Order.

On 14 February 1995, an Order in Council, SOR/95-89, was passed extending the Remission Order from 1 January 1995 to 31 December 1999. The product coverage was also expanded to include transformers and shunt reactors of 700 kilovolt class or greater and articles and materials used in the manufacture of the transformers and shunt reactors covered by the Remission Order.

Confederation Life Insurance Company/Great-West Life Assurance Company

Restructuring within the insurance industry, including the failure of Confederation Life Insurance Company (Confederation), has caused the Director to review a number of mergers in this industry over the last year. The pending failure of Confederation led to an initial transaction whereby the Great-West Life Assurance Company proposed that it acquire the preferred shares of Confederation and enter a capital maintenance agreement. Following the abandonment of this transaction, several of the subsequent transactions whereby the assets of Confederation were sold off, including the sale of its individual life and health policies to Maritime Life Assurance Company and the sale of its group life and health policies to the Manufacturers Life Insurance Company, were also reviewed by the Bureau.

Industry experts have declared that the trend within the insurance industry will be towards further consolidation, particularly as major new entrants begin to expand their activities in both the life and health area and the property and casualty area. The failure and subsequent redeployment of the Confederation assets is a good example where a rapid restructuring within an industry can be examined by the Bureau without causing any delay.

Gemini

The Gemini case was ultimately resolved when, on 24 November 1993, the Competition Tribunal varied its original July 1989 Gemini consent order so as to require the dissolution of Gemini, thereby releasing Canadian Airlines from its obligations under the hosting contract with Gemini. Subsequent appeals from this decision were eventually abandoned. The 24 November 1993 Tribunal order allowed Canadian Airlines to transfer its hosting activities to Sabre, the computer reservation system (CRS) operated by American Airlines Inc., a wholly-owned subsidiary of AMR Corporation. This transfer was a condition precedent to consummating with AMR a transaction which would preserve Canadian Airlines in the marketplace, thereby averting a substantial lessening of competition. The equity transaction was completed on 28 April 1994. The transfer of Canadian's hosting functions to Sabre occurred in November 1994.

Gemini was restructured into two companies. Advantis Canada, owned by IBM, assumed the computer and telecommunications network and information technology functions, including hosting, which previously had been operated by Air Canada and Gemini. Galileo Canada Inc., owned by Air Canada, assumed Gemini's CRS business.

Quebecor Printing Inc./Maclean Hunter Printing Ltd.

On 23 December 1994, Quebecor Printing Inc. (QPI) filed a notification of its intent to purchase Maclean Hunter Printing Ltd., Litho Plus Ltd., The Jasper Printing Group Ltd. and Templeton Studio Ltd. from Rogers Communications Inc. On 16 January 1995, a Consent Interim Order was issued by the Competition Tribunal allowing QPI to make the acquisitions but ordering QPI to maintain the acquired businesses separate from its operations for a 21 day period, so that the Director could complete his assessment. This was the first use by the Bureau of the Interim Consent Order provisions of Sections 100 and 105 of the Act.

The Director conducted a detailed examination to assess the impact of this transaction on competition in the market for heatset web offset commercial printing. This printing process is typically used to print catalogues, magazines and periodicals, advertising inserts and circulars, and general

commercial material. On 7 February 1995, the Director announced that he would not challenge the transaction based on the fact that QPI would continue to face vigorous and effective competition from its main competitor, G.T.C. Transcontinental Group Ltd., as well as from some medium-sized regional competitors and from a number of smaller niche players.

Southam Inc./Lower Mainland Publishing Inc.

From 13 February 1995 through 16 February 1995, the Federal Court of Appeal heard appeals from the Competition Tribunal's decisions of 2 June 1992, and 10 December 1992. The Director appealed the 2 June 1992 decision with respect to the finding that community newspapers were not in the same product market as daily newspapers and thus the acquisitions did not substantially lessen competition. The Director also appealed the Tribunal's refusal to consider whether the acquisitions prevented competition substantially in the form of future product innovations or other competitive pressures from outside the product market as defined by the Tribunal.

The respondents in the initial case appealed from the Competition Tribunal's 10 December 1992 decision which had ordered them to divest either the North Shore News or the Real Estate Weekly in their entirety. The appellants argued that the Tribunal had applied the wrong standard in seeking a remedy and had failed to weigh considerations of harm or inconvenience to respondents. Respondents also sought leave to introduce further evidence in respect of their appeal of the 10 December 1992 remedy decision. This motion was dismissed. The decision was taken on reserve by the Federal Court of Appeal. The 9 March 1992 order of the Competition Tribunal staying the execution of the divestiture order pending disposition of the appeal of the remedy decision remains in place. The parties have agreed that the interim hold separate order will remain in place pending the outcome of the appeal of the Tribunal's 2 June 1992 decision.

FICG Inc./Coles Book Stores Ltd.

In September 1994, FICG Inc., the operator of SmithBooks, and Coles Book Stores Ltd., a subsidiary of Southam Inc., announced the proposed merger of the two book store chains. The transaction was the subject of an extensive examination under the merger provisions. The Director obtained extensive documentary and oral information from the parties to the transaction and numerous industry participants, including publishers and retailers. The examination focused particularly on the impact of the transaction on Canadian publishers and exclusive agents and the potential impact on book prices and selection. On the basis of the available evidence, the Director concluded that there were not sufficient grounds for an application to the Competition Tribunal in respect of the merger. The Director concluded that the relevant market comprised the English language trade book retailing services provided by book stores in Canada. The available evidence indicated that the merged entity would account for approximately half of the sales of Canadian publishers and exclusive agents in this market. Accordingly, the Director conducted a careful analysis of the relevant Section 93 factors.

Among the Section 93 factors, the issue of barriers to entry was key in this matter. The available information did not warrant a conclusion that the merged entity would likely be able to exercise market power for any length of time without attracting competitive entry. A significant entry barrier identified in the examination, the restrictive covenants in many of the leases of Coles and SmithBooks which precluded other book retailers from obtaining access to prime retail locations, was removed when the parties to the merger advised the Director that the existing restrictive covenants would be waived prior to closing the transaction and that any future leases would not contain such provisions. Other entry barriers to the

relevant market appear to be relatively low. As a result of high market share of the parties and the serious concerns expressed by a large number of industry participants, the Director decided to monitor the effects of the transaction for the three-year period allowed by the Act. The Director issued a detailed background document on his analysis of this merger on 21 March 1995. The parties completed the transaction in April 1995.

Alternatives case resolution procedures

Several matters have been resolved through alternative case resolution procedures. When matters are resolved quickly and easily, without having a full enquiry or judicial proceeding, it not only saves time, but eases the strain that high litigation costs are increasingly putting on the Bureau's tight resources. The NBTel case is discussed above. Two further examples include a complaint that was received alleging that a competing party was exerting pressure on a software developer to restrict the sale of a communications software program which allows credit grantors to communicate with credit reporting systems via remote terminals and has multiple networking capabilities. However, during the preliminary investigation, the software developer agreed to supply the complainant with the communications software program. The other case involved written undertakings obtained from a distributor of an advertising trade publication concerning the cessation of an exclusive dealing practice. A complaint had previously been received that alleged the distributor of the advertising trade publication was engaged in exclusive dealing by offering a financial incentive to stores to cease carrying a competing publication.

III. The role of competition authorities in the formulation of other policies

International and inter-jurisdictional matters

At the case level, the number and complexity of notifications and requests for assistance and other interactions between the Bureau and foreign competition authorities continued to increase. During the year, the Bureau received 39 notifications from foreign competition authorities and sent 21 notifications to foreign authorities or governments. The vast majority of such interactions were with the United States. Notifications are made pursuant to the Canada-U.S. Memorandum of Understanding (MOU) on Notifications, Consultation and Co-operation and the 1986 OECD Revised Recommendation Concerning Co-operation between Member Countries on Restrictive Business Practices affecting international trade (the OECD Recommendation on Co-operation). During the fiscal year, assistance was also received from the U.S. in two instances and provided to U.S. competition authorities in two other instances under the Canada-U.S. Mutual Legal Assistance Treaty and Act.

Bilateral co-operation

A notable result of the new, more intensive level of bilateral co-operation between the competition authorities of Canada and the United States was the successful joint investigation between the Bureau and the U.S. Department of Justice of a foreign-directed price-fixing conspiracy on thermal facsimile paper, leading to two separate guilty pleas and substantial fines in both countries. On 12 July 1994, Kanzaki Specialty Papers, Inc. of Ware, Massachusetts, pleaded guilty before the Federal Court of Canada on one count under Section 45(1)(c) and was fined C$ 950 000. Kanzaki conspired to fix the prices for thermal fax paper in Canada from July 1991 to early 1992. On 5 August 1994, Mitsubishi Corporation of Tokyo, Japan and Mitsubishi Canada Ltd. of Toronto pleaded guilty in Federal Court in Toronto to charges under Section 46, Section 45(1)(c) and Section 61 and were fined C$ 950 000 in total.

These proceedings were a result of a joint investigation with the Antitrust Division of the U.S. Department of Justice. On 14 July 1994, in the U.S., a settlement was reached with Kanzaki and Mitsubishi Corporation resulting in fines totalling C$ six million (U.S.).

In a second case, Thomas Liquidations, the ability to achieve the remedy, a guilty plea, a prohibition order and a C$ 130 000 fine for misleading advertising, was a direct result of the capacity to be able to employ the Canada-U.S. Extradition Treaty for criminal competition matters. The case of Thomas Liquidation Inc., c.o.b. as Pascal Stores Ltd., on 7 February 1995, in Toronto was the first in which an international agreement has been used to cause American accused to attend a Canadian criminal court and answer charges under the Act. It sends the message to advertisers that Canada will not hesitate to use the extradition process to enforce the Act. The action taken in this case is in line with the Bureau's commitment to international co-operation in detecting and fighting unfair and deceptive marketing practices. After formal extradition processes were initiated, the president of the company voluntarily entered Canada from the U.S. and pleaded the company guilty. The company was fined C$ 130 000.

With regard to bilateral consultations, in September 1994, Bureau officials and the Director met with the Assistant Attorney General, United States Department of Justice, Antitrust Division, and the Chairman of the Federal Trade Commission in Ottawa. The discussions focused on ways and means to enhance bilateral co-operation on enforcement matters, including the strengthening of institutional arrangements.

At the same time, an initiative of the Bureau's Marketing Practices Branch brought together representatives of the Bureau of Consumer Protection in the U.S. Federal Trade Commission and other bilateral law enforcement agencies to discuss the investigation and prosecution of deceptive and fraudulent cross-border telemarketing. A number of initiatives stemming from this meeting continue to be pursued while ensuring on-going compliance with the requirements respecting confidentiality under the Act. In this regard, a specific proposal to strengthen the Bureau's ability to deal with deceptive telemarketing was developed as part of work on amendments to the Act. This work, along with on-going monitoring of similar developments in the U.S., will continue in the forthcoming year.

During the year, Bureau staff also held consultative meetings with counterparts from France, Japan, Germany, Mexico, the United Kingdom, the European Union and Australia. These meetings covered various matters of mutual interest including the desirability and feasibility of enhanced co-operation between the respective competition authorities. Discussions also continued regarding the development of a Canada-European Union competition accord on co-operation and co-ordination.

Regional co-operation

Pursuant to the North American Free Trade Agreement (NAFTA) Chapter 15, Article 1504, the Working Group on Trade and Competition met twice during the year, in Ottawa on 21 September 1994, and in Mexico City on 27-28 March 1995. The Working Group continued its on-going work on examining the relationship between trade and competition policy within the framework established by the provisions of the NAFTA. As part of this work, the Bureau took the lead role in tabling a paper on National Treatment under the competition laws of the NAFTA countries. The next meeting of the Working Group was scheduled for Washington in September 1995. The Bureau also contributed to competition-related questions and issues in respect of Chile's proposed accession into the NAFTA, as well as in respect of the proposed Canada-Israel Free Trade Agreement.

During 1994-1995, the Bureau monitored and contributed to the discussions on the role of competition policy in trade liberalisation within the emerging Asia Pacific Economic Co-operation area, the Free Trade Area of the Americas and several emerging sectoral agreements, such as those on telecommunications, energy and investment.

While there has been considerable interest lately in Canada regarding the removal of trade barriers, the Director has been keeping watch on how trade between jurisdictions can have an impact on competition. For example, in May 1994, the Director intervened before the Régie des alcools, des courses et des jeux in support of Lakeport Brewery's application for permission to distribute private label beer in Quebec. In its decision on 22 June 1994, the Régie granted Lakeport Brewery a distribution licence. Appeals were launched, and the matter is pending before the courts.

On 26 September 1994, the Director intervened before the Canadian International Trade Tribunal (CITT) in its review of the 1991 decision of finding injury in the dumping of beer in British Columbia. On 2 December 1994, the CITT issued its decision, favourable to the Director's position, rescinding its previous finding of material injury.

Multilateral co-operation

The Bureau's participation in multilateral competition policy fora focuses on the OECD Committee on Competition Law and Policy (CLP) and, secondarily, the UNCTAD Intergovernmental Group of Experts on Restrictive Business Practices. A major development during the year was the completion of the work of the Convergence Steering Group of the CLP Committee, under the Director's chairmanship. This resulted in a report to the OECD Council of Ministers, outlining the substantial progress made in competition policy convergence and co-operation over recent years and recommending that further work be undertaken towards the harmonisation process. The Council of Ministers accepted the report at its meeting of 11-12 April 1994, and instructed the OECD to continue to advance the convergence of competition laws and policies. The Bureau also contributed substantially to the joint work of the CLP and Trade Committees on the interrelationship between trade and competition policies, and the Director was elected to the Chairmanship of CLP Working Party number one (WP1) on Competition and Trade. Finally, the Bureau contributed to the ongoing work of CLP Working Party number three (WP3) on international co-operation on updating of the OECD Recommendation on Co-operation.

The Bureau participates regularly in the work of the Intergovernmental Group of Experts on Restrictive Business Practices of the United Nations Conference on Trade and Development (UNCTAD). The Bureau's representative was elected to the chair of UNCTAD's annual conference held in October 1994.

Technical assistance

During the year, the Bureau provided technical assistance regarding the application of competition law to countries that are attempting to implement a modern, market-based economic policy framework, both bilaterally and in support of OECD and other multilateral programs. In 1994-1995, technical assistance was provided to Mexico, Venezuela, Peru, China, Malaysia, Lithuania, Latvia and Estonia. Two of the Bureau's senior officers participated in training programs for competition officials of the countries of eastern and central Europe, as well as the Baltic republics, under the auspices of the OECD and the World Bank.

Compliance and education

Programs to encourage compliance with the Act continue to be a key activity of the Bureau. Last year's Annual Report stated that the Bureau would issue a consultation paper on the confidentiality provisions of the Act. A draft was released in July 1994, and dealt with the treatment of information in the Director's possession and the ability of the Director to share information with foreign antitrust authorities. The Director received extensive comments on the document reflecting a broad range of legal interpretations. Given the importance of effective transborder competition law enforcement and the questions that have been raised as to the Bureau's present ability to co-operate with foreign antitrust authorities, the Director intends to recommend to the Minister that there be legislative amendments to clearly articulate his statutory authority in this area.

Similarly, last year the Director indicated that he intended to issue an information bulletin on the subject of strategic alliances and their treatment under the Act. On 26 August 1994, the Director issued a discussion paper on the subject. The Director received many comments on the document and subsequently circulated a revised draft to a limited group of interested parties in January 1995. The Director hopes to release the final version of the Information Bulletin during the 1995-1996 year.

The Director has continued to emphasise the importance of compliance and education with a particular emphasis on the Public Education Initiative (PEI). The Director has been speaking about the Bureau's activities, as have other Bureau managers, at a total of 33 events in the past year. In fact, the Bureau has created a Speakers Bureau with staff available to provide speeches and information sessions on aspects of the Act to groups and organisations. In addition, the Bureau has created a PEI booth which has been used at a number of trade shows. At year end, there were seven pamphlets in the series, *You, Your Business and the Competition Act.* In the upcoming year, the Director intends to commence a companion series on issues of interest to consumers.

The Bureau's role in economic and regulatory issues

Expert economic advice on enforcement cases and related research matters is provided by Bureau economists and by visiting academics in the T.D. MacDonald Chair in Industrial Economics. At the beginning of the 1994-1995 year, the Chair was held by Professor Roger Ware of Queen's University. Subsequently, Professor Abraham Hollander of the University of Montreal assumed the duties of the position. Bureau officials worked closely with Industry Canada's Policy Sector, notably in the Departmental Assistant Deputy Ministers' Policy Co-ordination Group and departmental initiatives relating to: framework policies in the Asia Pacific Economic Community countries; science, technology and innovation; and the microeconomic policy agenda.

Early in the year, the Bureau completed a major comparative analysis of the role of competition policy and its relationship to other economic policies. The analysis examines the Canadian experience and the role of competition policy in key foreign jurisdictions, including the U.S., the European Union, Germany, France and Japan. The study, entitled *Competition Policy As A Dimension of Economic Policy: A Comparative Perspective,* was published as an Industry Canada Occasional Paper in May 1995.

Bureau commissioned research was presented at a Conference on National Competition Policy Institutions in a Global Market sponsored by Carleton University in Ottawa early in the year. The conference examined the evolving role of national competition authorities in Canada, the U.S., the European Community, the United Kingdom, Germany and Japan, in response to factors such as globalisation and the need for transparency and accountability in economic policy implementation.

The interaction between competition policy and intellectual property rights is of growing interest in the context of recent initiatives to foster innovation, technological diffusion and economic growth. In the U.S., the Department of Justice and Federal Trade Commission recently issued a joint set of "Antitrust Guidelines on Intellectual Property Licensing". To ensure the currency of the Bureau's knowledge, the Bureau commissioned a series of studies by leading academic economists and other specialists on the subjects of competition policy, intellectual property rights and international economic integration. The studies, to be completed in 1995-1996, are being conducted in co-operation with the Canadian Intellectual Property Office and the Policy Sector of Industry Canada.

Information was received that the New Brunswick Association of Real Estate Appraisers was supporting a bill before the legislature of the Province of New Brunswick that would give them a statutory monopoly with broad sweeping powers for self-regulation (e.g. regulation of advertising, establishing minimum standard of tariffs of fees and entry restrictions). The Director made a written submission providing general and specific competition policy comments on the proposed legislation, for the review of the Standing Committee on Private Bills which was forwarded to the Clerk of the Legislative Assembly on 5 April 1994. The Standing Committee on Private Bills, in its report to the Legislative Assembly on 12 April 1994, recommended Bill 17, without any substantive amendments. The next day, the bill was given second and third reading and on 20 April 1994, was given Royal Assent.

IV. Selected Publications relevant to Competition Policy

Bureau of Competition Policy

Communication of Confidential Information under the Competition Act, May 1995.

Discussion paper: Competition Act amendments, June 1995.

Predatory Pricing Enforcement Guidelines.

Price Discrimination Enforcement Guidelines.

Merger Enforcement Guidelines.

Guiding Principles for Environmental Labelling and Advertising (developed jointly with the Bureau of Consumer Affairs).

Program of Compliance (1993 update of June 1989 Information Bulletin No. 3).

An Overview of Canada's Competition Act (1993 update of November 1990 Information Bulletin No. 4).

Misleading Advertising Guidelines (Special Edition).

Misleading Advertising Bulletin (issued quarterly).

Information Bulletin: Multi-level Marketing and Pyramid Selling Provisions of the Competition Act, January 1995.

Pamphlet series

An Overview of the Competition Act.

Bid-Rigging.

Reaching an Agreement with Competitors.

Refusal to Supply. When a Company Abuses its Dominant Position.

Pyramid Selling and Multi-level Marketing Schemes.

Economic studies

ANDERSON, Robert D. and S. Dev KHOSLA, "Competition Policy As a Dimension of Economic Policy: A comparative Perspective" (Industry Canada Occasional Paper, May 1995).

IRELAND, Derek J., "Interactions Between Competition and Trade Policies: Challenges and Opportunities".

MONTEIRO, Joseph, "Europe 1992, The Regulated Sectors; the Scope for Expansion of Competition Policy; and the Implications for Canadian Businesses".

"Competition Policy in Canada: Its Interface With Other Economic and Social Policies".

"Competition Policy in Canada: The First Hundred Years".

(Some Bureau publications and speeches will soon be available on Internet at the world-wide-web address: http://info.ic.gc.ca/ic-data.)

HOW TO CONTACT THE BUREAU OF COMPETITION POLICY

Complaints and public enquiries centre

Anyone wishing to obtain general information or to make a complaint under the provisions of the Act should contact the Centre at:

Bureau of Competition Policy
Industry Canada
50 Victoria Street
Hull, Québec
K1A OC9

Telephone:

National Capital Region	(819) 997-4282
Toll free	1-800-348-5358
TDD[2]	1-800-642-3844 (hearing impaired)
Facsimile	(819) 997-0324
FAX on demand	(819) 997-2869

Mergers

Anyone wishing to obtain information concerning the application of the merger provisions of the Act, including those relating to notification of proposed transactions, may contact the Mergers Branch directly at the address below:

Mergers Branch
Bureau of Competition Policy
Industry Canada
50 Victoria Street, 19th Floor
Hull, Quebec
K1A 0C9

Telephone: (819) 953-4350
Fax: (819) 953-6169

The Bureau recommends that notification filings be hand-delivered.

Appendix I

Bureau Operations*

In 1994-95, the operating budget for the Bureau was $18 185 000. A major portion of this budget, $13 548 000, was allocated for salaries for 244 authorized full time staff. As of March 31, 1995, the Bureau was authorized to staff 241 positions consisting of 16 executives, 13 policy and research economists, 152 commerce officers and program managers and 60 employees carrying out informatics, administrative services and support functions. The Bureau also provides financial support, including salary funding for three lawyers employed by the Department of Justice, to the Departmental Legal Services Unit.

The Bureau is authorized to carry forward up to five percent of each current year's operating budget.

The Bureau also has administrative responsibility for collecting fines imposed by the courts. During 1994-95, $2 724 150 in fines was imposed, of which $1 778 900 was imposed and paid during the year in 14 cases and $945 250 was outstanding in 24 cases. An additional $236 500 in 11 cases outstanding from previous years was paid, giving a total paid during the year of $2 015 400 and credited to the government's Consolidated Revenue Fund.

***** Fines levied in a particular year do not necessarily equal fines collected that year.

Appendix II

STATISTICAL DATA

Table 1

Information and compliance data

	Misleading advertising and deceptive marketing		Other sections of the Act		Total	
	1993-94	1994-95	1993-94	1994-95	1993-94	1994-95
Information requests (public)	28 212	25 087	1 499	1 379	29 711	26 466
Oral advisory opinions	690	605*	98	100	788	705*
Written advisory opinions	372	380*	32	39	404	419*
Media contracts	110	129	218	188	328	317
Speeches, seminars and consultative meetings	68	50	69	33	137	83

* Estimates

Table 2

Selected activities of the Bureau of Competition Policy
(excluding misleading advertising and deceptive marketing practices)

	1990-91	1991-92	1992-93	1993-94	1994-95
Number of complaints, examinations and enquiries					
Total complaints	1 177	1 023	1 197	1 282	1 658
Examinations (two or more days of review)[1]	152	114	168	77[2]	74
Applications for enquiries under Section 9[1]	5	6	6	11	7
Enquiries in progress at year end[1]	47	54	47	50	41
Disposition of matters					
Enquiries formally discontinued	9	0	8	28	16
Matters referred to the Attorney General of Canada	5	7	5	6	7
Matters referred where further action is not warranted[3]	0	0	2	2	0
Prosecutions or other proceedings commenced	6	5	6	8*	3
Applications to the Competition Tribunal	3	0	1	1	5
- Mergers	2	0	1	0	2
- Other reviewable practices	1	0	0	1	3
Representations before regulatory bodies	3	6	7	7	11

1 Refers to civil and criminal matters only. See comparable statistics for the Merger and Marketing Practices Branches.

2 Examinations in 1992-1993 and years prior were defined by two or more days of review. In 1993-1994, only criminal matters which warranted further review based on case screening criteria adopted by the Criminal Affairs Branch were recorded as examinations.

3 May include matters referred during previous years.

Table 3

Civil matters -- selected activities

	1992-93	1993-94	1994-95
Number of complaints, examinations and enquiries			
Total complaints/information contacts	508	507	331
Examination commenced (two or more days of review)	43	21	21
Application for enquiries under Section 9[1]	19	8	10
Enquiries in progress at year end	6	2	5
Written advisory opinions	0	2	0
Disposition of enquiries			
Enquiries resolved by Alternative Case Resolution	1	2	2
Applications to the Competition Tribunal	0	1	3

1 Refers to six-resident application to the Director for Enquiry

Table 4

Criminal matters -- selected activities

	1992-93	1993-94	1994-95
Number of complaints, examinations and enquiries			
Total complaints/information requests	739	775	1 048
Examination commenced[1]	125	56	53
Application for enquiries under Section 9[2]	0	9	2
Enquiries in progress at year end	28	42	31
Disposition of enquiries			
Enquiries resolved by Alternative Case Resolution[3]	0	1	0

1 Examinations in 1992-1993 and years prior were defined by two or more days of review. In 1993-1994 and 1994-1995, only matters which warranted further review based on case screening criteria adopted by the Branch were recorded as examinations.

2 Refers to six-resident application to the Director for Enquiry.

3 Alternative Case Resolutions include: investigative visits, orders on consent and written undertakings.

Table 5

Merger examinations

	1990-91	1991-92	1992-93	1993-94	1994-95
Examinations commenced[1]	193	195	204	192	193
Notifiable transactions	75	76	62	65	74
Advance ruling certificate requests	87	98	125	124	139
Examinations concluded					
As posing no issue under the Act	170	196	198	185	183
With monitoring only	10	5	4	1	2
With pre-closing restructuring	0	0	0	0	0
With post-closing restructuring/undertakings	2	0	0	0	0
With consent orders	0	0	0	0	0
Through contested proceedings	0	1	2	0	1
Parties abandoned proposed mergers in whole or in part as a result of Director's position	1	1	3	2	3
Total examinations concluded[2]	183	203	207	188	189
Advance ruling certificates issued[3]	70	72	101	114	106
Advisory opinions issued[3]	17	9	27	10	11
Examinations ongoing at year end	42	34	31	35	39
Total examinations during the year	225	237	238	223	228
Applications and Notices of Application before Tribunal					
Concluded or withdrawn	0	1	2	0	1
Ongoing	3	2	1	2	1

1 Includes notifiable transactions, advance ruling certificate requests and examinations commenced for other reasons. Some examinations commenced may arise from notifications and advance ruling certificate requests in relation to the same transactions.

2 Includes advance ruling certificates and advisory opinions issued and matters which have been concluded or withdrawn before the Competition Tribunal.

3 Included in "Total examinations concluded".

Table 6

Misleading advertising and deceptive marketing practices offences: Selected activities

	1990-91	1991-92	1992-93	1993-94	1994-95
Number of complaints, examinations and enquiries					
Total complaints received	14 517	15 130	13 657[1]	11 000[1]	8 500[1]
Number of files opened	13 745	14 557	11 095[1]	10 500[1]	8 145[1]
Applications for enquiries under Section 9	0	4	0	5	2
Enquiries commenced	90	82	41	46	38
Disposition of enquiries					
Completed examination/enquiries	496	407	196	399	349
Information contacts	1 324	1 511	1 174	654[3]	762[2]
Enquiries formally discontinued					
Cases involving undertakings[3]	11	2	3	38	10
Other cases	4	1	10	3	16
Undertakings received	14	24	20	5	4
Matters referred to the Attorney General of Canada	90	55	16	36	23
Matters where further action is not warranted[4]	0	9	19	2	0
Prosecution commenced[5]	53	44	18	29	23
Prohibition order without conviction[4]	1	1	2	0	0
Prosecutions concluded convictions [4,5]	47	43	29	11	24
Non-convictions[6]	29	44	22	15	8
Total fines (in C$)	1 020 850	1 353 400	692 700	200 700	1 417 400

1 These figures are estimates. They are accurate within five per cent.

2 Prior year statistics included written, oral and in-person information contacts. This year's statistics includes only written contacts.

3 Discontinued enquiries involving undertakings are reported for the fiscal year in which they were discontinued. Accordingly, these may not coincide with the actual number of undertakings received in any given fiscal year.

4 May include matters referred during previous years.

5 These statistics were not reported prior to fiscal 1990-1991 on a "prosecution" basis.

6 This includes conditional and absolute discharges, withdrawals, stays of proceedings, etc. It should be noted that charges against some of the accused are often withdrawn after other accused in the same case have pleaded guilty. Accordingly, there is some overlap.

Appendix III

Proceedings under the Act

MISLEADING ADVERTISING AND DECEPTIVE MARKETING PRACTICES

Accused Convicted

Color Your World Corporation
Canadian Sportfishing Products Inc.
Liquidateur W.W. du Canada Ltée
Bouclair Inc.
Colorcarpet Inc. c.o.b. as Factorerie de Tapis
Gene Rosenberg Associates Canada Inc.
Renaud & Cie Ltée.
Oriental Rug Center Ltd. c.o.b. as Kings Oriental Rug Galleries and Aslan Mirkalami
671135 Ontario Ltd. c.o.b. as York Energy Conservation
Lighting Originals Inc.
Handi Food Ltd.
2848-3154 Québec Inc. c.o.b. as Laser Santé Enr.
Danielle Ouimet
Saskatoon T.V. Center Ltd. and Vern Paproski
Lifestyles Canada Limited
Lando Lighting Inc.
Wolverine Tube (Canada) Inc., Lloyd H. Kerr and Johnston B. Clarke
Les Publications Groupe R.R. International Inc. (also known as 2619-7533 Québec Inc.) and Louis-Luc Roy and Danielle Ouimet
2619-7533 Québec Inc., Les Publications Groupe R.R. International Inc. and Louis-Luc Roy
Les Publications Groupe R.R. International Inc. (also known as 2619-7533) c.o.b. as La Société NSA
Bedford Furniture Industries Inc., c.o.b. as King Koil
Thomas Liquidation Inc. c.o.b. as Pascal's Stores
North Park Investments Inc., Metro Mattress Inc. and Stephen Thomas Jacobs
The Young Manufacturer Inc. c.o.b. as Stiches

Accused Found Guilty But Not Convicted[1]

Charlie McDonald
Brian Whitelaw

Accused Not Convicted[2]

962876 Ontario Ltd. c.o.b. as World Gym
Larry Lewis
Philip Jacobs
Monique Trépanier
David Lorenzetti & Mike Grabowski
David Szydlow

Prosecutions Commenced

Singer du Canada Limitée
DFD Telebroadcasting
Dominion Energie Resources Limited, c.o.b. as Vituel Corporation
La maison de tissus Bouclair limitée
Canadian Sportfishing Productions Inc.
The Succes Group Inc. & Nasir Siddiki
Hudson's Bay Company, Compagnie De La Baie d'Hudson c.o.b. as The Bay
Interocean Enterprises Inc. c.o.b. as Canadian Wildlife Collection
Daharsh Career Institute of Canada Ltd. & Alan Holt
K Mart Canada Limited
Liquidateurs M.M. du Canada Ltée & Merit Furniture Liquidators Inc. & Merit Furniture Liquidators
600620 Saskatchewan Ltd. c.o.b. as Micro Ear 2000 & Jack Douglas
Hossein Farjani & Aban Persian Rugs Inc.
National Gym Clothing Limited & John Lennox
Noram Direct Marketing Ltd. c.o.b. as Worldwide Marketing Group Inc.
Reg Publishing Inc & Pierre Bellehumeur.
Bloomsbury & Butterfield, Auctioneers Appraisers Ltd. & Shahram Mirkalami
Bedford Furniture Industries Inc. c.o.b. as King Koil
North Park Investment Inc. c.o.b. as North Park Distributors
782341 Ontario Inc. c.o.b. as Orleans Sports Skinwear Outlet & Guy Châteauvert
63633 Ontario Limited c.o.b. as Alex Persian Rugs & Abdol Karim Kheradmand
Wolverine Tube (Canada) Inc.
Color Your World Corporation

CRIMINAL BRANCH

Proceedings Completed

Accused Convicted

Kanzaki Specialty Papers Inc.
Mitsubishi Corporation of Tokyo
Alberta Ambulance Operators' Association
William Coghill
Andrew Moffat
Daniel Osborne
Tennant Wire Limited
Mitsubishi Canada Limited
Royal LePage Real Estate Services Ltd.
Ted Zaharko
John Roche

Accused Not Convicted

nil

Prohibition Orders Pursuant to Subsection 34(2)

Queensland Citrus Exporters
Béton Régional Inc.
Béton Carrière Ltée

Proceedings Commenced

Association Québecoise des Pharmaciens Propriétaires
Le Groupe Jean Coutu Inc.
McMahon Essaim Inc.
Les Magasins Koffler de L'est Inc.
Famili-Prix Inc.
Pharmacentres Cumberland (Merivale) Ltée
Uniprix Inc.
Jean-Guy Prud'Homme
Guy Lanoue
François-Jean Coutu
Pierre M. Bossé
Guy Marie Papillon
Michel Lesieur
Claude Gagnon
Mr. Gas Limited
Sunys Petroleum Inc.
Seaway Gas & Fuel Ltd.
Luxottica Canada Inc.
Dr. Hook Towing Services Ltd.
Nick Roscoe
Walter Stratychuck
Lynne Anne Leah
Suburban Centre & Auto Service Ltd. doing business as both Midway Auto & Truck Parts and Hi-Way Metro Towing Services
Majestic Towing Services Ltd. doing business as Donway Towing
John T. Tindale
Gestion de rebuts DMP Inc.
Pierre Paré
Serge Brière
Robert Caron
Bison Bus 1985 Limited
Tenneco Canada Inc.
École de conduite Tecnic Aubé Inc.
École de conduite Lauzon Inc.
Le Groupe Lauzon Inc.
2172-3572 Québec Inc.
École de conduite Tecnic Estrie Inc.
École de conduite Asbestrie Inc.
André Houle
André Comeau

Yves Aubé
Jacques Perrault
Clarke Transport Canada Inc.
Consolidated Fastfrate Transport Inc.
Cottrell Transport Inc.
Northern Pool Express Ltd.
TNT Canada Inc.
Larry J. Wilson
David L. Trudeau
Donald W. Freeman
Albert Lajoie
Graham D. Muirhead

CIVIL BRANCH

Applications To The Competition Tribunal

Matters Pending

A.C. Nielsen Company of Canada Limited
Tele-Direct (Publications) Inc.[1](1)
Tele-Direct (Services) Inc.[2](1)

Matters Completed

Anglo Canadian Telephone Company(2)
AGT Directory Limited(2)
Edmonton Telephone Corporation(2)
DirectWest Publishers Ltd.(2) The Manitoba Telephone System (2)
Tele-Direct (Publications) Inc.(2)
Tele-Direct (Services) Inc.(2)
MT&T Holdings Incorporated(2)

Alternative Case Resolution

New Brunswick Telephone Company

Regulatory Representations Before The CRTC

Balloting Proceeding (Telecom Public Notice CRTC 94-19)
Directory Database Information (CRTC 94-3)
Information Highway Proceeding (Telecom Public Notice CRTC 94-130)
Forebearance of Non-Dominant Carriers (Telecom Decision CRTC 94-19)

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(1) Application Re: - Yellow Pages Publishing.

(2) Application Re: - Yellow Pages Advertising.

Satellite Master Antenna Systems (Telecom Public Notice (CRTC 94-20)

Other Regulatory Representations

DTH Policy Review Panel - Federal Government
Long Distance Competition - Saskatchewan
Ontario Hydro - Ontario Energy Board
Electricity Market Structure Review - British Columbia Utilities Commission
Beer - Régie des alcools, des courses et des jeux
Beer - Canadian International Trade Tribunal
New Brunswick Association of Real Estate Appraisers - Standing Committee on Private Bills

Appendix IV

Discontinued Inquiries

MISLEADING ADVERTISING AND DECEPTIVE MARKETING PRACTICES UNDERTAKING*

Industry	Section of the *Act*	Nature of Inquiry and Conclusion Reached
Automobiles	52(1)*(a)*	Winnipeg Jeep Eagle Inc. Issue 1/1993
Furniture	52(1)(*a*) & 52(1)(*d*)	Nefco Furniture Ltd. c.o.b. The Penthouse Interiors Issue 1/1994
Household Appliance	52(1)*(a)* & 52(1)*(b)*	Oshawa International Enterprises Inc. and James Chin Tao Cheng Issue 3,4/1994
Automotive Product	52(1)*(a)* & 52(1)*(b)*	Guy Diotte, c.o.b. Power Mist Racing Products Canada Issue 1/1994
Seeds	52(1)*(a)* & 52(1)*(b)*	Northrup King Seeds Ltd. Issue 3,4/1993
Heat pumps	52(1)(*a*) & 52(1)(*b*)	Atmosphair Commercial & Industrial Inc. Issue 1/1993
Grocery products	52(1)(a)	Sobey's Incorporated (Sobeys) Issue 4/1992
Water filtration systems	52(1)*(a)*	Polaris Water Company, Issue 2,3/1991
Household Hardware	52(1)*(d)*	Quincaillerie R. Durand Inc. Issue 4/1992
Paint	52(1)*a*) & 52(1)*d*)	Peintures Chateau Inc./Chateau Paints Inc. Issue 1/1993
	OTHER REASONS	
Furniture	52(1)*(a)*	The advertiser offered "complimentary airfare" to various destinations with the purchase of furniture. The airfare had additional charges and required expensive accommodation. Because of steps the company had taken to assure itself that the certificates were legitimate, it was arguable the defence of "due diligence" could be available if charges were to be laid. Given the resources required and the penalty likely to be imposed if the prosecution were successful, the Department of Justice was of the view that the Attorney General of Canada would not undertake a prosecution in these circumstances.
Food	52(1)*(a)*	The advertiser promoted comparison prices to those of a competitor. The competitor provided survey evidence to the effect that savings claims were false. During the inquiry, it became apparent that the methodology of the 'price' and 'product' surveys was flawed. In addition, the advertiser had abandoned this form of advertising.

* Where the receipt of an undertaking is the impetus for the impetus for the discontinuance of an enquiry, reference can be made to the summary of the case which appears in the issue of the *Misleading Bulletin* noted.

Office Supplies	52(1)*(a)*	A firm used telemarketing solicitations that prompted many complaints that it had misrepresented itself as the complainants' regular supplier. A search warrant was authorized but not successfully executed. The company had ceased operations and records to make any case against the primary corporate officer were inadvertently destroyed by a third party. This individual subsequently became involved in a similar new venture and a new inquiry was initiated with formal powers authorized.
Clothing	52(1)*(d)*	The advertiser promoted large, allegedly inflated, savings on poor quality leather garments in an Atlantic province. A related corporate entity operating in Ontario was before the courts for engaging in similar practices and the advertiser ceased doing business in the Atlantic province.
Drugs	52(1)*(a)*	In a section 9 application for inquiry, a competitor claimed that an advertiser's comparative advertising claims were based on misleading conclusions from a research study. Health experts consulted subsequently could not find fault with the study's conclusions.
Health clubs	52(1)*(a)* & 59(1)*(a)*	A company used "scratch and win" cards to induce membership sales. The requirement for a "nominal" maintenance fee was found, in fact, to equal half the regular membership fee. A parallel case against the directing mind of the promotion and another health club resulted in a finding of not guilty based on the lack of original materials from Canada Post. Due to the loss of important records by Canada Post, the inability to introduce evidence linking the accused to the promotion and the decision of the court in the related prosecution, it was determined not to refer the matter to the Attorney General of Canada.
Multi-Level Marketing	55(2) & 55.1(1)*(b)*	The company distributed a brochure to prospective participants containing representations relating to compensation and the representations did not constitute or include fair, reasonable or timely disclosure of compensation. Due to the timely corrective action initiated by the company, the fact that the company received inaccurate advice from its counsel, and assurances provided by the company, the issues of the Director's concern were addressed as to future compliance with s. 55(2) and 55.1(1)*(b)* .
Automobiles	52(1)*(a)* & 52(1)*(d)*	Preliminary examination revealed that an advertiser's savings implied in an advertisement were fictitious as the vehicles did not normally sell at the M.S.R.P. Upon having the issue brought to its attention by the Bureau and on its own initiative, the advertiser published a corrective notice in the newspaper.
Product distributorships	52(1)*(a)* & 52(1)*(b)*	Brochures published by the advertiser stated that its water conditioner "takes the place of a water softener without using salt", and that the fuel saver "improves mileage". Preliminary examination of this matter revealed that advertising for a magnetic water conditioner did not soften water or reduce scaling and secondly that a fuel saving device did not increase engine performance or provide better combustion. The advertiser died and his company no longer carried on business in Canada or in the United States.

Health club memberships	52(1)*(a)* & 52(1)*(d)*	Preliminary examination indicated advertised membership discounts were false and not based on the regular price of the marketplace or of this firm. It was established that the firm had closed several locations and ceased advertising after charges were laid by provincial consumer protection authorities.
Jewelry	52(1)*(a)* & 52(1)*(d)*	An advertiser promoted diamonds with comparison sale prices that inflated the regular price of the diamonds in question. Inquiry revealed that a new company existed in the advertiser's business location and the directing mind for the diamond advertising could not be determined.
Automobiles	52(1)*(a)* and others	On application by six residents under s. 9, an inquiry was initiated regarding a car manufacturer's brochure which stated, in part, "Only your... dealer can offer you real peace of mind knowing that you'll get parts that were made specifically for your car. And you can rest assured because they will be installed by specially trained technicians who know your (car) through and through." The applicants alleged that this representation was false based on the experience of one of the applicants who had her car serviced by a dealer. The applicants have represented that instead of using specially trained technicians, mechanics and/or apprentices worked on the car and knew little about it. Information gathered during the inquiry indicated that there was insufficient evidence to prove beyond a reasonable doubt that an offence occurred.
Time-sharing investments	52(1)*(a)* and 59(1)	Complainants alleged that promotion of a vacation time-sharing investment by mail flyers misled recipients who were told that they had won a gift. During the inquiry, it was discovered that the Ontario Ministry of Consumer and Commercial Relations, through its Real Estate Branch, had been in contact with the company regarding these mailouts and had authorized the solicitations under the Ontario Real Estate Act. The company was of the view that the nature of the representation in the solicitation was also authorized, which was not the case. There were also a number of difficulties in obtaining evidence from potential witnesses who were reluctant to assist in the investigation because they might not be able to resell their units due to a clause within the purchase agreement which allowed the promoter to not accept new buyers It was also determined that a number of unsatisfied consumers had initiated a civil action against the time-share promoter.
Hearing devices	52(1)*(a)* & 52(1)*(b)*	Consumers alleged a company was making inaccurate representations in promoting the sale of a hearing device. Shortly after the initiation of this inquiry, the company ceased marketing the product. Bureau staff monitored the marketplace during the inquiry and neither the product nor the advertisements promoting it were found. Expert evidence was inconclusive as to the quality of the device. The company was under inquiry for engaging in unsubstantiated performance claims in another matter with wider implications for the mail solicitation industry. Resources were re-allocated to that inquiry.

Real Estate Developments	52(1)*(a)*	Consumers complained that a developer advertised area amenities inaccurately. After this inquiry was initiated, a number of affected consumers started civil actions against the advertiser. In addition, there were also delays in obtaining evidence from the municipality and from an architect, both of which were reluctant to assist in the investigation. During the inquiry, the firm ceased operations and successor companies had minimal roles in the advertising being considered.
Clothing	52(1)*(a)* & 52(1)*(d)*	Consumers alleged that suggested savings were inflated for leather goods advertised by a national clothing retailer. During the course of the inquiry, the regular market prices for the items were fluctuating thereby causing difficulties in ascertaining the ordinary selling price of the product. Further expert evidence as to the appraised value and quality of the leather products was inconclusive.

CRIMINAL MATTERS

Industrial Cleaners	50(1)(c)	This inquiry was started in 1986 following receipt of a complaint from a company in New Brunswick engaged in the supply of industrial cleaning services in the Atlantic provinces alleging that the parties were engaging in predatory pricing. During the course of the inquiry searches and interviews were conducted and submissions were received from counsel for the accused. The evidence did not establish an offence under paragraph 50(1)(c). The inquiry was discontinued on March 30, 1995.
Canning and Bottling of Soft Drinks		This inquiry was commenced on February 23, 1994 following receipt of an application by six residents of Canada alleging that four suppliers of canning materials had entered into an agreement with a soft drink manufacturer to lessen competition unduly in the market for canning materials used in the production of soft drinks. No evidence was provided by the applicants to establish that the alleged agreement existed and further information obtained from other sources during the course of the inquiry indicated that the suppliers' materials pricing policy had no effect on competition in the market for canning materials. The inquiry was discontinued on March 30, 1995.
Surcharging of Automobiles Parts		This inquiry commenced on April 5, 1992 following information to the effect that all the dealers of a major automobile manufacturer (the Firm) in a city in Alberta were applying a surcharge to the suggested retail price of automobile parts. Further, it was alleged that the surcharge resulted from an agreement among all the Firm's dealers in this same city. After a series of meetings between staff of the Bureau and counsel for the dealers, the Firm undertook to write all its Canadian dealers stating that the Bureau had concerns with groups of dealers in Canada collectively agreeing to impose surcharges on the price of the Firm's captive parts. The Firm's letter explained the law concerning the imposition of agreed surcharges by a dealer group and the legal risks involved in engaging in such conduct. The Firm's letter also stated that any dealers who engage in such conduct might be in breach of the Dealer Sales and Service Agreement with the Firm and this could have commercial repercussions. Such repercussions could include the cancellation of the Firm's franchise agreement. The inquiry was discontinued on March 17, 1995.

Cement	50(1)(b)	This inquiry commenced on May 5 1993 following a complaint that in an area of Ontario two vertically integrated cement companies were engaged in a policy of predatory pricing and geographic price discrimination with the object of putting a company out of business. Subsequent investigation did not produce sufficient information to provide grounds for the exercise of formal powers or to lead to a conclusion that the alleged pricing practices had the effect or tendency of substantially lessening competition or eliminating a competitor or were designed to have that effect as described in s. 50(1)(b) of the *Competition Act.* The inquiry was discontinued on March 21 1995.
Tour Operators		This inquiry was commenced on October 30, 1989 when it was alleged that the major tour operators and travel agents in Canada had conspired to eliminate competition from the market by threatening to boycott airlines and hotels which supplied it. No evidence was found of an agreement or arrangement among tour operators and or travel agents. The inquiry was discontinued on March 17, 1995.
Change of Control of Teleglobe Inc.	45 & 92	This inquiry was commenced on January 12, 1993 to examine the change in control at Teleglobe Canada Inc. and the subsequent shift in competitive strategy by its subsidiary firm, Teleglobe Canada Inc. The inquiry examined activities in light of the merger and conspiracy provisions of the *Act*. Information obtained during the inquiry would not support the allegations that section 45 and 92 of the *Act* had been violated.. The inquiry was discontinued on March 16, 1995.
Travel Agents		This inquiry was commenced in 1984 following allegations that travel agents in a city in Quebec had agreed to put pressure on travel wholesalers to refuse to provide all-inclusive package deals to a firm that specialized in last minute and discounted trips. The allegations were made in regard to the conspiracy and price maintenance provisions of the *Act* . Information gathered during the inquiry however, showed that there was insufficient evidence to bring this matter to the Attorney General. The inquiry was discontinued on March 16, 1995.
Margarine in Québec	50(1)(b), 50(1)(c) & 79	This inquiry was commenced on December 23, 1993 following receipt of an application from six Canadian residents alleging illegal commercial practices with respect to paragraphs 50(1)(b) and 50(1)(c) and section 79 of the *Act* by a major margarine manufacturer. Information obtained during the enquiry did not support the allegations under the subject sections of the *Act*. The inquiry was discontinued on October 26, 1994.
Food Equipment	50(1)(a)	This inquiry was commenced on December 14, 1993 following receipt of an application from six Canadian residents alleging refusal of a food equipment group to make available a volume discount on terms equal to those offered to competing purchasers of like quantity. The evidence obtained during the inquiry which was examined with respect to paragraph 50(1)(a) of the *Act*, determined that the distributor was not practicing price discrimination. The inquiry was discontinued on June 22, 1994.

Concrete - New Brunswick	50(1)(a) & 50(1)(a)	This inquiry was commenced in June 1987 under paragraphs 50(1)(b) and (c) of the *Competition Act* following allegations that a concrete producer had undertaken a practice of predatory pricing in the Woodstock and Grand Sault regions of New Brunswick. Searches were completed in June 1987. Evidence obtained during the inquiry did not show that the manufacturer had engaged in practices that prevented or lessened substantially competition.

MERGERS

Medical laboratory services92	On November 15, 1994, the Director discontinued an inquiry which had been commenced following receipt of an application by six residents, into the acquisition by a competitor of a company providing medical laboratory services in the Province of Ontario. The applicants alleged that the transaction caused a substantial lessening of competition in the private medical laboratory business in Ottawa and facilitated the removal of capacity in that industry to the Toronto area and that the Director should therefore initiate an inquiry under s.92 of the *Act*. The Director found that the appropriately defined product and geographic markets were broader than proposed by the complaint and that the acquisition had not raised any concerns under the *Act*. He concluded that no further inquiry was therefore justified.

CIVIL MATTERS
FAILURE TO COMPLY WITH CERTAIN ORDERS

The NutraSweet Company	The Director commenced an inquiry in April 1991 following receipt of information that The NutraSweet Company (NutraSweet) had failed to comply with the Order made by the Competition Tribunal on October 4, 1990, thereby violating section 74 of the *Competition Act*. Subsequent discussions were held between the Director's staff and counsel and officials and counsel for NutraSweet. As a result, NutraSweet agreed to send letters approved by the Director, explaining to customers the provisions of the Tribunal's Order with regard to the removal of the exclusive use provisions in current contracts, and the removal of the allowance or discount for the use of the NutraSweet logo. NutraSweet also outlined in these letters the approach it would follow with regard to the drafting of new contracts, which would be in compliance with the Tribunal's Order. Accordingly, the inquiry was discontinued.
Xerox Canada Ltd.	The Director commenced an inquiry in July 1992 following receipt of information that Xerox Canada Ltd. (Xerox) had failed to comply with the order made by the Competition Tribunal on November 2, 1990, thereby violating section 74 of the *Competition Act*. However, during the examination of the matter, Xerox changed its policy in Canada to conform to the policy of its U.S. parent. Accordingly, the inquiry was discontinued.

ABUSE OF DOMINANT POSITION

Commercial Printing	The Director received a six resident application for an inquiry in 1992, alleging that a commercial printer engaged in a number of anti-competitive acts aimed at eliminating a competitor in the commercial printing market in the Toronto area. It was alleged that the practices contravened a number of provisions of the *Act*, in particular, the abuse of dominant position provisions and the criminal provisions of subsections 45(1) and 61(6) of the *Act*. However, the information obtained during this inquiry did not lead the Director to believe on reasonable grounds that an offence under the criminal provisions of the *Act* had been committed or that grounds existed for the making of an order by the Competition Tribunal. Accordingly, the inquiry was discontinued.

Potato Processing	The Director received a six-resident application for an inquiry in June 1994, alleging that a potato processing firm in the province of Prince Edward Island had substantial control of the processing potato market in that province and that the erection of a potato storage facility and the expansion of the firm's processing plant constituted a practice of anti-competitive acts, contrary to section 79 of the *Act*. However, an examination of the matter did not provide evidence that the erection of the facility would change the dynamics of the bargaining process between the Potato Processing Council and the two potato processors. Moreover, a review of the documents and information provided by the Applicants did not indicate that the erection of the facility and the expansion of the processing facilities would constitute a practice of anti-competitive acts as envisaged under section 79. Accordingly, the inquiry was discontinued.

REFUSAL TO DEAL

Telecommunications Equipment	The Director commenced an inquiry in April 1990 following the receipt of a complaint that a telecommunications firm refused to supply a business with parts and related services for repairing and refurbishing terminal equipment manufactured by the telecommunications firm. The telecommunications firm was subsequently informed of the Director's intention to file an application with the Competition Tribunal for an order requiring that the telecommunications firm accept the business as a customer. Subsequent negotiations between the two companies resulted in a supply arrangement being reached. Accordingly, the inquiry was discontinued.

FINLAND*

(1994-1995)

Executive Summary

In 1994, 268 new matters involving restraints on competitions came up before the Office of Free Competition. Of these, 180 were requests for action received from undertakings and 20 were applications for exemptions. In 1994 the Office resolved a total of 213 matters regarding restraints on competition. In 120 cases the Office issued a formal decision; of these, 18 concerned applications for exemptions. The other cases were resolved by administrative letters, or did not lead to further measures. The Office of Free Competition referred two matters to the Competition Council for resolution. The Council rendered 11 decisions, of which five concerned applications for exemptions. In two cases the Council granted an exemption. Five Competition Council decisions were appealed to the Supreme Administrative Court, which issued a decision in one matter.

In the control of horizontal restraints on competition, the Office of Free Competition's objective in 1994 was to investigate and abolish cartel arrangements especially in the closed sector and basic industry. One of the most important cartel cases handled by the Office involved an application for an exemption for a price- and volume-target agreement between buyers and sellers of raw wood. The Office issued a one-year exemption for the agreement, with strict conditions, and urged the parties to seek new, more competitive operation modes for the raw wood market before the expiration of the exemption.

In the investigation of vertical restraints on competition, the Office has focused on the retail trade in current consumer goods and speciality goods. Measures taken by the Office in 1994 were directed at removal of competition-restraining conditions from agreements in retailing groups and chains, and at ending price discrimination of independent retailers.

In the control of abuse of a dominant market position, the Office of Free Competition concentrated especially on basic industries which supply production inputs, and on eliminating abuse of the dominant market position of public undertakings. Special emphasis was given to the proposals made to the Competition Council by the Office regarding discriminatory and tying conditions applied by Imatran Voima in its electricity contracts and Neste in its fuel-delivery contracts. The Office considers the cases in question important for maintaining the credibility of the prohibition of the abuse of a dominant market position.

As regards public restraints on competition, the Office concentrated on reducing structural regulation, especially in the food production, transport, insurance, energy and construction sectors. Most important tasks of the year in dismantling of regulation were the reform of the Alcohol Act and the Electricity Market Act. The Office also promoted introduction of competitive methods into public services

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* The original language of this report is English.

and examined the competition-distorting effects of public subsidies. Among other things, the Office drafted a statement intended to initiate discussion of the competition effects of state subsidies.

I. Changes to competition laws and policies adopted or envisaged

At the beginning of July 1994, an amendment to the Act on Restrictions on Competition (447/94) came into force. The amendment clarified the application of the Act to co-operative activity among agricultural producers in the primary production of agricultural products. The Act will not be applied to agreements, decisions or comparable practices between agricultural producers or their organisations regarding primary production of agricultural products, when those practices advance the implementation of the objectives of the Agricultural Market System Act. The Act on Restrictions on Competition will however be applied to practices which appreciably hinder sound and effective competition in the agricultural-product market or lead to the abuse of a dominant market position. The Act will thus make it possible to intervene in such practices as producer agreements regarding minimum prices, restriction on the use of alternative suppliers, and boycotts directed against buyers or other producers. The trade in agricultural products, co-operative activity by buyers, and the manufacture and marketing of processed products will continue to fall completely within the Act's scope.

At the same time, another amendment was made to the Act on Restrictions on Competition (448/94), so as to increase the Office of Free Competition's powers to investigate restrictions on competition. The Act was amended so that the Office may provide assistance to the EFTA Surveillance Authority (ESA), as required by the EEA Agreement, in order to carry out the ESA's investigations and inspections. The amendment emphasises the obligation of the undertakings to co-operate actively with inspecting officials and gives the inspectors the right, at their own initiative, to search for documents and demand that closed places of storage be opened. Further, the officials now are empowered to ask for oral explanations on the spot and to take copies of documents to be inspected. If an undertaking refuses to submit to the investigation, the police can, upon request, provide executive assistance in an investigation. All these amendments apply to investigations made in accordance with both the Act on Restrictions on Competition and the EEA Agreement.

In order to fulfil obligations placed on national competition authorities by the EU Accession Treaty, the Ministry of Trade and Industry is preparing an amendment to the Act on Restrictions on Competition. After the amendment, the Office of Free Competition can assist the European Commission in carrying out investigations and inspections.

II. Enforcement of competition laws and policies

Action by competition authorities against anti-competitive practices

In 1994, 268 new matters involving restraints on competition came before the Office of Free Competition. Most of these were requests for action received from undertakings (180 cases), applications for exemptions (20) or enquiries. Less than ten per cent of the 268 matters were opened at the Office's own initiative. About 30 per cent of the matters concerned horizontal restraints on competition, 25 per cent vertical restraints, 24 per cent abuse of dominant position and 20 per cent restrictions created by public authorities. About 20 per cent fewer cases came before the Office in 1994 than in 1993.

In 1994, the Office resolved a total of 213 matters regarding restraints on competition. In 120 cases, the Office issued a formal decision; of these, 18 concerned applications for exemptions. The

other matters either were resolved by administrative letters or did not lead to further measures. Of the matters resolved in 1994, 31 per cent concerned horizontal restraints on competition, 27 per cent vertical restraints, 29 per cent abuse of dominant position and 12 per cent restrictions created by public authorities.

The Office of Free Competition referred two matters to the Competition Council for resolution. The Competition Council rendered eleven decisions, five of which concerned applications for exemptions. In two cases, the Council granted an exemption. In 1994, five Competition Council decisions were appealed to the Supreme Administrative Court, which issued a decision in one matter.

Cases handled by the Supreme Administrative Court

On 1 November 1994, the Supreme Administrative Court gave its decision in a case concerning a complaint about abuse of dominant position by Posts and Telecommunications of Finland (later Finland Post, Ltd.) in the marketing of post boxes. The Court agreed with the Office of Free Competition and the Competition Council that Posts and Telecommunications of Finland had not been guilty of abuse of dominant position.

Cases handled by the Competition Council

Collective bargaining agreements in the paper industry

On 24 June 1993, the Office of Free Competition presented the Competition Council with a proposal for the prohibition of restrictions included in the paper industry's collective bargaining agreements regarding the use of outside enterprises. Stipulations at issue prevented employer enterprises covered by the agreements from using outside service enterprises for such tasks as cleaning, security and transportation. The Competition Council issued a decision in the matter on 16 June 1994.

The Competition Council took the position that, while the provisions of collective bargaining agreements generally remain outside the scope of the Act on Restrictions on Competition, the Act may be applied in those exceptional situations in which the agreement incorporates provisions that do not concern the fundamental terms and conditions of employment, but do harmfully restrict competition. The decisive factor is not the judicial form given to the arrangements, but rather their actual effects on the market. The Act on Restrictions on Competition may not be applied when the collective bargaining agreement's provisions concern wages, working hours or other factors connected to the social position or security of the workers. By contrast, in those cases in which terms contained in collective bargaining agreements do not concern the essence of labour contracts or labour relations, the application of the Act on Restrictions on Competition may, in the Competition Council's view, enter the consideration regardless of whether those terms fall within the sphere of the regulatory competence referred to in the Act Respecting Collective Agreements. In such cases, attention is to be given to the content, importance and effects of the collective bargaining agreements' stipulations, from the standpoint of effective competition.

In the Competition Council's opinion, the provisions in question restricted and impeded forest industry companies, in the harmful manner defined by the Act on Restrictions on Competition, in the assignment of certain tasks to outside service enterprises. For the outside service enterprises, the said provisions constituted an entry barrier, which prevented them from expanding their operations into the paper industry. For forest industry companies, the use of outside service enterprises would bring cost savings. It was thus possible to view the restraints as reducing efficiency in the economy. The Council

also found that, considering the paper industry's economic importance in Finland, the harmful effects of the restraints on competition could not be viewed as minor.

The decision has been appealed to the Supreme Administrative Court. On 11 April 1995, the Court issued its decision in which it upheld the Council's position. The decision is an important precedent in applying competition legislation to collective bargaining agreements. For forest industry companies, the decision will also create an opportunity to rationalise their functions, for example by using subcontractors in a way which enhances economic efficiency.

Refinery sales of fuels

In autumn 1993, the Office of Free Competition presented the Competition Council with a proposal for elimination of abuse of dominant position by Finland's state-owned oil company, the Neste Corporation, in the refinery sales of fuels. The Office's objective was to abolish price discrimination against the SEO petrol-station chain and to ensure new distribution schemes of competitive conditions which would be fair vis-à-vis those of the traditional system of wholesalers. In accordance with the Office's proposal, the Competition Council, in a decision rendered on 16 June 1994, prohibited Neste from applying the pricing models it had introduced on 1 January 1993. The Council found that the justifications for a discount granted by an undertaking in a dominant market position must be verifiable, clear and moderate, and that the rebate must not artificially distort competition among customers of varying size. According to the decision, volume discounts and other discounts based on cost savings thereby generated for the seller are justified in terms of competition law. Only for special reasons may there be deviation from this cost rationale for price differences, and it is the competition authority which assesses the acceptability of those reasons.

The Office of Free Competition appealed the Council decision to the Supreme Administrative Court, since the Council had found that Neste had abused its dominant position, but yet did not impose any penalty for the offence. The Office took the position that, in order to maintain the credibility of the prohibition against abuse of dominant position, it was essential that the Supreme Administrative Court impose a fine on Neste. Neste also appealed the Competition Council's decision to the Supreme Administrative Court and notified its pricing practice to ESA in order to obtain a negative clearance.

Wholesale supply of electricity

On the presentation of the Office of Free Competition, the Competition Council issued a decision on 24 August 1994 regarding the wholesale conditions used by the state-owned energy company Imatran Voima. In discussions with the Office of Free Competition, Imatran Voima had consented to take into consideration, in its new terms for supplying electricity, the changes demanded by the Office (i.e. termination of restraints on the resale and intended use of the electricity; repeal of the energy replaceability prohibition and order-price compensation, so as to make possible the purchase of electricity from multiple suppliers; improved consistency of prices with costs; and increased flexibility regarding contractual periods and fluctuations in power-output ordered). With the exception of the restriction on resale, however, Imatran Voima continued to apply competition-restraining terms of supply in its old electricity contracts, which will remain in force until the end of 1995. Contrary to the Office of Free Competition's presentation, the Competition Council considered interference in these earlier contracts unnecessary from the standpoint of effective competition, and dismissed the Office's demands without prejudice.

In the view of the Office of Free Competition, before granting the transitional period requested by Imatran Voima, the Competition Council should have found that Imatran Voima occupied a dominant position as a wholesaler. Further, the Office holds the opinion that the aforementioned terms, which have tying and discriminatory effects on customers and exclude alternative suppliers, are to be considered an abuse of dominant position. The Office took the position that by dismissing the matter without considering the merits, the Council proceeded against the prohibition principle contained in the Act on Restrictions on Competition. Thus the Council compromised the actions taken by the Office and endangered the directive impact of the reforms thus accomplished, in a sector in which seller's dominant position is common. For this reason, the Office appealed the Council's decision to the Supreme Administrative Court. On 10 April 1995, the Court issued its decision overruling the Council's decision. The Court returned the matter to the Competition Council for renewed examination and resolution.

Applications for exemptions

The Competition Council issued five decisions in 1994 regarding applications it had received for exemptions. The Council granted exemptions to allow the Finnish Cinema Owners' Association and the Finnish Film Distributors' Association to establish a mutual target price for film presentations. The Council also exempted target prices for the care charges of private childminders. The Council did not however grant exemptions in the following cases: the recommended display-hire price of an association of suppliers of goods for the laboratory and health-care fields; price co-operation by the Association of Machine Entrepreneurs in the conclusion of contract agreements for wood harvesting and forest improvement; and target fees used by the Association of Finnish Shipping Agents in clearance and line-agent operations.

Cases handled by the Office of Free Competition

Horizontal restraints on competition

Price and volume targets for raw wood

On 4 March 1994, the Office of Free Competition granted a conditional exemption to the agreement reached by the Finnish Forest Industries Association and the Central Union of Agricultural Producers and Forest Owners (MTK) on price and volume targets for raw wood. The exemption remained in force until 31 March 1995. The agreement contained, among other things, targets, in terms of each type of timber, for average prices both nationally and regionally (by forestry board), as well as price ranges and volume targets for wood to be harvested from private forests. In its decision, the Office found that the raw-wood target-price agreement, together with the volume targets, reduced uncertainty connected with the price and supply of wood and decreased cyclical fluctuations in wood prices and volumes. The Office took the view that the agreement balanced out the supply of wood, so that the capacity utilisation ratio of the pulp and paper industry remained as high as possible and production resources were being efficiently used. The primary objective of the target prices was to eliminate sellers' expectations on price increases and to increase the supply of wood.

The Office found, however, that a national target-price agreement is not the only, indispensable alternative for keeping price expectations under control. The industry and the forest owners' interest group have traditionally reached a centralised agreement as to wood prices and delivery volumes. The centralised price and volume targets have caused significant structural distortions in wood pricing. The price targets have especially ignored the differing needs of pulp and paper industry and sawmills as

regards flexibility of prices and raw-wood supply. The Office took the view that the new price and volume targets would probably lead to the same sort of structural distortions as the earlier agreements did.

The smooth functioning of the wood trade is nevertheless very important in terms of the national economy, and ensuring the forest companies of an undisturbed supply of wood helped them to register profits last year. For the development of wood-sales practices, the solution reached in the case represented a step in a more competitive direction, since the new agreement is not as detailed and binding as the parties' prior agreements were. The Finnish Forest Industries Association and MTK have informed ESA of their agreement and, with Finland having become a member of the EU, handling of the matter has been transferred to the European Commission.

Price co-operation in the administration of copyrights

In 1994, the Office of Free Competition investigated horizontal price co-operation in the determination of copyright compensations by the copyright organisations Gramex and Teosto (the Finnish Composers' International Copyright Bureau). Gramex administers the rights of performing and recording artists under the Copyright Act. A musicians' union, an association of soloists who perform or record in Finland, and producers of recordings, films and videos are members of Gramex. Teosto administers and supervises copyrights for musical and related literary compositions. Composers, arrangers, lyricists, writers and music publishers belong to Teosto.

In both cases, the Office of Free Competition granted ten-year exemptions for price co-operation related to the administration of copyrights. The co-operation concerns the mass use of works and recordings. "Mass use" refers to situations in which determination of a compensation based on performance or reproduction is impossible in view of the large number of performances and/or users. The Office found that the price co-operation reduced the transaction costs. Without co-operation between those holding the copyrights, it would be necessary to hold thousands of price negotiations in the sector, as a result of which the amount of music being publicly performed would probably decrease. The co-operation also facilitates achievement of economies of scale in collecting compensations from users and crediting those compensations to the copyright holders.

The Office of Free Competition found that Gramex enjoys a dominant position in the collection of compensations belonging to artists and producers for the use of musical recordings. Teosto, for its part, is the only organisation administering musical-composition copyrights in Finland. In practice, Teosto controls all presentation of foreign music. It is thus possible to view Teosto as occupying a dominant position. The Office of Free Competition has not, however, considered the possible abuse of dominant position in this connection.

Suspected allocation of suppliers in acquisition of broadcast rights for television programmes

In view of Eurocable's request for action, the Office of Free Competition investigated possible joint activity by the state television company YLE and the commercial television company MTV in the acquisition of rights to present television programmes. According to Eurocable, YLE and MTV had agreed not to buy, from foreign programme suppliers, programmes which had been broadcasted on Eurocable's Entertainment Channel. Eurocable alleged that YLE and MTV had also refused to deal with programme sellers who sell to Eurocable. According to Eurocable, YLE and MTV jointly hold a dominant market position in commercial programming activity in Finland, and on this basis can pressure programme sellers not to sell to Eurocable. Eurocable competes with YLE and MTV for rights to present

television programmes. The company acquires broadcast rights for films and television programmes for the PTV channel and its own Entertainment Channel, which are broadcast via cable television. Eurocable also markets the international FilmNet channel in Finland.

The Office of Free Competition found in its investigations that YLE and MTV do not generally acquire programmes which have been presented on such channels as Eurocable's Entertainment Channel. However, the Office has not found any evidence on concerted action between the two companies, such as allocation of suppliers or discrimination of programme suppliers that do business with Eurocable. Nor was the Office able to state that the intent of YLE's and MTV's practice was to hamper Eurocable's economic activity or to exclude a competitor from the field. The two companies presented justifications stating that it was not profitable for them to broadcast programmes which had already been presented on the Entertainment Channel. The primary justification was that programmes already presented would no longer interest Finnish television viewers.

It was not found that YLE and MTV have joint activity of a continuing nature in the acquisition of programmes or otherwise in programme activity. Accordingly, it is not possible to view the two companies as jointly holding a dominant position, or to consider their methods as an abuse of dominant position.

Vertical restraints on competition

Terms of sale in speciality-goods trade

The Office of Free Competition had in previous years investigated invoicing practices and retailers' tie-ins to central companies of trade in the current consumer goods market. In 1994, the Office directed its investigations into the speciality-goods trade by studying the terms of sale of a number of retail chains and enterprises which manufacture technical products. In the terms of sale of two retail chains, harmful restraints on competition were observed. The Office negotiated for removal of the restraints. In addition, harmful restraints were found on two manufacturing enterprise's terms of sale, which will lead to further measures in 1995.

On 27 December 1994, the Office of Free Competition rendered a decision concerning harmful restraints connected to the contracts and terms of sale used by Kenkäkesko, a chain of shoe stores belonging to Finland's largest retail group, the K-Group. After negotiations with the Office of Free Competition, the K-Group's central company, Kesko, removed from its agreements stipulations on mandatory indirect invoicing and conditions regarding the payment of loyalty rebates. In drawing attention to tying terms of sale, the goal was to increase retailers possibilities to purchase products from other sources besides their own central wholesaler. Further, after the decision, manufacturers can deal directly with the retail outlet which improves competitive conditions also at the manufacturers' level. The decision was consistent with the Office's policy on the current consumer goods trade, as regards opening alternative suppliers to retail shops tied to central companies.

The eyeglasses trade was another field in retail trade in which competition-restraining terms of sale were noted. Enterprises who are members of Europta Ltd., the joint purchasing organisation of Silmäterä opticians, had only been able to obtain products from suppliers with whom Europta had concluded agreements on indirect-invoicing. Prohibiting direct customer relations prevented the member firms from provoking competition among alternative suppliers. Moreover, the purchasing terms negotiated with suppliers by Europta on behalf of its members reduced price competition between the

opticians. At the request of the Office of Free Competition, Europta gave up the obligation to indirect-invoicing. For Silmäterä opticians, this opened up alternative sources of supply.

Tie-ins in real-estate-management contracts

On the basis of requests for action which were received by the Office of Free Competition in 1994, it investigated maintenance contracts concluded with housing corporations by three different maintenance companies. In two cases, the Office found that the customers were tied to the maintenance company either perpetually or by long terms of contract and notice. The real-estate-management contract between Riihelän Huolto and its customers stipulated that it would remain in force permanently. An initial real-estate-management contract between Hakunilan Huolto and its customer had a term of five years.

In both cases, the real-estate-management contract between the maintenance company and the customer corporation restrained competition in the real-estate-management market. The maintenance company tied the customer to the use of its services, so that competitors were not in a position to offer their services to the customer in question. From the point of view of the housing corporations, the contracts denied them the benefits of price and quality competition among maintenance firms.

Following negotiations with the Office of Free Competition, each maintenance company announced that it would change the contracts so that the customer would no longer be tied for a long time to the use of the company's services. The companies also started to offer services in smaller packages, instead of the previously used comprehensive packages.

Customer restriction on Opel dealers

In October 1993, the Office of Free Competition received a request for action stating that dealers for Opel Oy (General Motors of Finland) were refusing to sell Opel automobiles to Russian buyers. The Office's investigation revealed that, under the contracts between Opel and its distributors, the latter was not allowed to sell new cars for resale or initial use outside Finland. The provision limited the Finnish dealer's opportunities for competing for foreign customers. It was thus possible to apply Finnish competition legislation to the restriction on competition, even though the restriction did not directly affect Finnish customers but Russian and other foreign customers.

The provision was also incompatible with Article 53 of the EEA Agreement. The Office notified the company of the anti-competitive nature of the distribution contracts, which the company then changed to conform with the EEA competition rules. The case was notified informally to the ESA, but measures based on violation of Article 53 will hardly be initiated, since the contracts were changed within the prescribed six-month transitional period which followed the EEA Agreement's entry into force. The Office of Free Competition did not tackle the sales restriction insofar as it concerned the sale of tax-free cars to Russia. This partial acceptance of the restriction stemmed from, among other things, the fact that Opel cars sold in Finland differ in their equipment from Opels sold in Russia to the extent that the General Motors Russian service organisation would not be able to efficiently service cars imported from Finland. From the standpoint of Finnish distributors, the removal of export restrictions concerning the European Economic Area meant a fundamental enhancement of opportunities to compete.

Abuse of dominant market position

Pricing of newspaper delivery services

The Office of Free Competition has received numerous requests for action concerning Finland Post Ltd. In 1994, the Office resolved seven of these requests. The most important decision concerned the pricing applied by Finland Post for its newspaper delivery service which is an activity separate from the daily delivery of post. Between 1990 and 1992, the Council of State granted Finland Post out-of-state funds, a general transport subsidy for the delivery of newspapers and stipulated the delivery charges for different newspaper groups. In 1993, the newspaper-delivery subsidy was terminated, and Finland Post began to price its newspaper delivery services independently. At that time, it introduced a new pricing system, which, according to the request for action filed with the Office of Free Competition, discriminated its customers leading, in the case of certain customers, to price increases which were considered excessive.

In the course of the investigation, Finland Post conceded its pricing system's unfinished nature, which stemmed from the fact that Finland Post had been obliged in a very short time to shift newspaper delivery to an independent-pricing basis, and to cover the loss of income caused by the unexpected loss of the state's delivery subsidy. It had done this by increasing prices for delivery services and by streamlining its operations. Finland Post committed itself to changing its pricing as from 1 June 1994, so as to make it fair and bring it into line with costs, as required by the Office of Free Competition. This reduced the price differentials which had developed during the transitional period and were excessive from the customers' point of view. On these grounds, and taking into account the difficulty of constructing a new pricing system at such a short notice, the Office took the view that Finland Post had not acted abusively.

An undertaking dissatisfied with the Office of Free Competition's decision took the matter before the Competition Council -- as also happened in the case of a 1993 decision regarding Finland Post's activity in the postbox market. In the latter case, the Competition Council agreed with the Office that Finland Post's minor sales of postboxes and its other marketing measures -- connected to the transfer to home delivery of post and implemented for the purpose of customer service -- did not have harmful effects originating in abuse of dominant position in the postbox market. The Supreme Administrative Court upheld this decision.

Statutory exclusive rights in money-game activities

In 1994, the Office of Free Competition investigated the activities of two enterprises, Veikkaus and the Slot Machine Association (RAY), which have received exclusive rights, on the basis of special legislation, to engage in money-game activities. Veikkaus and RAY were persuaded by the Office to accept that the relevant special legislation does not prevent competition authorities from intervening, on the basis of competition legislation, in distribution agreements in the field, if they violate the principle of non-discrimination. This stems from the fact that the special legislation does not contain detailed stipulations on contractual usage which would narrow the scope of the Act on Restrictions on Competition. On this basis, the Office has investigated RAY's marketing criteria and has handed down four decisions concerning Veikkaus. According to these decisions, the company is obliged to treat its "on-line" agents non-discriminatorily.

Through action by the Office of Free Competition, shortcomings in Veikkaus's and RAY's game-activity organisational directives and practices were thus corrected. These shortcomings made it possible to discriminate against hotel and restaurant operators as well as retail traders. The Office of Free

Competition also took part in the drafting of the new Entertainment Machines Act, which, when it came into force in 1995, ended RAY's monopoly on the leasing of such devices.

Abuse of dominant market position in the after-sales market

In three decisions issued in 1994, the Office of Free Competition expanded control of abuse of dominant position to include the after-sales market. The first decision involved alleged excessive pricing by Oriola in the maintenance of a device for nitrogen-distillation and -analysis of waste water. According to the decision, Oriola holds a dominant market position in the spare-parts market for the Kjeltec Auto 1030 analysis device, manufactured by Tecator, but not in the maintenance market for the device. Because the spare parts needed in maintenance work could be ordered by Oriola customers -- which made it possible to use a firm other than Oriola for the maintenance work -- Oriola's practice was not assessed on the basis of Section 7 of the Act on Restrictions on Competition, which concerns abuse of dominant position.

Regarding suspected predatory pricing of spare parts for Scania lorries imported by Scan-Auto, the Office of Free Competition found that the price reduction implemented by the company did not constitute pricing below cost. Therefore, in this case, the discount measures, taken in a competitive situation, could not be considered abuse of dominant position. Accordingly, the Office did not investigate in greater detail the question of whether Scan-Auto has a dominant position either in the spare parts market for Scania lorries as a whole, or in certain spare part groups.

By contrast, in the case of Nordson Finland, the Office of Free Competition found that the company does hold a dominant position in the spare parts market for Nordson hot-setting adhesion devices, and that the company had abused that position by refusing to supply spare parts to Nord-Melt, which competes with Nordson for maintenance work. According to the Office's decision, a manufacturer of durable goods can hold a dominant position in the market for spare parts for the goods in question, even if it does not have such a position in the market for the goods themselves. In such a situation, the manufacturer must supply its branded spare parts to an independent maintenance organisation, if the latter fulfils objective criteria. When the Office expressed the view that Nord-Melt fulfilled the requirements established for an independent Nordson maintenance enterprise, Nordson terminated its refusal to deal. The restraint on competition having thus come to an end, the Office did not refer the matter to the Competition Council; the Office did however render its decision regarding dominant position and its abuse. The decision, which had the nature of a precedent, will open up opportunities for independent competitors in maintenance services, and thus increase the customer's alternatives.

Conduct by natural monopolies

In 1994, the Office of Free Competition had under examination a total of 35 requests for action concerning public enterprises engaged in electricity supply, district heating, waste management or water supply. Inasmuch as the operating circumstances of these enterprises generally fulfil the characteristics of natural monopolies, the requests for action tend to involve allegations of excessive pricing and other terms of supply more so than requests regarding other sectors have. The two cases resolved in 1994 are described below.

By mutual agreement, the Turku Energy Company, which sells and distributes district heat in Turku, and a company owning a local heat distribution system in a certain Turku neighbourhood had organised that neighbourhood's heat deliveries using the so-called combined hook-up alternative. Under

the agreement, the properties in the neighbourhood receive the Energy Company's district heat, through the distribution company, which acts as a joint purchaser. When the Energy Company, citing the aforementioned heating agreement, refused to supply the area with a separate district-heating hook-up, the housing corporation which had sought a direct hook-up filed a request for action with the Office of Free Competition. According to the housing corporation, in its case, the heat distribution system had led to higher heating costs relative to the Energy Company's rates and rates paid by other district-heating customers.

In its decision in the matter, the Office of Free Competition regarded the heating agreement between the Turku Energy Company and the neighbourhood distribution company as advantageous and efficient in terms of overall economy. As a result of the agreement, the Energy Company avoided construction of a new distribution network which would have been an unprofitable, overlapping investment. In its heat deliveries, the company has been able to utilise the local heat-distribution network owned by the neighbourhood heating company without a lease or other such usufructuary agreement, such as would engender added costs. Further, for the housing corporations within its sphere, the joint hook-up has been more economical than the alternative, separate hook-ups. Such would also have been the case for the complainant. On these grounds, the Office of Free Competition took the view that the Turku Energy Company and the distribution company were not guilty of abuse of dominant position.

In the other case decided, the Office of Free Competition found that the Helsinki Metropolitan Area Council (YTV) occupied a regional dominant position in waste haulage in the capital area, the centre of Helsinki excluded. YTV enjoys the status of a legal monopoly everywhere else in the region. It was suspected that YTV had abused this position by levying, for its waste haulage, fees substantially higher than those charged for contractually based waste-haulage. As far as the undertaking which filed the request for action was concerned, however, the pricing was corrected when YTV allowed the complainant to continue to organise its waste haulage independently, as owners of commercial or industrial properties do.

III. The role of competition authorities in the formulation of other policies: deregulation initiatives and statements

In 1994, measures taken by the Office of Free Competition for the dismantling of public restraints on competition aimed at the reduction of structural competition-restraining regulations (entry barriers and exclusion from markets), particularly in the food production, transport, insurance, energy and construction sectors. The Office also emphasised the promotion of the introduction of competitive practices in public services and the prevention of the competition-distorting effects of public subsidies.

In 1994, the Office of Free Competition took three initiatives concerning deregulation. In addition, the Office gave various public authorities a total of 41 statements of preventing anti-competitive provisions from being included in regulations. Certain key measures dismantling public restraints on competition are described below.

Reform of the Electricity Market Act

The new Electricity Market Act will enter into force on 1 June 1995. The Electricity Market Centre will be established to supervise enforcement of the Act. The Office of Free Competition participated in the preparation of the Electricity Market Act from the start, and ensured that competition questions were taken into account in enactment of the Act. It was also considered important to avoid inconsistencies and overlaps between the duties of the Office and those of the Electricity Market Centre.

The new Electricity Market Act will open production, distribution and foreign trade of electricity to competition. The law will dismantle the monopoly enjoyed by electricity distribution plants. Major users, regardless of their location, will be able to buy electricity from any producer or distributor. After a two-year transitional period, households will also be able to choose between competing electricity suppliers. Network activity will remain permit-based and the Electricity Market Centre will issue the permits. The owner of the network will be obligated to sell, for a reasonable charge, electricity transmission services to all who need them. It will also be required that pricing of both electricity and transmission services be public and transparent. Further, electricity companies will have to differentiate commercial activity which holds a dominant position from their other activities.

Reform of the Alcohol Act

Completely revised alcohol legislation came into force at the beginning of 1995. The exclusive rights granted by former alcohol legislation were contrary to EU and EEA competition rules and the principle of free movement of goods. The reform abolished the Finnish state-owned alcohol company Alko's import, export and wholesale monopolies. The company's exclusive right to manufacture alcohol beverages was also terminated. Alko's retail sale monopoly, which it retained, was modified so that food shops may now sell cider and other fermented beverages with a maximum alcohol content of 4.7 per cent, in addition to medium-strength beer. The new act also permits retail sale of light so-called farm wines and home-brewed beer, when these are sold by the producer in the immediate vicinity of the place of production.

The new Alcohol Act allows much more room for competition than the government bill did. Contrary to the government's bill, Parliament decided to remove, among other things, Alko's exclusive wholesale and manufacturing rights. In a statement to Parliament's Committee for Social and Health Affairs, the Office of Free Competition found that the preservation of exclusive rights for the manufacture, wholesale and retail trade of alcoholic beverages was problematic from the standpoint of the EEA Agreement. The Office also felt that the bill's strict ban on advertising would impede both the import of alcoholic beverages and sales promotion of domestic alcoholic beverages. Parliament changed the law so that advertising of beverages with a maximum alcohol content of 22 per cent will be permitted, provided that the advertising is not aimed at minors and does not connect the use of alcohol with the driving of a vehicle. Advertising which emphasises alcohol content or depicts immoderate consumption of alcohol in a favourable light will not be permitted either.

Competition-distorting effects of state subsidies

The Office of Free Competition has initiated a project in which the effects of state subsidies on competition will be examined, as part of the Office's efforts to eliminate restrictions and distortions of competition created by public authorities. Evaluation of the amount of state support and its harmonisation with EU regulations is underway in various ministries. The Ministry of Trade and Industry, for example,

is planning a reform of its subsidies to enterprises. It is likely that state subsidies will be limited to the appearance of market disturbances and programs with far-reaching implications, such as investments in technology and the environment.

Part of the special legislation concerning state subsidies and operational directives of authorities granting it, already contain provisions obliging the authorities to minimise the anti-competitive effects of subsidies. In practice, however, decisions on state support to undertakings are taken without any assessment of the effect on competition. The Office of Free Competition has drafted a statement designed to initiate a national debate on subsidies. The statement assesses the subsidies' effects on competition. On the basis of these assessments, it will be possible to develop subsidy systems further so that they take into consideration the effects on competition, as well as the provisions of the competition legislation.

Discrimination of a new fuel-distribution chain

At the request of the Office of Free Competition, the Ministry of the Environment commenced an investigation into discrimination by municipalities against a new fuel-distribution chain, JET. The request for action came from the Finnish subsidiary of Du Pont Jet and Auto Parikka. The problem originated when the municipalities interpreted a statement by the Ministry concerning planning of petrol station lots as calling for needs testing. The City of Vantaa, for example, took a decision according to which the placement of a new petrol station next to an existing station would not be supported. Further, the City of Vantaa had decided to utilise its own land for the siting of unmanned outlets. Therefore, the City of Vantaa had not supported an exemption sought by Auto Parikka for the construction of an unmanned outlet on its own lot. The Office of Free Competition took the view that Vantaa was utilising planning as a barrier to entry and was linking planning to an activity (the sale of lots) in which the municipality itself acts as an undertaking.

The Ministry of the Environment is drafting a new letter to the municipalities. The letter urges the municipalities to reserve a sufficient amount of lots for the location of unmanned outlets as well. The municipalities are also urged to give consideration to the fact that the placement of unmanned outlets does not always generate as many land-use problems as the placement of service stations does. The Ministry of the Environment's letter intends to facilitate entry of new entrepreneurs and business ideas to fuel-distribution.

Sulphur-content regulations for heating oil and diesel oil

In a statement to the Ministry of the Environment on 15 September 1994, the Office of Free Competition took a critical view of the proposal for a Council of State decision which would change regulations on the sulphur content of heating oil and diesel oil. The proposal calls for making the Finnish heating-oil sulphur-content norm stricter than the comparable EU norm. The proposal also calls for applying the European sulphur-content standard in Finland almost two years earlier than in the European Union. The Office of Free Competition considers the planned measure clearly contrary to the non-discrimination principle. The proposed sulphur-content regulations would -- without any justification -- hamper import competition. The procedure will thus artificially strengthen the position which an already-strong Finnish oil refiner has in the liquid-fuels market. Preparation of the matter in the Ministry of the Environment continues.

IV. New studies relevant to competition policy

In 1994 and 1995, the Office of Free Competition published the following two studies:

KUITUNEN, Tero, *Elinkeinotuet ja kilpailuneutraalisuus* (State subsidies and neutrality of competition), 1/95.

PALLARI, Martti, Rinnakaistuiontiin littyvät kilpailunrajoitukset ja vastuukysymykset (Responsibility questions and restraints on competition related to parallel imports), 1/94.

FRANCE*

(1994)

I. Changes to competition laws and policies

In the French economy, state-owned companies with a monopoly are increasingly coming into competition with other companies. This is a result of either their diversification into related markets, or because activities have been withdrawn from the scope of their monopoly as a result of Community directives (e.g. the telecommunications and air transport industries). As a consequence, it has become necessary to predict and, should the need arise, correct any abuses which might be committed by these very large companies, either through the monopoly which they retain over certain activities or major infrastructures, or through the dominant market position which history has conferred on them. For example, they must not use this dominant position to prevent new operators from gaining access to the market.

Accordingly, the Competition Council, in response to a government referral formulated by the General Directorate for Fair Trading, Consumer Affairs and Fraud Control (DGCCRF), issued an opinion on suitable conditions for the diversification of EDF. Although not ruling on the legality of these activities under the legislation setting up EDF, it suggested a series of measures designed to avoid abuses. In particular, it recommended the transfer of these activities to subsidiaries with commercial and accounting autonomy, this complete separation of their financial resources from those of the state-owned monopoly, and the grouping of these subsidiaries in a financial holding company which would enter the capital market subject to the provisions of common law.

Following this opinion, discussions began between EDF, professionals from the relevant sectors and the Ministry of Industry, Post and Telecommunications**,** and Foreign Trade. These discussions were closely monitored so as to ensure strict compliance by the parties with the principles laid down by the Competition Council. These principles are general in scope. They apply to all the competitive activities of state-owned companies with historical monopolies. A letter to this effect was dispatched to all state-owned companies in December 1994 inviting them to comply with the principles.

Incorporation of community directives into French law

In the telecommunications sector, the opening of the market to free competition is scheduled to take place before 1 February 1998. Even at the present time, the degree of openness of the French telecommunications market is being closely monitored abroad, in particular by governmental authorities, with special attention being paid to France Telecom's projects for international alliances and multilateral commercial negotiations.

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* The original language of this report is French.

Progress may appear to be difficult to achieve in certain areas of telecommunications over the short term (e.g. infrastructures and the status of the public operator). Nonetheless, changes have been initiated where possible. In 1994, two reforms were carried out: selection of a new operator for radiotelephony and price liberalisation for certain communications. As a result, in all establishments other than hospitals and businesses (hotels, cafes, restaurants, etc.), prices for telephone communications from facilities provided for the public have been decontrolled as the consumer can now choose to use alternative facilities (such as public call boxes or radio telephones) which creates a competitive situation. At the same time, establishments must inform consumers of their prices. In contrast, a structure has been retained for private facilities in hospitals or businesses in order to protect users, whose freedom of choice is generally restricted.

In addition, following a complaint by the Société Française de Radiotéléphone (SFR), the DGCCRF and the General Directorate for Post and Telecommunications (DGPT) launched a public enquiry on the supply and pricing of specialised leased lines provided by France Telecom. Economic agents were asked questions grouped under three headings: supply of leased lines, in particular concerning the proposal by France Telecom to include in its 1995 price list an offer for very high-capacity leased lines; pricing of leased lines; and pricing regulations (goals and framework).

In the air transport sector, 1994 marked an important stage in the process of liberalisation undertaken by the EC since 1985-1986 in order to ensure compliance with the competition regulations within the single market. The DGCCRF, which is a member of the Superior Council of Commercial Aviation (an advisory body), made its contribution to increased competition with an international call for tenders for the Orly-Marseille and Orly-Toulouse lines. Operation of these two lines by the new competitor companies (Air Liberté, AOM, TAT and Euralair) commenced on 1 January 1995.

On these lines, it became clear that competition can have multiple repercussions. For example, on the Orly-Marseille line, improvements were made in service and flight frequency, reflecting what had occurred on the Orly-Nice line. On the Orly-Toulouse line prices fell, which led to an appeal by Air Liberté to the Competition Council alleging abuse of dominant position by Air Inter. The DGCCRF, which listened to both companies and examined the two defence pleadings submitted for the appeal, together with the General Directorate for Civil Aviation, reminded both competitors of some of the basic operating principles of a competitive market. Despite all this, the air transport industry, putting aside some unique features, does not seem to differ fundamentally from other economic sectors.

Harmonisation of European competition regulations

1994 was notable for continued efforts towards European construction in a rapidly changing European and global context. Globalisation of trade among nations has significant repercussions on the functions attributed to competition policy. In particular, a vital goal is to ensure competitive functioning of globalised markets for European, and more especially, French companies. It is a question of ensuring that the competition rules which have been one of the bases of European economic success over the past 35 years are applied. With this goal in mind, the DGCCRF believes that it is possible to encourage greater convergence between the views and policies on competition of different nations around the world. This is a realistic goal. Within Europe, this is a question of pragmatically implementing subsidiarity. Competition matters must be dealt with by individual member states wherever suitable (including, when necessary, cases involving direct application of Community law, in particular Treaty of Rome Articles 85 and 86). Community authorities must deal with matters involving Community-wide markets which cannot be effectively examined by a national competition authority.

Modifications to regulations

With regard to cartels and exemptions, 1994 was a year of intense regulatory activity for the Commission. French competition authorities sought to participate actively in this process. Regulation No. 3385/94 of 21 December 1994 and the new A/B form were clarified and the procedures were accelerated. The Commission substantially modified the A/B form, which is used as the basis for several hundred notifications of agreements seeking an exemption every year under Article 85 of the EC Treaty (control of cartels). In particular, the DGCCRF stressed the need for an approach which would both inform the public and improve processing delays for dossiers. The new form is clearer and contains more relevant questions, based on both experience and current case law.

The draft regulation on exemptions for car distribution agreements aims to avoid too drastic a departure from the regulation in force up to now. The current Regulation No. 123/85 expired during the summer of 1995. On several occasions in 1994, the DGCCRF undertook to communicate its views on the various proposed changes to the Commission. There is a need to expand the regulation to allow more freedom of competition and achieve a better balance between the economic agents in question. The draft regulation was intended simultaneously to allow manufacturers to ensure continued stocking of their product lines, dealers to retain exclusive relationships with their suppliers, and consumers to encourage more competition while still retaining a guarantee which will be honoured throughout their vehicle manufacturer's entire network.

The draft regulation on exemptions for transfer of technology agreements avoids an approach that would unduly disadvantage large companies. The Commission is considering combining the exemption regulations covering licensing agreements for know-how in a single text because of the many similarities between these agreements. The DGCCRF supported this attempt at simplification, but was opposed to several legal innovations. In particular, it was opposed to those aimed at imposing a presumption of anti-competitiveness on markets with oligopolistic structure.

With regard to mergers, 1994 was marked by the clarification of the regulation's scope with the goal of providing greater transparency and increased efficiency. In its report to the Council of Ministers on the scope of the regulation on mergers of 28 July 1993, the Commission substantially adopted the suggestions of states, including France, in promising to improve existing procedures to increase efficiency and transparency and to provide a more secure legal environment for companies.

To achieve these goals, the Commission submitted several draft laws which were the subject of wide debate throughout the third quarter of 1994. The discussions led to preparation of three explanatory declarations on the legal and technical aspects of the regulation: the concept of merger, the concept of relevant companies and methods for calculating turnover. Further, in order to respond to concerns of professionals and certain member states, including France, the Commission modified its paper on joint ventures which raise merger and co-operation issues. The new text, drawn up in association with member states, represents a major step in clarification. A new enforcement regulation was also drawn up, which eliminates certain ambiguities in the old law. The CO form, which lists the information that companies must furnish when notifying a merger, was also changed so as to better define the information which must be submitted to the Commission and to reduce formal requirements. In response to a concern raised three years ago by France, simplified notifications will be authorised for the creation of joint ventures whose turnover does not exceed 100 million ECU.

Community procedures on mergers

The regulation provides that Community mergers fall under the exclusive jurisdiction of the Commission, and that only the mechanism described in the law may apply. However, national authorities are not excluded from monitoring Community mergers. First, they are involved in the procedure set in motion by the Commission, and in this capacity France takes an active part in Community monitoring. Second, they can be authorised to take measures themselves in certain circumstances. In particular, the regulation provides for a referral procedure of Community operations to member states for application of their national competition legislation. They can also contest rulings of the Commission before the European Court of Justice.

During 1994, companies gave notice of 90 planned Community mergers, which represents an increase of approximately 90 per cent with respect to previous years. This growth is explained in part by the rise in the number of operations involving at least one company incorporated under French law, amounting to 31 cases in all. Together with Germany, France continues to be the member state most affected by the application of the regulation on mergers. The sharp increase in the number of notifications, even in the absence of lower thresholds for Community jurisdiction, shows that the decision taken in 1993, in accordance with the French position, not to lower these thresholds was fully justified.

Numerous planned operations were the subject of detailed investigations within the five-month time period provided for under the regulation when serious concerns are voiced. These led to meetings of the Advisory Committee made up of representatives of Member States with the task of giving its opinion on draft decisions of the Commission.

It should also be noted that, for the first time since the regulation came into force, France requested the referral of a Community operation: the planned acquisition of the French company CEDEST by the Swiss group Holderbank. The Commission ruled that the conditions for referral were satisfied and agreed to transfer the case for scrutiny by national merger authorities. The Minister referred the matter to the Competition Council for an opinion and subsequently authorised the operation on the condition that certain agreed modifications protecting genuine competition in the relevant markets be implemented by the companies. The procedure was completed within the four-month time period provided for in the regulation.

To the extent that this case involved several local ready-mixed concrete markets, and that this was the first example of a member state's national legislation being applied to a referred case, the implementation of the procedure under Article 9 by France showed that the mechanism provided not only function perfectly, but is also appropriate for situations where the interests of competition can only be adequately protected through application of a member country's national law. In this case, despite the Community-wide nature of the operation in legal terms, its effects were limited to French territory within distinct local markets scattered over northern and eastern France. National authorities were clearly the most appropriate monitoring body to judge the impact of the operation, formulate market-by-market modifications and supervise enforcement of undertakings given by the companies.

The DGCCRF played an active role in the exchange of views between Member States and the Commission, particularly on the practical application of traditional analysis criteria in competition matters, such as the concept of entry barriers in the Procter & Gamble/Schikedanz case (feminine hygiene products market). It also contributed to the understanding of more recent issues such as the risk of restricting the development of newly formed markets which can result from alliances between major operators with strong market positions and complementary activities; and the distinction between the markets for the

manufacture and sale of products, and activities for developing technology for these products and the supply of corresponding licences.

The General Directorate also campaigned for decisions taken in merger cases not to be based on undertakings suggested by companies promising a certain course of conduct in the future. Such undertakings imply an ongoing monitoring process to ensure compliance, a process which would be both too difficult and too bureaucratic.

Finally, the DGCCRF took part in various working parties studying problems in defining relevant markets in new and rapidly evolving sectors, such as telecommunications.

Community litigation on cartels

The Commission imposed fines of up to eight per cent of turnover on approximately 20 European cardboard manufacturers found to have established a cartel. Similarly, approximately 40 European cement manufacturers were fined for forming a cartel. In such cases, the DGCCRF verifies that the proposed fines are based on clearly proven breaches, and that their amount is strictly proportional to the duration and seriousness of the breaches attributable to each company.

In the rail and maritime transport sector, an area in which several important decisions have been handed down, the DGCCRF ensured the proper co-ordination of competition policy and the aims of transport policy. This was particularly true of decisions relating to operation of the Channel tunnel. For example, in a decision dated 13 December 1994, the Commission found that the agreement for use of the Channel tunnel entered into by Eurotunnel and the British and French rail companies, British Rail and SNCF, did not fall within the scope of the prohibition against cartels. Under the terms of this agreement, the tunnel's traffic capacity was divided into two equal halves: one-half for operation of the shuttle service reserved for Eurotunnel, and the other half for operation of passenger and goods trains by British Rail and SNCF. The DGCCRF played an active role, together with relevant ministerial departments, in preliminary drafting of this model decision, particularly in emphasising the positive aspects of the arrangement. On the one hand, the Commission accepted the fact that this vital infrastructure represented an extremely large investment which had to be paid off over a long period. On the other hand, 25 per cent of the tunnel's traffic capacity which had originally been assigned to the British and French operators was reserved for third-party rail transport companies who were found to also have a right of access to the tunnel.

II. Enforcement of competition laws and policies

Action against anti-competitive practices

Activity of the Competition Council

1994 marked the eighth year of the Competition Council's operation since it was formed by the Act of 1 December 1986 on freedom of competition and prices. The legislation governing the Council's organisation was not modified this year. The President, Mr. Charles Barbeau, Senior Member of the Conseil d'État, the two vice-presidents, Mr. Pierre Cortesse, Judge of the Cour des Comptes, and Mr. Frédéric Jenny, Professor of Economics, are permanent members of the Council. The 13 other members, magistrates, lawyers, academics, industry, distribution and banking professionals, and one member of a consumer association are temporary appointments. In addition, investigation of Council matters is carried out by 20 permanent reporters under the supervision and control of a Master Reporter.

Overall, the Council was far more active than in previous years with 140 referrals (compared with 127 in 1993), 89 decisions handed down (85 in 1993) and 32 opinions (20 in 1993). The increase in Council activity is mainly due to a rise in litigated cases involving applications for interim measures.

Performance of the Competition Council

One hundred thirteen contested cases were referred to the Council (103 in 1993). Of these, 34 were applications for interim measures (12 in 1993). Table 1 below breaks down the 79 litigated referrals decided on the merits, indicating the origin of the action. The Act of 1986 stipulates that a contested case may be referred to the Competition Council either by the Minister of Economy and Finance or directly by companies, trade associations, chambers of commerce or trade, consumer associations and local authorities, or by the Council itself, on its own initiative. The statistics show that direct referrals were mainly initiated by companies, whereas during previous years there was a balance between these referrals and referrals initiated by the Ministry.

Table 1

Number of referrals in 1994

Minister of Economy and Finance	27
Direct referrals, of which:	51
Companies	45
Trade associations	6
Chambers of commerce	0
Chambers of trade	0
Consumer associations	0
Local authorities	0
Referrals on the Council's own initiative	1

In addition, 27 applications for an opinion were recorded in 1994, of which:

-- nine on general competition issues;

-- five on draft regulations affecting competition issues;

-- three in response to an application from a court of law; and

-- ten on mergers.

In 1994, among the 75 litigated decisions, 35 concerned cases where a formal complaint had been lodged. The Council also handed down decisions non-suiting plaintiffs or dismissals when it decided that the facts did not fall within its jurisdiction or were not supported by convincing evidence and closed cases where the application was withdrawn or stayed judgment.

In 27 cases, the Council imposed fines on 119 companies and 28 trade associations amounting to FF 76 740 000. In fixing the amount of these fines, it took into account the seriousness of the practices

observed, their effect on the market and the role of the operators found to be in breach. These sanctions do not preclude other measures: corrective steps may be ordered, in the form of injunctions served on the firms requiring them to change their behaviour and exemplary measures, such as the order to publish the Council's decision in the press.

Of the 18 decisions rendered in response to requests for interim measures, 15 were rejected, one was withdrawn and filed, two were favourably received and resulted in injunctions pronounced by the Council.

Appeals of Council decisions can be made in the Paris Court of Appeals. In 1994, 22 of 75 decisions were appealed. As of 15 April 1995, the Court had ruled on 13 decisions of which eleven were affirmed in full. One appeal was rejected on a motion for dismissal of the application, and another decision was partially affirmed. Since the establishment of the Council, of 551 litigated decisions, 186 have led to an appeal. Among the 166 judgments handed down by the Court, 109 decisions have been affirmed, and 29 decisions have been affirmed on the merits with amendments made to penalties or injunctions issued by the Council. In total, only 28 decisions have been reversed or amended on the merits by the Court.

The Council also issued 32 opinions (20 in 1993):

-- one on a draft bill regulating prices and requiring a preliminary opinion of the Council;

-- five on draft bills introducing schemes which would restrict competition;

-- five on general competition issues;

-- six in response to applications from courts of law; and

-- 15 in merger cases.

Finally, in tandem with its litigation and consulting activities, the Council continues to develop its relations with EC authorities and international organisations. It also maintains frequent, ongoing contacts with many national competition authorities both in industrialised and developing countries.

Decisions of the Competition Council

Jurisdiction of the Council

Again in 1994, the Competition Council had the occasion to define the scope of its authority in several areas. During the year, the Council had the opportunity to rule on the scope of Article 53 of the Act of 1 December 1986 which provides that the provisions of the Act will apply ". . .to all production, distribution and service activities, including those involving state-owned companies". The Council held that it fell outside the scope of its authority to rule on the practices allegedly carried on by health insurance funds concerning delegation of payment provided for under Article L.322-1 of the Social Security Code. Since this constituted a special approach to managing exemptions from expense advances, the Council decided that social security bodies were in this case carrying out a public service function which did not fall within the field of commercial, economic or speculative activity. Accordingly, it dismissed the referral (decision No. 94-D-04).

In a second case relating to bodies administering social security benefits for students, a firm of insurance brokers complained that it had suffered discrimination in that it had been denied the facilities to sell insurance products in universities which are offered to mutual insurance companies. The Council found that, in refusing access to their premises, the university authorities had not engaged in production, distribution or service activities and that, consequently, the practices complained of did not fall within the scope of the Act (decision No. 94-D-46).

In contrast, in a case on competition in the ski insurance industry, the Council ruled that even though the Minister for Sports had authorised the French Ski Federation to organise sporting competitions, the distribution of insurance products designed to cover the risk of ski accidents did not fall within the scope of this public service mission and did constitute a service activity, falling within the scope of Article 53 of the Act of 1 December 1986 (decision No. 94-D-40).

The Council repeated on several occasions that it did not fall within the scope of its authority to rule on the legality of administrative acts. In a decision on practices noted in the automobile industry, the Council found that it was not competent to judge a policy of quotas implemented by the public authorities even if this limited access to the French market for Japanese and Korean vehicles. This was part of the regulatory policy implemented by the government and precluded any commercial autonomy for the companies.

The Council also reiterated that it did not have authority to hear and judge the conditions in which administrations and public bodies such as EDF, GDF and France Telecom, had made their choices regarding the type of services needed for analysis of land registry data (decision No. 94-D-15).

On several occasions, the Council was given the opportunity to define further its jurisdiction under the various sections of the Act of 1 December 1986. In particular, it examined the provisions covering cartels and abuse of dominant positions interfering with the normal operation of a market (Articles 7 and 8 of the Act), and those covering relations between companies, independent of market transactions (Articles contained under Chapter IV).

Examination of practices brought to light in the electronics sector, the market for distribution of garden supplies and power agriculture tools, and in the portable power tools sector gave the Council an opportunity to reiterate that the terms of sale and price benefits offered by a supplier to its distributors constitute agreements within the scope of Article 7 of the Act of 1 December 1986 as agreements for commercial co-operation (decision No. 94-D-27).

Similarly, the Council confirmed, in the two cases concerning the provision of services in the haircare sector (Jacques Dessange and Jean-Louis David Diffusion), that franchise agreements linking a group of companies with a franchiser could fall within the scope of Article 7 of the Act (decisions Nos. 94-D-06 and 94-D-07). The Council held, however, that when the practices concerned did not prejudice the functioning of the market, the questions involved related solely to the contractual relations between franchiser and franchisee (decision concerning the Avanti company, a franchisee of the Eurodollar group); the dispute therefore concerned tort law and consequently fell outside its jurisdiction (decision No. 94-D-24).

Enforcement of Community law

The Council is authorised, under Article 88 of the Treaty of Rome and Article 9(3) of Regulation 17 of the EC Council of Ministers, to enforce the provisions of Articles 85(1) and 86 of the Treaty.

Further, since the entry into force of the Act of 11 December 1992, supplementing the Act of 1986 with Article 56 bis, referrals may be made to the Council based solely on Articles 85 and 86 of the Treaty.

In 1994, the Council applied Community law in five cases. In the above-mentioned matter relating to the automobile industry, the Council noted that the European Commission had started proceedings under Article 9(3) of Regulation 17, and ruled that as a result it was no longer competent to examine the case under Article 85 of the Treaty. In contrast, the Council affirmed its jurisdiction to examine the alleged practices of certain auto show organisers who had refused to allow several companies to show the vehicles they were marketing. The Council held that these practices could negatively affect trade between Member States as the distributors excluded from the show imported their vehicles into France from other countries of the European Union. Accordingly, the practices were held to be contrary to the provisions of Article 85(1) of the Treaty.

In a case concerning the production and marketing of olive oil, the European Commission was consulted by the Minister of Economy and Finance as to whether the practice of several industry trade associations of fixing the prices for olive pressing was covered by the provisions of Article 2(1) of Regulation No. 26-62 of the EC Council of Ministers. The Commission ruled that none of the criteria had been satisfied, and therefore, the practices did not fall within the scope of the exemption provided under Regulation No. 26-62. They could thus be described as falling within the statutory authority of Article 85(1) of the Treaty, and consequently under Article 7 of the Act of 1986 as well.

The Council also applied the principles contained in Community regulations and case law to determine whether certain clauses included in franchise agreements of the Jean-Louis David Diffusion and Jacques Dessange hair salon chains were anti-competitive in nature. The questionable provision in these contracts concerned exclusive supply of a product to the franchisee. The Council referred to Regulation No. 4087-88 of the Commission which provides an exception to the prohibition contained in Article 85(1) for such contractual provisions where they are necessary to preserve the common identity or reputation of the franchise network, and when it is impossible in practice, because of the nature of the products distributed by the franchise, to apply objective quality standards. In this case, the Council held that these conditions were satisfied, and that as a consequence the practices could benefit from the exception contained in Article 85(3) and thus could be qualified on the basis of Article 7 of the Act of 1986.

The Council applied Article 86 of the Treaty in a case involving the German company Brasseler, a manufacturer of dental instruments. All the companies engaged in mail-order selling had been excluded from the distribution of products manufactured by this company. Further, it was found that this company occupied a dominant position in a significant part of the Common Market. Because trade between Member States appeared to be affected, these practices were held to be contrary not only to Article 8 of the Act of 1986, but also to the provisions of Article 86 of the Treaty (decision No. 94-D-28).

Prohibited agreements

In 1994, the Council handed down 33 decisions on the contents of Article 7(1) of the Act of 1986 which prohibits concerted actions, contracts, express or implicit agreements or collusion whose goal or effect is to hinder, restrain or distort competition within a market. In seven of these decisions, the Council found that the existence of practices violating the Act had not been proved.

Horizontal cartels

The Council had the opportunity to examine horizontal cartels taking on widely varying aspects. For example, these included price or margin agreements between theoretically competing companies, development and circulation of price schedules, price recommendations or price guidelines or discounts by trade associations, exchanges of information or agreements between tenderers for the same call for tenders, market-sharing agreements, concerted practices aimed at excluding certain companies from a market or limiting their access, and general terms of purchase or sale and their enforcement.

i) Agreements and exchanges of information on prices and margins

In 1994, the Council examined 20 cases and handed down ten decisions on this type of practices. With regard to company groupings, the Council reiterated that grouping enterprises under the umbrella of one company or one Economic Interest Grouping (EIG) does not constitute a prohibited practice, unless it is proved that the practices engaged in by the company or by the EIG are intended or liable to distort competition within a market. In one case, eight companies from the construction sector had created an EIG whose aim was to offer to its members the services and material means to facilitate and promote their respective activities. The EIG centralised price estimates and had drafted a price schedule for minor emergency repair work, with each company invoicing its work in its own name, using a standardised form and price schedule. The Council ruled that even though the centralising of estimates contributed to the attainment of the goal set by the EIG without affecting competition, this was not the case for the common prices fixed for repair work, as the EIG itself or one of its members could find itself in a situation where it wanted to make a competing offer. The Council rejected the arguments advanced by the parties that the legislation on price advertising made a common price schedule necessary, and that this guaranteed predictable invoicing for clients.

Similarly, a concerted practice by retail perfume sellers operating in the Asnières district of the Paris region, aimed at defining common ratios for margins to be applied to pre-tax wholesale prices, was found to be subject to the provisions of Article 7 of the Act (decision No. 94-D-36).

Using the same reasoning, the Council ruled that several companies in the Bordeaux region, operating in the moving market for the general public, were exchanging information on the type of services provided and on prices, in order to draw up estimates of profit margins. The Council highlighted that the necessary goal of these practices and their probable effect was to mislead with regard to both the existence and extent of competition. Similarly, in another case concerning the same industrial sector, where sub-contracting had been organised among members of an EIG, the Council found that the circulation of prices applicable to sub-contracted services was anti-competitive where the goal of these prices was to encourage companies to follow a uniform pricing policy (decision No. 94-D-51).

In several cases, the Council ruled that the practice by which trade associations had drawn up and distributed price schedules to their members was in itself likely to distort competition, given that the communication of such information could encourage companies to fix their prices using the distributed schedule as a reference. This was true of several cases involving areas such as the production and marketing of olive oil, road passenger transport in the Upper Rhine Region, and travel arrangements for the Pope's visit to Strasbourg.

Consideration of certain practices in a case concerning the laundry detergent sector allowed the Council to develop a similar line of reasoning regarding the conditions for product listing.

ii) Concerted practices or agreements concerning public or private calls for tenders

In 1994, as in previous years, the Council had the occasion to examine cases in which companies had distorted competition in markets created by calls for tenders. The Council handed down six rulings in this area. For example, in a case on practices noted during the award of contracts offered by the Landes Département for the supply and transport of gravel needed for the construction of roadbeds and surfaces carried out on the département's road network, the Council found that consultation, traditionally carried out in the form of negotiated contracts, had given rise to calls for tenders in response to which eight firms had tendered an offer containing either identical unit prices, or identical surcharge rates and identical prices for weighing, transport and unloading. Two managers of firms also admitted that a meeting bringing together local carriers had taken place before submission of the tenders, during which the prices to be submitted for this call for tenders had been fixed. The Council ruled against this concerted practice which had precluded any competition for the award of this contract. It rejected the argument of the tendering firms, which submitted that they had followed an established custom approved by the administration in previous tenders where they had adopted the adjusted price indexes published in the Moniteur des Travaux Publics (Public Works Journal), and held that all the firms in question had, through a concerted practice, failed to fix their prices in an autonomous fashion (decision No. 94-D-12).

iii) Market-sharing

Travel arrangements for the Pope's visit to Alsace (in 1988) gave rise to market-sharing. In the Haut-Rhin Département, the Trade Federation of Road-Transport Companies took charge of all arrangements for travel between the districts surrounding Mulhouse to the Ill stadium, where the religious service was to take place. It centralised all orders, fixed the prices for services, received payments and chartered the necessary vehicles from transport companies. The actions of this trade association, which overstepped the legal bounds of its duty to protect the professional interests of its members, had both the aim and effect of sharing the demand created by these groups of religious pilgrims between a number of transport companies. This prevented other potentially more competitive operators from entering this market. Accordingly, the Council ruled that the practice violated the provisions of Article 7 of the Act (decision No. 94-D-42).

iv) Barriers to market entry

In addition to practices in which companies jointly fix their price and production volume strategies, disregarding as a result the requirement of autonomous decision-making within a competitive market, several cases examined by the Council in 1994 involved concerted practices intended or liable to restrict market access. In a case concerning the automobile industry, the Council ruled against exclusionary practices, which consisted of barring access to the Orléans Car Show, organised in 1986 by the Foires et Salon d'Orléans association, to a distributor of Daihatsu and Suzuki vehicles. The Council noted that participation in a professional trade show allows an automobile importer or dealer to meet potential customers and that practices excluding certain distributors of Japanese brand names from these events were anti-competitive in purpose and effect. Accordingly, they were prohibited under competition law on both the national and Community levels. The Council rejected all arguments presented by the trade associations and car show organisers, based in particular on their duty to supervise and regulate trade fairs and shows, and to fully inform consumers who might have been misled by the presence of registered vehicles in an exhibition containing only new vehicles. On the second point, the Council referred to a judgment of the European Court of Justice in which the Court ruled that parallel vehicle imports should enjoy some protection to encourage development of trade and strengthen competition and that, as a result,

an advertisement could present a vehicle as new when the only reason it had been registered was for import requirements (decision No. 94-D-05).

In its decision on practices implemented in the advertising sector for pharmacies, the Council ruled against exclusionary practices. Beginning in 1989, several companies developed a new videographic advertising technique consisting of installation of videographic equipment in pharmacy dispensaries displaying advertising messages controlled from a central server. At the end of 1990, the President of the Pharmacist's Union of the Paris Region (UPRP) circulated a warning against the activities of these companies to all pharmacists. At the same time, the departmental unions belonging to the UPRP and the Ile de France Pharmacists' Federation banded together to support the UPRP's efforts to control the development of videographic advertising in dispensaries. The Council found that the legal arrangement under which partial business transfers were made to two companies specifically responsible for managing all advertising agency contracts and placed under the control of these trade associations, was aimed at excluding from the market those companies which had introduced this new form of advertising in dispensaries (decision No. 94-D-34).

Vertical cartels

The provisions of Article 7 of the Act of 1 December 1986 prohibiting cartels intended or liable to distort competition are applicable not only to concerted actions by potential competitors, but also to relationships which can exist between economic agents operating at different points along the production and marketing chain. This includes agreements linking a producer and its distributors. On several occasions in 1994, the Council examined clauses contained in terms of sale or commercial co-operation contracts, an exclusive distribution agreement, licensing and co-operation contracts and franchise agreements.

In a case involving contracts governing relations between Electrolux Motoculture and its distributors concerning the marketing of garden supplies under the Huqsvarna brand name and power agriculture tools under the Staub brand name, the Council restated the legality requirements for selective or exclusive distribution arrangements. It held that such arrangements comply with the provisions of Article 7 of the Act provided the selection criteria are objective in nature, are justified by the need for adequate distribution of the products in question, are neither intended nor liable to exclude one or more of the established distribution methods, are not applied in a discriminatory fashion and do not limit the commercial freedom of retailers. In this case, the Council held that the clauses did constitute a restraint on the commercial freedom of the retailers and were designed to bring about an artificial sharing of the market because they prohibited retailers from selling the products outside the zone of influence granted to them. Accordingly, it held that the clauses violated the provisions of Article 7 due to their aim and potential anti-competitive effect.

In another case, the Council examined the general terms of sale of a manufacturer of retail electronic goods and how they were applied in practice (Hitachi). The Council noted that clauses in general terms of sale or commercial co-operation agreements are prohibited under the provisions of Article 7 of the Act of 1 December 1986, if they are not clearly and objectively defined, and if price reductions are granted to certain distributors in the absence of objectively defined conditions and without any real return provided by the beneficiary or beneficiaries. In this case, the Council noted that Hitachi had agreed to depart from the clauses on several occasions. It further noted that the same company had signed additional commercial co-operation agreements with certain distributors granting them additional rebates, while at the same time the written undertakings signed by them did not go beyond those contained in the terms of sale to which they were already signatories. Noting the discriminatory effect of the application of the

terms of sale, the Council considered that they were liable to distort competition within the market for the distribution of retail electronic goods and ruled against Hitachi's practices (decision No. 94-D-33).

In a case on practices found in the portable power tool sector, the Council considered various clauses of commercial co-operation contracts and how they were applied in practice. Portable power tools are sold principally in large supermarkets. The three largest manufacturers have entered into commercial co-operation contracts with distributors. The investigation showed that in several clauses in these contracts, the granting of planned rebates was dependent on various conditions directly or indirectly limiting the distributors' commercial freedom. The Council found that the aim and possible effect of these clauses was anti-competitive and, as a result, the clauses in question were prohibited under the provisions of Article 7 of the Act of 1 December 1986. The Council ruled that the Metabo company could not justify imposing a minimum rate of margins against repayment in demonstration services. Accordingly, it ruled against the use of such clauses, not only by the supplier, but by distributors who had tacitly or even expressly accepted the practice (decision No. 94-D-55).

The Council also had occasion to rule against similar practices in a decision dealing with practices uncovered in the laundry detergent industry. The commercial agreements in force between laundry detergent suppliers and their distributors were ruled to be in violation where they distorted competition among the distributors either by restricting their commercial freedom or by granting certain of them discriminatory terms. The Council noted that in 1989 and 1990, Henkel France had fixed a minimum consumer resale price, called a "threshold price", which appeared to have been negotiated with certain purchasing groups. Compliance with the threshold price by each shop was monitored. The company submitted that the price corresponded to the legal threshold of reselling at a loss and did not constitute a fixed price. The Council ruled that it was the distributor's task to determine their consumer retail prices and that, as a result, even though Henkel believed that its products were being resold at a loss, which was not proven, it should use appropriate legal avenues to put an end to such practices, without being able to justify its adoption of anti-competitive behaviour (decision No. 94-D-60).

In contrast, the Council found that price-fixing by Procter & Gamble and Scapnor, the regional purchasing group of the Leclerc group, was not anti-competitive, as there was no evidence showing that these prices had been jointly fixed by the two companies.

This case also gave the Council an opportunity to consider the status of "listing" agreements concluded between distributors and their suppliers. The "commercial agreements" signed between Galec (a purchasing group of the distributor Leclerc) and the laundry detergent manufacturers Procter & Gamble, Lever, Henkel France and Colgate-Palmolive provided for payment of a benefit to this product listing group, nominally towards "advertising contributions" calculated as a percentage of turnover generated with these suppliers by each of Galec's member companies. The benefit, under the terms of the agreements, was to remain confidential. The Council ruled against this practice, stressing that its confidential nature prevented members of the listing group from reflecting in their sale prices what was in fact a disguised additional rebate. At the same time, this allowed suppliers to withstand competition for these products by granting benefits which were not translated into lower retail prices. The practice was thus liable to distort competition within the market for laundry detergent and was prohibited under the provisions of Article 7 of the Act. As a result, the Council did not accept the arguments put forward by Galec and the four laundry detergent suppliers that this benefit constituted payment for a real service tied to the listing of the products by Galec. In fact, from an accounting point of view, this benefit was listed as a price reduction and not as provision of services.

The Council used a similar reasoning process in ruling against the conditions for application of an agreement concluded between Henkel and ITM France (Intermarché) providing for, in addition to

payment of a 1.05 per cent rebate for maintaining 14 listings in all points of sale throughout 1991, an additional rebate of 0.60 per cent if turnover with this group reached FF 260 million. Although this turnover target was not reached, the turnover rebate was paid by Henkel. The Council held that this benefit, which went beyond the turnover rebate provided for in the terms of sale, could not be justified solely by the fact that the Intermarché group was one of Henkel's two largest clients.

Finally, the Council examined the financing of an advertising publication, "L'Argus de la distribution", circulated by the ITM company. Forty per cent of the financing for this document was supplied by laundry detergent manufacturers, even though their share in this distributor's turnover did not exceed two per cent. The Council held that this practice was not anti-competitive. The fact that the laundry detergent manufacturers were guaranteed that their products would appear in this advertising document with a print run of 12 million copies represented a major advantage in addition to the effect of the advertising, as they were guaranteed that their products would be physically present on the shelf line-ups of this distributor. The Council ruled that their financial contributions corresponded to payment for a real service. Further, it had not been proved that the laundry detergent suppliers had fixed the laundry detergent prices appearing in the Argus in concert with ITM or that they might have derived any benefit from this advantage, even if the prices had not been fixed. The Council came to the same conclusion in examining the practice under the provisions of Article 8(2) of the Act.

In addition to agreements between producers and their distributors, the Council examined vertical cartels between operators located at different stages of the marketing and production chain. For example, in a case dealing with practices noted in the flat glass industry, Saint-Gobain Vitrage entered into licencing agreements with its manufacturers accompanied by "co-operation" contracts, relating to the manufacture and distribution of double-glazed panels. Under these licencing and co-operation contracts, Saint-Gobain Vitrage transferred the know-how and rights to market products under certain trademarks, provided that the licensees obtain their supplies exclusively from Saint-Gobain or from other companies which it might designate. The Council ruled that these exclusive supply provisions were potentially anti-competitive as they limited the possibility for the manufacturers of glass products to obtain supplies from a competitor, that they were not based on sound technical or commercial grounds, and that Saint-Gobain could have introduced production standards for which it could have ensured compliance (decision No. 94-D-11).

Dominant positions, situations of economic dependency and anti-competitive abuses

Several cases concerned the enforcement of Article 8(1) of the Act of 1986, which prohibits abuse of dominant positions, and the enforcement of Article 8(2), prohibiting abuses of economic dependency.

Dominant positions

The first step in applying Article 8(1) of the Act is to define the relevant market. On this subject, the Council considers products or services to be interchangeable, and consequently contained within the same market, if it is reasonable to believe that potential buyers regard them as suitable to satisfy the same demand. The next step is to assess the market position of the company or group of companies whose practices are being impugned. Finally, in a case where dominant position is established, the practices are examined to determine if they are abusive and anti-competitive in nature. Several cases contain illustrations of this analytical approach.

In a case on practices of the Office d'Annonces (ODA) (Advertising Bureau), the Council, noting the lack of interchangeability between the telephone directories of France Telecom and other advertising media, defined as the relevant market the market for advertising space in these phone directories, rejecting the alternative of considering the entire advertising market. On the facts before it, the Council noted that demand in this market originated from advertising agencies and not advertisers, and that private advertising agencies constituted only a very minor part of global demand for advertising space in the official France Telecom directories, as national advertisers used the services of a specialised subsidiary of ODA to purchase advertising space in them. The Council, noting that the official directories remain a vital tool because of the specific services that they offer to telephone subscribers and the public nature of the publishing company, also rejected the argument that the various directories which had come onto the market since 1990 were in competition with those of France Telecom.

On the question of whether ODA, the exclusive manager of advertising in France Telecom's directories, occupied a dominant position, the Council noted that ODA held a monopoly on the marketing of advertising space in the directories and that as an obvious consequence this organisation did occupy a dominant position.

During the third stage of the analysis, the Council took notice of several exclusionary practices by the company. First, it noted that ODA had discredited certain agencies with which it was in competition with advertisers by making these advertisers believe that the agencies were not authorised to accept advertisements for France Telecom's directories. Further, ODA circulated a newsletter on an individual basis to local advertisers contacted by an agency informing them that orders for advertising insets transmitted through this agency would not be honoured. The system for placing orders set up by ODA also contributed to the disruption of new agencies specialising in advertising insets. These agencies were forced to place all of their orders through a specially designated sales agent. Similarly, ODA refused to provide them with pricing information. Further, on the issue of pricing, the Council noted the new structure for agency commissions, which provided for cancellation of all payments when sales with ODA dropped by 30 per cent in relation to the previous year, and held that this constituted an abuse of ODA's dominant position. The Council also applied the same analytical method to the policy of guarantees adopted by ODA towards agencies, and found that it contained requirements which were disproportionate to the financial risks being assumed. In particular, it pointed to signature of a power of attorney by the advertiser, which was liable to discourage advertisers from using the services of these agencies (decision No. 94-D-21).

In a case on practices noted in the coin-operated amusement machine industry, the Council, pointing to the interchangeability of the various machines, ruled that a pinball machine market existed (independently of the recreational games market). First, it noted that within the field of automatic games, "juke-boxes" corresponded to a specific demand for music and cost twice as much as the average price of a pinball machine. Further, billiards and table football are multiple player games with simple mechanics and prices half as low as pinball machines. Finally, pinball and video games are based on completely different techniques, with video games being subject to special regulations. Nonetheless, cafe operators attribute specific advantages to pinball machines, a fact which is confirmed by the proportion of these games in the total pool of installed machines -- i.e. double the number of video games.

On the question of whether P.S.D. occupied a dominant position in the pinball machine market, the Council examined the market share held by the company, which represented between 56.9 per cent and 68.7 per cent of sales realised during the given period. In addition, the Council took particular note that the brand names marketed by this company were amongst the most well-known to both operators and players. These machines were also recognised as being amongst the best for profitability and sales according to various specialised reviews.

Turning to the question of the legality of the company's practices, the Council found that the terms of sale implemented by P.S.D. amongst independent distributors were intended and liable to eliminate all competition within the pinball machine market. For example, P.S.D. had granted preferential rebates to a group, with no real justification. It had also unilaterally lowered the percentage rebate granted to independent retailers from 15.5 per cent to five per cent, a drop which made profitable marketing of certain machines, for which P.S.D. is the sole French importer, impossible (decision No. 94-D-22).

In a decision handed down on a referral from the Distribution Logistique Dentaire et Médicale company, the Council examined the question of whether the type of materials with which dental tools are manufactured gave rise to distinct markets. In particular, the Council considered whether diamond-tipped rotary instruments were interchangeable with all other rotary instruments used in dental care. The Council found that even though practitioners used tungsten, carbide or diamond-tipped rotary instruments, diamond-tipped instruments were the only ones that could be used for peripheral coronal preparation of the tooth and for work on tooth enamel. For these tasks, there were no substitutes for diamond-tipped tools, which constituted the relevant market as a consequence. The Paris Court of Appeals affirmed this analysis (decision No. 94-D-28).

On this basis, several points were noted by the Council in considering whether the Brasseler company, a manufacturer of dental instruments under the brand name Komet, and its exclusive distributor in France, occupied a dominant position within the diamond-tipped rotary instruments market. First, it noted that instruments of this brand name represented more than half the value of products of this type sold on the market. Second, the structure of competing suppliers was fragmented, with seven other distributors sharing the rest of the market, the largest of which had a turnover half as large as Brasseler. Finally, instruments under the Komet brand name enjoyed a good reputation and were the subject of a special presentation in the most comprehensive instrument catalogue of the market, circulated throughout the entire country.

The exclusive distributor, occupying a dominant position in France, had halted all commercial sales with mail-order companies on orders from the German parent company. This exclusionary practice was justified on the grounds that Komet instruments were so technically complex that they could only be sold through specialised retailers who directly provided information about the product. The Council ruled that this practice of excluding a sales method was likely to restrain competition, and was not justified by the concern of providing adequate information to customers when it had not been proved that mail-order companies were incapable of providing such information.

In a decision handed down on a referral by Sobea, the Council ruled, first, that cement could not be considered an interchangeable product with ready-mixed concrete, with ready-mixed concrete being a product whose strength and water-resistance made it appropriate for specific uses. Second, the issue arose of the geographic limits of the market, which would allow the Council to examine whether purchasers were able to choose between different products and services. Given the weight of ready-mixed concrete, the need for quick delivery and the high proportion of transport costs in the total cost of the product delivered on site, the Council found that the companies in question were able to choose between competitors in a zone extending in a 25 km circular radius around the city of Albi.

Within this market, which was limited to the geographic zone surrounding Albi, Béton de France was responsible for 64 per cent of sales. Further, it operated 175 plants scattered around the entire country and had major financial support because of its membership in the British group RMC. Finally, it had easy access to supplies from a quarry belonging to the same group. The Council concluded that Béton de France did occupy a dominant position.

The Council took this occasion to reiterate the conditions in which pricing strategies implemented by a producer in a dominant position can be abusive and liable to restrain competition within a market. It stated that a producer, confronted with a policy of lower prices by a new competitor in the market, abuses its dominant position if it sells its products at prices lower than variable average costs. In this case, the producer registers a loss with every unit sold, which can only be consistent with its interests if it knows that such prices will allow it to eliminate competition and that the accumulated losses will be compensated by profits that it will be able to generate once its dominant position has been re-established. The Council went on to say that, in the same conditions, setting prices lower than total average costs, but above variable average costs, could also be considered an abuse of dominant position if it was intended or liable to prevent a new competitor from remaining in the market. On the facts before it, the Council noted that the prices fixed by Béton de France had never fallen below variable average costs, and that in fact they could be explained as a response to price reductions by its competitors. The Council also noted that the competitor company which had filed the complaint had itself captured a major share of the market. The claim for predatory pricing was rejected (decision No. 94-D-30).

Situations of economic dependency

Under the provisions of Article 8(2) of the Act, a company is economically dependent on a supplier or client when it has no other equivalent solution. The Council dealt with a single case involving a situation of economic dependency with respect to a purchaser. In the laundry detergent case mentioned above, the agreements under which laundry detergent manufacturers agreed to finance "L'Argus de la distribution", an advertising document circulated by the Intermarché group, were challenged. The Council noted that a situation of economic dependency with respect to a distributor should be analysed using several criteria: the proportion of the supplier's total turnover generated with the distributor, the distributor's importance in the marketing of the products in question, the factors which led to the merger of the supplier's sales through the distributor, and, finally, the existence and diversity of possible alternative solutions for the supplier. The Council went ahead to apply these criteria and found that there was not a situation of economic dependency. It further found that laundry detergent production is highly concentrated, that these brand names had a very good reputation, and that the product is to a great extent sold in advance, which explains why distributors seek to have a wide range and sell at low or even non-existent margins. These findings were corroborated by the fact that the company which had filed the complaint had cancelled its sales to Intermarché without this cancellation significantly affecting their overall sales figures (decision No. 94-D-60).

Opinions of the Competition Council

Opinions on merger operations

During 1994, 15 opinions were issued under the provisions of Chapter V of the Act. This represents a major increase in the Council's activity in merger operations. The first step in the Council's analysis of a merger operation is to verify that the operation is subject to controls. The second step is examining whether the operation affects fair competition. If this is the case, the Council goes on to determine whether the contribution made to economic progress is sufficient to offset the restriction on competition. Most of the operations examined by the Council throughout the year involved the acquisition of the majority or all of the equity of one company by another, which clearly made them mergers under the definition contained in Article 39 of the Act. However, other situations arose which allowed the Council to further define the operations which it considers subject to controls.

In a case dealing with the acquisition by Financière Générale de Restauration of the Elior company, the Council noted that subscribing for shares in a capital increase does not constitute in itself a transfer of title or rights of possession to all or part of a company's assets, rights and obligations. The Council seized on several facts which it used to characterise the operation in question. First, the shareholders of Elior, the Compagnie Générale des Eaux and the companies in the Ravaud group, had decided to increase the capital of the company, waiving some of their preferential subscription rights in favour of a private investment by Financière Générale de Restauration, one of Elior's competitors. As a result, Compagnie Générale des Eaux became the dominant shareholder in both Elior and Financière Générale de Restauration by virtue of its direct and indirect shareholdings, allowing it to control both companies. Finally, it had decided to reorganise certain supply and information management functions under two economic interest groupings (EIG). Consequently, the operation referred to the Council for consideration did constitute a merger as defined under Article 39.

On the issue of defining the relevant market, the parties proposed the entire institutional food services industry, whether self-managed or franchised, maintaining that the same services were provided to the same users in both cases with identical pricing structures for meals. The Council, having examined the position of the companies on the market or a substantial part thereof, restricted the relevant market to franchised institutional food services only, defining this as services offered to institutions wishing to have food services provided by a third party, but excluding in-house services. It declined to differentiate between franchised institutional food services on the basis of the target public, whether school children, employees or patients in a health care establishment.

In measuring the restraint on competition within the market for the supply of public catering to companies, the Council noted that the merger operation did not place suppliers in a position of dependency on the companies in question. Even if these companies were to collaborate in listing their suppliers, none of the suppliers generated more than ten per cent of their total sales with these companies. Second, in the franchised institutional food services market, which involved major and sometimes complex investments, competition seemed to have been sustained through the existence of several competitor companies, which accounted for approximately 40 per cent of available contracts. Furthermore, in contracts involving only the provision of meals, competition also appeared not to have been affected because of four other large firms which had captured a large number of these contracts. Finally, the Council considered the risk of restraint on competition stemming from the fact that the Compagnie Générale des Eaux, in becoming the major shareholder of Elior and Financière Générale de Restauration, had become the largest group specialised in providing services to local authorities, which could encourage local authorities to use the same group for all required services. The Council noted that the financial links between these companies had pre-dated the operation under review, and that as a result the current operation could not be the cause of the alleged risk to competition. In the circumstances, the Council found that the risks of restraint on competition were so low as to justify granting an authorisation without any attached conditions (opinion No. 94-A-16).

In an opinion on the creation of a joint subsidiary, Euroxye, by the Metaleurop group and Heubach & Lindgens in the lead oxides industry, the Council ruled that the resulting joint subsidiary was indeed a means of effecting a merger. It noted that the two parent companies had conceded a part of their assets, rights and obligations to the new company. It ruled that the operation was subject to controls as the two companies together made up 91.1 per cent of sales within the market and thus clearly exceeded the threshold requirements (25 per cent).

The survey of competition carried out during the examination of this merger led the Council to the conclusion that the operation in question did contain risks of affecting competition. In fact, the joint subsidiary eliminated competition between the two largest operators in the market, and 90 per cent of sales

within this market would in the future be generated by a single firm, which had no other significant competitors. Nevertheless, the Council ruled that during a period of falling demand, the operation would make a transfer of production possible to more profitable and efficient installations whose capacity was not saturated. In addition, this would enable the introduction of less polluting production techniques. The Council stressed that the fight against pollution was liable to enhance the competitiveness of Metaleurop and Heubach & Lindgen within the European market. Consequently, the Council found that even though the contributions to the companies' economic progress and competitiveness were limited, they were sufficient to compensate the risks of restraint on competition (opinion No. 94-A-18).

In a case involving Leybold and Oerlikon Bührle, an analysis of the markets in question, i.e. vacuum measurement instruments and thin film deposition equipment for electronic products, revealed that the market share of the group resulting from the merger would equal 35 per cent and 75 per cent in the respective markets.

With regard to the market for vacuum measurement instruments, the Council noted that the group resulting from the merger would not occupy a dominant position and would remain subject to competition from other suppliers. In contrast, the risk of restricting competition was undeniable in the market for thin film deposition equipment. A supplier was disappearing from the market, and only one other large company appeared to be able to compete with the group resulting from the merger within a market with very high technological barriers to entry, a result of industry patent policies. However, the Council found that these risks were limited, because of the negotiating power of the main industrial purchasers, and because of the existence of major international firms highly capable of both innovation and penetration of new markets, especially in France. Finally, the Council found that the operation would allow rationalisation of distribution for thin film deposition equipment and increase research and development work, which would improve the new group's international competitiveness. In its opinion, the Council found that the restraint on competition possibly generated by this operation was compensated by the contribution to economic progress and improvement of the group's international competitiveness (opinion No. 94-A-23).

In a case concerning the acquisition of Picard Surgelés by Carrefour, the Council began its definition of the relevant market by noting that the parties did not operate in the public catering market, but only in the markets for supply of deep frozen products to distributors and retail distribution of the same products. In this second market, the issue arose of its possible sub-division into three markets: distribution of deep frozen products to supermarkets; retail sales through specialised stores; and door-to-door sales. For the first of these markets, the Council found that the range of deep frozen products stocked by these stores comprises essentially everyday products, within a moderate price range and sold using techniques offering few services to the public. In contrast, specialised distribution offers a very wide range of deep frozen products, including comprehensive service. Consequently, supermarkets do not operate on the same market as specialised distributors for these products.

The final issue was to consider whether door-to-door sales of these products could be considered as a distinct market. The Council found that even though these two forms of distribution, through "freezer centres" and door-to-door, had historically developed in geographically distinct areas, they tended to overlap, especially in the Paris suburbs and other rural centres. Further, these two forms of distribution possessed the same "specialist" image in the minds of consumers, and offered a similar range of products to their clienteles at similar prices. Finally, the Council noted that it was increasingly common for "freezer centres" to offer home delivery services. Given all these facts, the Council found that in the current state of development of this sector, distribution through specialised stores and door-to-door sales of deep frozen products constituted a single market.

In ascertaining whether the absolute threshold value of FF two billion fixed by Article 38 of the Act had been reached, the Council found that Picard Surgelés had generated a turnover of FF 1.635 billion, and that as a result the operation was not subject to controls (opinion No. 94-A-30).

In an opinion on the takeover of Epeda and Merinos, which operated in the mattress and bedspring markets, the Council found that even though a supplier was disappearing from the markets in question, the operation in itself did not appear to be liable to affect their normal functioning. While it was true that the new group was strengthening its position in these markets, two other companies, Sumitomo and Recticel, also commanded large market shares, up to 22 per cent and 24 per cent respectively, and were backed by large financial groups as were other less important competitors, Cauval Industries and Pirelli. Further, the parties involved in the merger already possessed major buying power, so that the pooling of their purchases was not liable to influence competition between suppliers operating in upstream markets. Such was also the case with regard to supermarket distribution and other distribution channels: the operation was not liable to change the power relationship already in place. Under these conditions, the Council found that there were no grounds to consider whether there was any contribution to economic progress as the operation posed no risk to competition (opinion No. 94-A-04).

In the acquisition of Sucrerie-Raffinerie de Châlon sur Saône by Union Financière Sucrière du Sud-Est, the Council noted that competition in sugar markets was limited because of a Community regulation limiting the possibilities for expansion of each supplier and allowing sale of only the proportion of production fixed by quotas. In this market, the operation involved a company which represented 1.65 per cent of national production, whose operations were limited to a certain geographical area, and whose prospects for future development appeared practically non-existent. The Council also noted that even though the Eurosucre group, to which Ufisuse belonged, represented nearly 50 per cent of beet sugar sales on the French market, its three nearest competitors only represented 28.5 per cent, 7.95 per cent and 6.77 per cent of national production. Further, the clientele of the Châlon sugar mill for domestic sugar was limited and composed mainly of supermarkets. For industrial sugar, the company's clientele was also limited, with clients also obtaining supplies from other sugar mills. In light of all these facts, the Council found that the operation did not represent any risk to competition and that therefore there were no grounds to examine possible contributions to economic progress (opinion No. 94-A-11).

On a referral to consider the acquisition of Excel by the Vandemoortele group in the margarine market, the Council noted that the group was as a result the leading supplier to industry and self-employed workmen. However, the Council also noted that the group resulting from the merger was in competition with Astra, a company supported by the Unilever group and very active in sectors neighbouring that of professional margarine, and was also facing a strong flow of imports, particularly from other EU countries. Further, it was noted that a proportion of margarine sales to self-employed workmen was in competition with sales of butter and that a number of major companies had the means to start up their own production of margarine. In these circumstances, the Council found that margarine suppliers could not implement an uncompetitive pricing policy without risking the loss of customers, and therefore that the risks of limiting competition were so low as to merit authorisation of the operation without attachment of any special conditions (opinion No. 94-A-17).

In a case concerning the acquisition of Cedest by Holdercim in the ready-mixed concrete market, Holdercim had notified the European Commission of its planned acquisition of the French company Cedest. The French authorities responded by requesting implementation of the referral procedure contained in Article 9 of Regulation No. 4064/89 of the EC Council of Ministers alleging that the result of the operation would be to "significantly affect competition within an internal market of a member state displaying all the characteristics of a distinct market". Under its decision of 6 July 1994, the Commission referred this planned acquisition to the French authorities. It was subsequently referred to the Competition

Council for opinion. In its analysis, the Council noted that each of the parties owned one or more concrete plants, and that 15 local markets were affected by the operation. However, it found that the threshold market share of 25 per cent was satisfied in 13 of these cases.

The Holdercim company gave an undertaking, because of the likely effects of the operation on competition, to dispose of a certain number of concrete plants in several markets so as to maintain adequate conditions for competition. The Council considered several facts in examining the real state of competition in the markets in question. It took into account the projected market share that the new group would possess in each of the markets, but also the characteristics of competitor concrete plants: whether they belonged to an integrated cement group or were the property of independent manufacturers. Further, even though Holdercim submitted that there were no structural obstacles preventing access to the ready-mixed concrete market, and that purchasers always had the option of manufacturing their own concrete, the Council found that self-production was not always technically feasible nor economically profitable, and furthermore that proportional demand for ready-mixed concrete was constantly growing. In addition, it noted that concentrating supply in certain markets risked throwing the continued existence of independent manufacturers into doubt or discouraging new competitors from entering the market. Given these facts, the Council found that the operation should be made conditional on the sale of certain Holdercim assets in order to lower its market share to less than 50 per cent in several geographically defined markets. The Council added that these sales were not to create a duopoly, or be used to strengthen the position of subsidiaries of the cement groups operating in a certain number of these markets (opinion No. 94-A-24).

One final notable case involved the acquisition of the radio stations Fun Radio and M 40 by Compagnie Luxembourgeoise de Télédiffusion (C.L.T.). C.L.T. operates nine television programmes and 13 radio stations in Europe, which places it among industry leaders. In two successive transactions, C.L.T. first acquired 89.5 per cent of the equity of Finvest, which itself holds all of the equity of S.E.R.C., which produces and operates the Fun Radio radio station, and second 91.49 per cent of the equity of Sodera, which owns the M 40 radio station. The Council defined the relevant market as the market for radio advertising time, in which the purchaser company held a share of more than 25 per cent. The Council found that the takeover of the Fun Radio and M 40 stations by C.L.T. would allow C.L.T. to establish discounts on simultaneous advertising time and its related conditions, and that this must be taken into account in considering the effects of the operation. It found that this discount did not have the same effect as a simple price reduction by one of the two stations, and in fact represented a clear advantage for advertisers who agreed to purchase space simultaneously on two or more media. The Council found that this constituted a major advantage in competition with other small music radio stations, a fact made all the more significant by C.L.T.'s leading position in the industry.

The continued operation of the M 40 station, and particularly its impact on employment, was found not to constitute a sufficient argument to justify the operation. The Council pointed out that any contribution to economic progress must benefit the entire community, and not merely the companies involved in the operation. In addition, it was not proved that the expansion of the company being acquired could not have been achieved without this operation, nor that it would not negatively affect employment at other radio stations following the merger. The absolute need for C.L.T. to expand internationally through the merger was not proved either, especially as it is already well established in France. As a result, the Council found that there were grounds to make the operation conditional on C.L.T. and its subsidiaries refusing to allow their advertising agencies to offer discounts on purchases of simultaneous advertising time on the RTL, Fun Radio and M 40 stations.

The Minister of Economy and Finance did not follow the Council's reasoning and conclusions. The Minister found that even though C.L.T. was the leader in the radio advertising time market, it was not

immune to competition. In fact, its competitors had also introduced simultaneous advertising time, and advertisers did not make decisions based solely on price considerations. Since it had not been shown that competition was affected, the Minister decided that there were no grounds to prohibit the merger. However, it was added that this decision did not constitute approval of simultaneous advertising practices.

Other opinions of the Council

Among other opinions issued by the Council on cases not involving mergers, one was in response to a referral from the Minister of Economy and Finance on the legal validity under competition regulations of the diversification operations undertaken by Electricité de France (EDF) and Gaz de France (GDF). Diversification, meaning projects aimed at developing activities other than those granted under legislation, has been underway in these two enterprises for the last ten years. The competition issues raised by diversification vary depending on the market in question and the amount of existing competition. In place of a market-by-market analysis, the Council laid down some general principles for analysing this diversification process and defining the conditions to be respected by the two state-owned companies to maintain competition.

First, the Council noted that the captive markets created by the legal monopolies granted to these state-owned companies and the public service which they provide gave them access to unusual resources when developing other activities. It emphasised that their special status gave them privileged access to financing, easy access to consumers because of networks covering the entire country and a reputation of service to the public, all of which constituted undeniable advantages when entering markets not covered by the legal monopoly.

In addition, internal transfers between companies of the same group, in various forms, could lead to the grant of cross-subsidies, which would permanently distort apparent costs and encourage companies to fix prices not based on economic considerations. In the cases of these two companies, whose operations generate turnovers and margins far in excess of their subsidiaries, such practices could lead to the artificial introduction, support or development of publicly funded companies in certain markets able to offer consistently lower prices than their competitors. If this diversification takes place in markets containing major companies, the presence of EDF or GDF could increase competition. However, in markets where operators are small, the arrival of EDF or GDF could lead to the progressive elimination of competition.

Further, given the role played by these companies in the areas of standardisation, recommendation and approval of professionals, and product quality control, the Council stressed that in order for healthy competition to subsist, the creator of a standard, the recommending body and the final installer must not all belong to the same organisation. Similarly, the duration of contracting or franchise agreements must not be disproportionate to the defined goal, nor cover too wide a range of services, so as to ensure the creation of competition between different agents during market devolution procedures.

In conclusion, the Council recommended that certain measures be adopted to structure the diversification of these two monopolies and avoid distortion of competition. It suggested separating diversified services from those operating under the monopoly, as well as prohibiting EDF or GDF from approving or stipulating the goods or services to be produced by their subsidiaries, with the exception of requests to the subsidiary to discontinue marketing of their products. Implementation of these restraints should expose the subsidiaries to the same conditions as subsidiaries in private groups, in particular in relation to financing. Finally, the Council noted that merger control provisions could be used to monitor the growing diversification of these state-owned companies.

Another of the opinions issued by the Council which should be noted dealt with a draft decree regulating disposal of used oil (opinion No. 94-A-31). The current system for disposal of used oil brings together the relevant administrations and professionals from the sector (refiners, lubricant manufacturers, independent oil companies, lessees, collectors, cement contractors and recyclers) in a management committee responsible for deciding how the revenue of a special tax, introduced to make up the difference between collection costs and the price of collected used oil, is applied.

The draft decree, which was eventually abandoned, radically altered this system by transferring responsibility for the entire process to lubricant manufacturers. Under the proposed provisions, lubricant manufacturers were responsible for collecting or having collected, and reconditioning or having reconditioned, the used oil generated by the total stock of lubricants on the market. Most of these professionals had already transferred management of their obligations to Eco-Lubrifiants, a company set up for this reason, which was controlled by the nine oil companies. The Council highlighted the serious risk of restricting competition present in the new system, which put an end to the independence of the governing body. The refineries, which account for all the production of basic oils and two-thirds of lubricants, had no interest in encouraging production of recycled oil, which was in direct competition with their products. The Council stressed that with control over the collection of used oil, the refineries could control supply to recyclers and discourage new competitors from entering the market. As a result, the new regime also risked affecting the independence of lubricant manufacturers, which would no longer have an alternative source of supply independent of the refineries (which are both their suppliers and their main competitors).

The Council found that it was preferable to recommend modifying the compensation conditions of collectors, so as to better reflect their operating conditions and to develop new operating capacity, increasing competition between new and recycled oil.

Activity of civil and commercial courts

Under the provisions of Chapter IV of Act No. 86-1243 of 1 December 1986 on freedom of prices and competition, commercial negotiations are unregulated. In cases of discrimination or refusals to sell, only abuse gives rise to liability. As shown by some 15 decisions in 1994, intervention by civil or commercial courts in abusive discriminations can now be both real and effective. Case law has clearly attributed a role of defending the public economic order to the Minister, independent of the rights and interests of parties to a litigated case.

During the year, the courts also accepted the unified nature of the procedural framework: the application of Article 36 (abusive discrimination) was held to be a part of the overall framework of Article 56 (authorising the Minister to initiate proceedings before the courts), in particular concerning applications to nullify agreements violating Article 9 of the Act. For example, the Paris Court of Appeals declared null and void certain clauses of a company's distribution contract which contained such subjective clauses that it arbitrarily eliminated certain resale outlets, small shops and retailers. Under Article 36, on several occasions, the Minister secured the repayment of sums improperly paid by a supplier which had been forced to accept exorbitant requirements in the terms of sale.

Proceedings in civil tribunals under Article 56 also proved to be effective to curtail behaviour designed to eliminate competitors. For example, the anti-competitive practices adopted by a funeral company with a franchise covering 50 districts were held to constitute an abuse of dominant position.

Ten new cases were lodged in 1994. The DGCCRF is being requested to intervene in increasingly complex disputes. An example of this was the price war in the film distribution industry. In this case, the urgent protection of the parties' interests led the administration to take action in favour of operators which had been denied supply of a copy of a film the day of its opening in violation of the terms of the contract.

Activity of criminal courts

Chapter IV of Act No. 86-1243 of 1 December 1986 also contains various criminal prohibitions. Compliance with billing requirements, selling at a loss and price maintenance are closely monitored. Price maintenance, which has the effect of restricting free competition by taking away the autonomy of distributors, was the subject of proceedings before the courts on 12 occasions in 1994. These cases also dealt with the issue of correct invoicing. For example, proceedings were commenced against a major distribution group for illegal invoicing in conformance with case law, which clearly provides for the possibility of criminal liability being restricted solely to the buyer in cases of prohibited invoicing. In 1994, a total of 621 proceedings were commenced.

In the area of selling at a loss, a number of court decisions confirmed the administrative doctrine dealing with the question. A total of 262 proceedings were commenced in 1994. In particular, these adopted a more restrictive definition of parallel pricing: the prices must be identical; the seller with which the prices are compared must be located in a neighbouring geographical area; and the parallel pricing exception may only be claimed for identical products sold at a "temporally proximate" moment (Cour de Cassation, 7 January 1994).

Table 2

Statistics of activity 1994

Type of violation	Control sanctions	Warnings	Violations referred to Public Prosecutor's Office
Fixing minimum prices	1 785	19	12
Invoicing	15 958	1 622	621
Selling at a loss	2 006	50	262

Activity of the Paris Court of Appeals

Nineteen of the Competition Council's decisions were appealed to the Paris Court of Appeals. Whereas the total number of decisions rose in relation to 1993, the number of appeals fell from 36 per cent in 1993 to 25 per cent in 1994. The Court of Appeals handed down 35 judgments in 1994, a bit more than double the number in 1993. In addition, the Court issued five orders in contrast to only one in 1993. The number of decisions rendered by the Council and the Paris Court of Appeals increased. Among the 35 judgments handed down by the Court of Appeals, 71.5 per cent affirmed the Council's decision, the same percentage affirmed in 1993. As in 1993, the judgments handed down were on the merits, except for

a single application for interim measures. In addition, the number of appeals brought by the Minister fell from four in 1993 to a single case in 1994.

Table 3

Judgments and orders of the Paris Court of Appeals in 1993 and 1994

	1993	1994
Judgments	17	34
On the merits	17	33
Interim measures	-	1
Orders:		
of which applications for stays	1	5

Table 4

Judgment outcomes

	1993	1994
Total judgments handed down on Council decisions	17	35
Affirmed	8	19
Affirmed with reduction in penalties	4	6
Partial amendment	4	4
Reversed	-	1
Partial reversal	-	2
Other judgments on accessory matters	1	1

Main additions to substantive case law

Cartels

In the Sifco Stanley judgment of 17 May 1994, the Court discussed defining the relevant market. The Competition Council had found that the hand tool market was split into two categories depending on whether the user was professional or a hobbyist, and that even within these two markets there were different product families. On appeal, the Minister applied for a partial amendment of the Council's decision on these points. The Court, finding that supply originated with manufacturers and demand with hand tool wholesalers, held that the relevant market was to be found on the wholesale, and not retail, level. Second, noting that the goal of a wholesaler is to provide a complete range of different hand tools to retailers so that retailers can meet the needs of consumers, whether professional or amateur, the Court concluded that the hand tool sector was indeed a unified market, as submitted by the Minister.

In addition, in two judgments of 7 and 8 July 1994 (the Odoncia and *Sony v. Chapelle* cases), the Court was given an opportunity to rule on the concept of noticeable effect. In the Odoncia case, the Court noted that under the terms of Article 7 of the Act of 1 December 1986, to be characterised as a prohibited practice it was sufficient if the "aim" of a concerted practice was to restrain or distort competition. Accordingly, the Court found that Odoncia's refusal to supply to the Gemma company, on the grounds that its prices were lower than those fixed by its usual distributors, was indeed aimed at limiting price competition by eliminating Gemma from the dental supply market. Further, it held that even though Odoncia's products represented less than one per cent of the turnover of the CAP company, the mere fact of having taken action with this company because of its prices constituted a restriction on freedom of pricing, and was necessarily aimed at restraining or distorting competition.

The Court, examining the practices adopted by Sony in relation to the Chapelle group, made it clear that even a potential discriminatory effect generated by the practices in question was sufficient to violate the provisions of Article 7 of the Act of 1 December 1986. Second, it noted that some of the companies that had benefited from the price rebates in question belonged to large groups, and concluded from this that the discriminatory practices under examination could have had a noticeable effect on the market involved. In conclusion, the Court held that even though the "incidents" under examination were minor, this did not justify anti-competitive practices, and were only to be taken into account in penalising the behaviour. In these judgments, the Paris Court of Appeals affirmed all points of the Competition Council's decisions, which had imposed fines of FF 300 000 and FF 800 000 on Odoncia and Sony respectively.

Abuse of dominant position

In a decision of 18 January 1995, the Court of Appeals affirmed a decision in which the Council ruled that ODA, an exclusive agent, occupied a dominant position in the advertising market for France Telecom advertisements, a market in which marketing of advertising space is arranged by ODA and advertising agencies, and that ODA had abused its dominant position by attempting through its sales agents and various means, to discredit the Audace et Stratégie agency with advertisers, and hamper this agency's activities. The contribution made by this decision is to be found in the definition of the relevant market for the official phone directories, as well as in the affirmation of the Council's analysis finding that the practice of denigrating a competitor amounts to abuse of a dominant position.

Competition policy implemented by the General Directorate for Fair Trading, Consumer Affairs and Fraud Control (DGCCRF) in 1994

In 1994, disputes between suppliers and distributors revealed dysfunctions stemming from various abusive practices and caused economic partners to question the current legal framework. Certain of them criticised the alleged complexity of the 1986 Act and suggested deregulation. In contrast, others felt that the current provisions (six articles of the Act) do not cover all cases of unfair behaviour, and called for stricter regulations to curtail certain abusive practices. As a result, no consensus was reached in 1994 to introduce new regulations.

However, this did not discourage the DGCCRF from remaining open to suggestions from all economic partners, and exploring all possible means for encouraging improved behaviour. In 1994, it continued to concentrate its efforts on particularly sensitive areas, and also launched enquiries on new sectors. This activity gave rise to several new procedures and developments in the field of case law.

Activity against cartels and abuse of dominant positions

In 1994, the General Directorate continued to monitor the proper functioning of markets. Three hundred five indications of anti-competitive practices were observed, 230 enquiries launched (25 of which at the request of the Competition Council) and 193 enquiry reports prepared. The Minister of Economy and Finance made 26 referrals to the Council, in particular concerning practices observed in the awarding of government procurement contracts (seven times) and in the health sector (six times). This figure is lower than in previous years, especially in the services sector. The behaviour of service providers and their trade associations has shifted towards increased compliance with competition rules as a result of recent litigation. In the area of cartels, the Council ruled against several cases of collusion involving the award of government procurement contracts on referrals from the Minister. The Court of Appeals affirmed in turn the claims accepted by the Council in the "road works" and "electricity works" cases in its judgments of 4 July 1994 and 26 April 1994.

In several cases involving government procurement contracts, the Council, together with the Court, noted the seriousness of the violations. These included recurring market sharing and concerted supply practices affecting entire sectors. These facts were taken into account in calculating the amount of fines to be imposed.

In the area of abuse of dominant position, the DGCCRF, representing the Minister of Economy and Finance before the Court, successfully had several of the Council's decisions affirmed. For example, the Court, at the request of the Minister, found that each manufacturer of photographic cameras occupied a dominant position in the market for its own spare parts. The refusal to supply independent repairers, unless the manufacturer has established a network of approved repairers, is therefore an abuse.

A new principle of case law was established concerning predatory pricing practices (the ready-mixed concrete case).

Finally, on two occasions the Council, applying for the first time Article 17 of the Act, decided to forward the referrals which it had received to the Public Prosecutor's Office for the institution of criminal proceedings.

Close monitoring of structural developments

In 1994, the DGCCRF recorded nearly 700 merger operations. This figure, which is lower than the previous year, is explained by changes to the recording criteria which no longer include minor transactions. Nonetheless, most of the recorded operations did not have any appreciable effect on competition and therefore did not lead to implementation of the two procedures provided for control of national merger operations under Chapter V of the Act of 1986. It should be noted that in France notification of mergers is not mandatory, in order to spare companies unnecessary compliance with formal requirements.

The Competition Council received referrals from the Minister on ten occasions. This figure is very close to the previous year's figure, which marked a sharp rise over earlier figures. The upward trend for the number of referrals to the Council is thus firmly established. This reflects an increased desire for transparency as well as for increased monitoring of the structures of various markets within the national economy. It also reflects efforts to create a more secure legal environment for industry.

This philosophy is the motivating force behind the decision to publish the full decisions for authorisation issued by the Minister after consideration of official notifications. Twenty operations were voluntarily notified by companies during the year. Of these, six were referred to the Competition Council for opinion. The others did not pose any problems, and letters of consent were issued and published. In addition, four operations which were not notified were referred by the Minister to the Competition Council, the same number as during the previous year. Two referrals involved the agri-food sector, which is already highly concentrated. One concerned the takeover of the Le Flanchec group by the American multinational Heinz (fishing and canned fish), and the other the takeover of Excel by the Belgian group Vandemoortele (fats and oils). The supermarket industry was also the subject of two referrals (the takeovers of Picard Surgelés by Carrefour, and Cash Service by Primistères Reynoird). This reflects the determination of the Minister to closely examine any groupings in this sector, where mergers can have significant effects both on the buying power of distributors and competition for trading areas. The other sectors involved were advertising (C.L.T./Fun Radio, M 40), concrete (Holderbank Cedest), driving schools (takeover of Codes Rousseau by the Bertelsmann group), surgical supplies (Puritan Benett/Sefam), vacuum technology (Balzers-Leybold) and the armoured car industry.

The Minister handed down 12 decisions following opinions issued by the Competition Council in 1994. Ten of these decisions were letters of consent, and two were ministerial decrees which made authorisation conditional on the giving of undertakings by the companies to restore competition in the markets concerned. In the case of the takeover of Cedest by Holderbank, this involved restoring competition within various local markets, while in the case of Bertelsmann's takeover of Codes Rousseau, it was necessary to limit the risk posed by the new group to competition in the market for the supply of driving school products and teaching services by ordering a partial reassignment.

Communicating with the public and raising awareness of competition law

In order to increase transparency, the General Directorate began drafting in 1994 the principles used to control mergers. The most recent publication on this subject dated from 1992 and since that time the theory has become considerably more complex. The goal is to provide economic agents, which have legitimate concerns about their legal situation, with an understandable explanation of the criteria used by the Minister of Economy and Finance to examine merger operations, laying out the rules and tests used by ministerial departments in their analysis. An initial document, completed in 1994, explains how the relevant market is defined, which is the first step in any analysis of a merger.

Similarly, the General Directorate has launched a study on difficult and controversial issues of competition law using monthly workshops. These workshops will continue in 1995.

Finally, to improve public awareness of case law, all the judgments handed down by the Court of Appeals and Cour de Cassation in the competition field have been collected in several volumes with case notes and classified by subject matter. These works, published by the DGCCRF, are currently available for the years 1987 to 1993 and are on sale at the Government Publications Office.

The fight against serious breaches of trade fairness

In addition to simply applying the existing legislation, the DGCCRF ensured that particularly severe sanctions were applied in cases of serious breaches of trade fairness. This was the case in the areas of government procurement contracts, intellectual property infringement, the advertising industry and health care.

Government procurement contracts and public service delegation

The role of local public authorities is vital to the nation's economy. Public purchases amount to FF 700 billion and eleven per cent of the GDP. Delegations of public service to industry generate large turnovers: FF 38 billion francs for water and purification, FF 25 billion for transport and FF ten billion for household waste collection. Conscious of the stakes, the General Directorate actively monitored tendering procedures, particularly to ensure compliance with the ground rules for public tenders: preparatory publicity, transparency and equal treatment of candidates. The scope of its authority does not extend to investigating corruption, but rather covers action to ensure compliance with these rules on all levels.

The regional departments of the DGCCRF are field administrations, operating as a part of the local economic fabric. They play an active role in informing and educating public buyers. These departments also play a vital role by taking part in commissions convened to open bids and calls for tenders. In 1994, regional departments were called upon on 70 000 occasions, and took part in nearly 18 000 commissions. Particular attention was paid to contracts awarded by government controlled companies (participation in 550 commissions), contracts awarded by government subsidised housing bodies (470 commissions) and contracts involving hospitals (2 000 commissions). Regional departments also took part in commissions on calls for tenders involving public service delegations.

The scope of participation by the DGCCRF in commissions on calls for tenders, which has long been authorised under the Government Procurement Code, has been widened in recent months. The Act of 29 January 1993 on the prevention of corruption and the Act of 8 February 1995 on government contracts and public service delegations provide for the presence of a representative of the DGCCRF at commissions convened to supervise calls for tenders involving government controlled company contracts and government subsidised housing contracts, as well as riders added to public contracts increasing prices by more than five cent. In addition, DGCCRF representatives may now have their written comments included in the commission's formal report which adds significant weight to their written opinions on transparency and competition regulations. While taking part in a commission, they may now note their observations and alert the Regional Prefect in cases of perceived serious irregularities. They are also authorised to notify the Prefect as part of their legal supervisory role. In 228 cases in 1994 (85 cases in 1993), proceedings were initiated in administrative courts for serious breaches of the provisions of the Government Procurement Code. In the same area, the DGCCRF also plays an important role in advising

companies improperly excluded from public contracts on how to apply to an administrative court for summary procedures.

This active participation in proceedings also allows regional departments to identify conduct indicative of agreements between companies whose effect is to mislead the project owner as to the reality of competition, distort the procedure of submitting the offer to competition, and ultimately increase the cost of the services provided. For example, following investigation, 12 cases were referred to the Competition Council in 1993 and six in 1994. In general, this type of agreement entails complicated investigations including visits to numerous companies and seizures due to the secret nature of the practices under examination. Nine operations of this type were carried out in 1994. A large number of enquiries were made in economically important sectors significantly affected by such conduct, including construction, maintenance of purification plants, renovation of government subsidised housing, and cable networks.

Finally, the General Directorate also plays a vital role in identifying evidence of favouritism, a major criminal offence punishable under the Penal Code by the Act of 3 January 1991. This evidence is composed of indications that the principles of transparency, impartiality and compliance with the equal opportunity rule for all candidates may have been intentionally violated. This generally involves breaches of the requirement that an offer be opened up to competition, and behaviour tending to grant an unjustified advantage on a particular company. Since 1992, more than 90 such cases of suspect behaviour identified by the DGCCRF (with the number of cases increasing in 1993 and again in 1994, reflecting the increasing expertise acquired in these matters) have been referred to the Interdepartmental Market Investigations Commission authorised to carry out enquiries on referrals from the prefects or the Minister. Twenty cases have been referred to the Public Prosecutor's Office, and the first decisions should be handed down in 1995. The sectors particularly involved are construction, public works, purification and capital goods. In addition to this activity helping to correct the behaviour of public buyers, the DGCCRF continues to pursue its role of economic analysis and providing information to buyers, particularly in the area of public service delegations. For example, the prices of water and purification are rising rapidly from one year to the next and are clearly outstripping inflation. In order to provide better information on changes in these prices and accurate statistics to both local authorities and relevant administrative departments, a water price monitoring body has been set up. It will provide an annual report on water and purification prices, with detailed figures on an annual base consumption of 120 m^3 in some 700 districts, representing a population of 24 million inhabitants. This study, carried out by the DGCCRF, will also contain relevant data on public service delegation contracts and on works to explain the price increases. The first report analysing the data should be published in the second half of 1995.

The General Directorate also monitors the proper performance of contracts, looking for breaches of contractual terms, or discrepancies in the quantity or quality of services provided which either can be evidence of deception, or indicate possible favouritism dating from the negotiating phase of the contract. It monitors the quality of services provided, particularly in the area of purchasing groups set up by local authorities.

Finally, certain cases involving possible criminal practices, such as unlawful acquisition of an interest by a current or former public official, or corruption, are referred to the Public Prosecutor's Office.

The power of public sector buyers is such that it is essential for the proper functioning of the economy that the principles of open competition and transparency be strictly observed by all the actors involved in the procedure. This supervisory role is a vital part of the General Directorate's activities.

Intellectual property infringement (counterfeitings)

In 1994, the Marrakesh Convention marked a turning point for the world community. In Europe, the EC issued regulations on trademarks and pirated goods, and in France, the Act of 5 February 1994 increased the penalties for the major offence of trademark infringement. The DGCCRF worked particularly towards qualitative improvements by shifting the focus of investigations to industries with vulnerable products. The results are telling: the 2 010 cases opened in 1993 led to 123 reports and 24 warnings, while the 1 670 cases opened in 1994 led to 246 reports and 61 warnings.

Textile industry products made up the majority of cases (approximately 75 brand names). These were followed by perfumes (20 brands), leather goods/shoes (14 brands) and watches (five brands). Piracy of less well-known products, such as glue tubes, lawnmowers, automobile spare parts and a combination hot-plate/washing machine, was uncovered.

In addition, the investigation of sales throughout the 1994 Tour de France confirmed the effectiveness of the action taken in 1993. Less evidence of piracy was detected. English investigators were particularly interested by this case and accompanied the Tour de France during the stages taking place in the Great Britain.

An investigation into the automobile spare parts industry was organised in several départements during which investigators, in addition to intellectual property infringement, explored whether piracy of models and designs could fall under the criminal offence of deceit. Considerations of product safety are also a part of these investigations, as the pirated spare parts are often less reliable than the originals.

In order to improve its effectiveness in the area of counterfeitings, which often includes an international aspect, the DGCCRF has strengthened its relations with its counterpart agencies in other countries. International contacts are handled by a regional department appointed to manage relations with the country in question. With OECD countries, co-operation is carried out through the framework of a monitoring network for questionable commercial practices. For example, in an investigation involving oil filters illegally using the brand name of an automobile manufacturer, a referral was made to the Belgian Inspection Générale Economique, since the products were imported from Belgium. Similarly, the DGCCRF's services, in collaboration with the agricultural services of the Généralité de Catalogne, identified the culprits in a counterfeiting ring for false certification labels attached to vine seedlings.

In order to raise awareness of its activities and operating methods, the DGCCRF has taken part in several conferences organised both on a national and a regional level (in Dijon, Rennes, etc.). Companies which had been victims of intellectual property infringement, lawyers and other authorities responsible for combating this sort of practice (customs officers, police, gendarmes), also took part. The DGCCRF is developing its collaboration with all these bodies as much as possible.

Advertising

To improve the functioning of the advertising industry, the Act of 29 January 1993 introduced new regulations clarifying the role of intermediaries and encouraging transparent relations between the various media, buyers of advertising space and advertisers, particularly by separating the buying and referral functions. Aware of the difficulties of interpretation which this new Act raises for professionals, the Ministers of Economy and Finance and of Communication appointed Mr. Cortesse, Judge of the Cour des Comptes, to head a commission to look into the economic consequences of the Act and to identify possible dysfunctions. This commission recommended the drafting of a circular on enforcement of the

Act, so as to provide operators with a predictable legal environment. This circular, dated 18 September 1994, supplements the Circular of 23 October 1993, and only covers financial advertising. It lays down the new ground rules for the industry: media must supply any operator purchasing space with their terms of sale and prices; and intermediaries must have the legal status of agents and can only be paid by advertisers. The circular also contains practical suggestions for implementation of the Act. Having first laid down a definition of advertising -- a voluntary operation aimed at promoting the advertiser's activities, products or services -- the circular also clarifies how the Act should be enforced in relation to certain categories of operators, invoicing methods and organisation of payment channels.

Health care

Regular contacts are maintained with the Conseil National de l'Ordre des Médecins, the body responsible for enforcing the medical profession's code of ethics. It is essential to prevent doctors from being financially influenced by manufacturers in the choice of different medicines or prostheses, and to ensure that prescriptions are only based on the real needs of the patient. With this goal in mind, particular support has been given to the investigating services enforcing Articles L 365, L 375-1 and L 549 of the Health Care Code. These articles guarantee the impartial choice of care and medical supplies by the prescribing doctor. In this area also, the year was characterised by a development of working methods.

Twenty investigations were instigated by the central administration in 1994. Controls were also carried out by decentralised services on their own initiative. The investigations examined the relationships between the medical profession and firms belonging to extremely varied sectors, which provide goods and services to the health sector: medicines, orthopaedic prostheses, intraocular implants, cardiac pacemakers, thermal spring companies, etc. Various intermediary bodies such as associations, which can sometimes serve as a front for accepting benefits, were also investigated.

GERMANY*

(1 July 1994 - 30 June 1995)

I. Changes to competition laws and policies adopted or envisaged

Neither the German Act against Restraints of Competition (ARC), which is enforced by the Federal Cartel Office (FCO), nor the Unfair Competition Act (UCA), which is enforced by the civil courts at the request of affected parties, was amended in the period under review.

As announced in its 1995 economic report, the government decided that the ARC should be adjusted to European competition law. The changes are to take account of the new dimension of competition that results from the growing integration of European markets. In a single economic area, the different treatment of the same matters under national and European competition laws is no longer justifiable. Rather, it is necessary to harmonise the structure and contents of national and European competition laws as far as possible.

In view of the significance and the scope of the project, the Ministry of Economics, with the participation of the Federal Cartel Office, has instituted a working group to amend competition legislation, responsible for reviewing all the provisions of the ARC. The working group is to attain the following objectives:

-- bring about as much agreement as possible between national and European competition laws;

-- review the partial exemptions from German competition law, particularly in transportbanking and insurance, areas which do not correspond with European law;

-- simplify the German Competition Act, which has become too complex and partly unclear; and

-- take into account the further development of European law, in particular in view of the 1996 revision of the EC merger regulation.

The absence of legal uniformity is indeed a shortcoming of the European Union and the single European market. A lack of harmonisation can be found not only in the area of competition law, but also in nearly all the other fields of private and public economic law. However, it would not be appropriate to bring about harmonisation by simply giving up the various national legal traditions. An adjustment of German competition law will therefore leave intact the central position of the protection of competition within the system of the social market economy, a principle which has been characteristic of the German economic order and has been a major contributing factor in its success.

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* The original language of this report is English.

In order to know the views of the trade associations about the issue of amending the ARC, the Working Group has asked them to submit their comments by the end of June 1995.

The reform of energy industry law and the ARC provisions on energy (thus far a partially exempted area), which was also announced in the government's annual economic report, has reached a fairly advanced stage and will probably be submitted to the Cabinet for decision-taking within the next few months, independently of the general amendment of competition law.

Regarding the economic and competition policy situation

The German economy is currently in a phase of rapid structural change which will result in a lasting transformation. This is especially true of the eastern part of Germany (the former GDR), where the production structure inherited from the planned economy stood no chance of survival under the conditions of open markets and world-wide competition. Here, after an adjustment process that is unparalleled in history and has been most painful for those affected by it, the profile of a new industrial and services economy is gradually taking shape which has a good chance of finding its place in a world economy based on division of labour.

Structural change, if less obvious than in east Germany, is also taking place in the former Federal Republic. The recession, which began in the early 1990s and marked the end of a period of nearly ten years of growth, brought to light the long-standing inefficiencies and structural weaknesses of the west German economy. The reaction of the German economy to the changed competitive environment is now all the stronger. This environment is characterised by increasing globalisation of markets caused by world-wide mobility of goods, capital and technical know-how. On the whole, these factors have led to a considerable stiffening of competition among industrialised countries as well as between the industrialised and the so-called newly industrialising countries as regards the location of industries. Products which for decades have been sold as "made in Germany" are now, under the pressure of competition, being examined for whether all or part of their production can be shifted to low-wage countries in order to reduce costs.

The relocation of production that has become inefficient in Germany must, however, also be seen as offering an opportunity. Insofar as German firms, for example in the shoe, textile and automobile industries, have themselves taken the initiative in transferring part of their production to neighbouring east European countries or the southern EU member states, there is reasonable hope that part of the resulting value added, to the extent that it is attributable to know-how, research and development as well as marketing, can in the long run be secured for Germany as an industrial base.

Of course, cost efficiency cannot be improved simply by shifting production as a whole or individual production stages to low-wage countries. The classic instruments of increasing efficiency, i.e. optimising the firms' organisational structure, production process or rate of in-house production, remain of primary importance. In a functioning competitive economy, by contrast to centrally planned economies, new decisions on the combination of inputs are taken all the time under cost considerations. The same applies to the question whether in-house production is preferable to buying from outside suppliers. In Germany, there is currently a marked tendency towards outsourcing in many industries, for example in the automobile industry, which leads to an increase of competition in the markets of the hived-off product areas, because requirements that had until then been satisfied within the group are now covered by the market.

But whether the challenges of structural change can be met successfully depends not only on the flexibility of the firms, but also on the regulatory framework set by economic policy.

II. Enforcement of competition laws and policies

Increased application of EC competition law by the FCO

Increased and systematic decentralised enforcement of Articles 85 and 86 of the EC Treaty by the national competition authorities is a significant step towards harmonised European competition legislation, which is the long-term goal. Effectiveness, proportionality and "nearness to the citizen" of the decision-making process, the arguments put forward in this connection, as well as considerations of how to reach that goal, continue to be highly topical. Moreover, a fair distribution of powers between the European Commission and the Member states, which themselves take responsibility for competition law enforcement, helps to implement the subsidiarity principle laid down in Article 3b (2) of the EC Treaty. Such sharing of powers also heightens acceptance of the competition rules within the European Union as a whole and contributes significantly to harmonisation of competition law enforcement within the EC. For just as the national authorities participate in the EC Commission's decision-making, so the Commission ought to have a say in the proceedings carried on by national authorities, whose outcome is ultimately subject to review by the European Court of Justice.

In the period under review, as in previous periods, the FCO initiated several proceedings based either exclusively or additionally on European competition rules. One of those proceedings was closed with the issuance of a prohibition. In each case, the FCO had checked with the European Commission beforehand as to whether the latter intended to initiate its own proceedings.

Action against anti-competitive practices

Violation of the ban on cartels

The ban on cartels, which is intended to safeguard the freedom of competitive action of independent market participants, continues to be one of the pillars of the German competition system. Only if individual economic decision-making is free and independent can competition function properly and increase prosperity. In the reporting period, the FCO therefore continued to act on a number of cases where illegal co-ordination of conduct was suspected to be present. (The FCO's power to base such proceedings not only on the provisions of the German ban on cartels, but on Article 85 of the EC Treaty as well is of no practical importance in the case of illegal horizontal agreements. This is mainly due to the fact that the substantive content of the German and European bans is largely identical, and the national competition authorities have no power to impose fines under Community law.)

Having detected an anti-competitive price and rebate agreement concluded among five leading German manufacturers of fire engine superstructures and imposed fines in the amount of DM 3.8 million in 1993, the FCO in the period under review imposed fines totalling DM 4.6 million on six fire hose manufacturers and their managing directors for having operated restrictive agreements. During a search in December 1993, the FCO seized comprehensive evidence which showed that, over a number of years, the enterprises involved had allocated quotas among themselves regarding the market for fire hoses and hoses for construction and industrial purposes, and had fixed list prices, discounts and customers as well as colluded regarding orders by local authorities and the Bundeswehr (German armed forces). Most of the administrative fine decisions have become final, whereas appeals have been filed against the remainder.

Table 1

Legalised cartels

Types of cartels	Cartels 1994 Additions	Deletions	Total number since 1958	Still effective as at December 1994
Condition cartels. Section 2	3	-	69	44
Rebate cartels. Section 3	-	-	33	5
Combined condition and rebate cartels.	-	-	15	3
Crisis cartels. Section 4	-	-	2	-
Standardisation cartels. Section 5(1)	1	-	17	7
Rationalisation cartels. Section 5(2) Sentence 1	1	-	24	3
Rationalisation cartels. Section 5(2) Sentence 2	2	-	40	10
Specialisation cartels. Section 5a (1) Sentence 1	1	-	66	16
Specialisation cartels. Section 5a (1) Sentence 2	-	2	57	16
Co-operation cartels. Section 5b	4	-	122	100
Purchasing co-operations. Section 5c	9	-	10	10
Export cartels. Section 6(1)	2	2	115	40
Export cartels. Section 6(2)	-	-	14	2
Import cartels. Section 7	-	-	2	-
Emergency cartels. Section 8	-	-	4	2
Total	**23**	**4**	**590**	**258**

Still pending are a number of other proceedings for violations of the ban on cartels, in particular in the form of prohibited collusive tendering in the southwest German heating, air conditioning, ventilating and sanitary installations industry as well as in the market for road markings.

After the FCO had informed three leading German manufacturers of plastic case-shaped bottle containers that the proposed formation of a patent pool would raise competitive concerns, they abandoned their project. The three enterprises involved intended to make available to each other, and in particular cases also to third parties, a substantial part of their important property rights for bottle cases against payment of uniform lump-sum royalties. In view of the importance of industrial property rights to the production of modern bottle cases and the market leadership of the enterprises involved, it would have been likely that this project would have led to oligopolistic market domination. Further, the joint fixing of royalties by leading competitors for granting their industrial property rights constitutes a prohibited horizontal agreement which is likely to restrict competition appreciably. The FCO was moreover able to

demonstrate that the envisaged fixing of uniform royalties for plastic bottle cases would have raised prices by about 20 per cent on average.

Statistics of different types of legalised cartels

The number and types of cartels legalised by the FCO and the Minister of Economics are shown in Table 1 above.

There is no contradiction between the consistent enforcement of the German ban on cartels by the FCO and the provision of wide-ranging possibilities of inter-company co-operation, particularly for small- and medium-sized companies, but not only for them.

In the period under review, the number of cartels legalised by the FCO rose from 239 to 258 (compared with an increase from 227 to 239 in the 1993-1994 period). In four cases, so-called small business co-operation agreements were involved, which are expressly encouraged by the FCO to offer the co-operating companies better market chances when competing with large, powerful enterprises. Such co-operation agreements account for some 40 per cent of all legalised cartels. The increase in the number of legal cartels recorded in the period under review is mostly due to nine cases of purchasing co-operation agreements operated exclusively by small- and medium-sized firms. While such agreements have been permitted under German co-operatives law since 1889, they have been explicitly exempted from the ARC since the 1990 amendment.

Vertical restraints

The legal view asserted by the FCO in a pilot proceeding to the effect that the exemption for publications from the ban on resale price maintenance did not apply to CD-ROM products with legal databases has been confirmed by the Berlin Court of Appeals. Since the case involves issues of fundamental importance, it is to be expected that the company concerned, the large German publishing house C.H. Beck, will file an appeal on points of law with the Supreme Court.

In order to protect the free setting of prices, the FCO imposed fines (involving rather small sums) on several manufacturers of branded goods. By threatening to withhold supplies, they had in some cases tried to force retailers to adhere to recommended resale prices or a minimum price level.

The ARC not only protects the free setting of prices and terms of business, but also ensures that the parties to an agreement in principle are free to organise their business relationships with third parties as they wish. However, certain forms of exclusivity clauses, by which a significant number of enterprises in terms of competition are similarly bound and unfairly restricted in their freedom of competition, may be declared to be of no effect. This is illustrated by the following decision.

The FCO prohibited the large (but not market dominating) German tour operators Touristik Union International GmbH & Co. KG (TUI), of Hanover, and NUR Touristic GmbH (NUR), of Frankfurt/Main, from operating restrictive exclusivity agreements with 15 Spanish hotel owners on the Balearic Islands and the Canary Islands regarding the purchase of room quotas for German tourists for the winter 1994-1995 season and from implementing similar clauses in future agreements with those hotels. The prohibited agreements required the Spanish hotel owners:

-- not to sell room quotas for their hotels to certain other competing German tour operators; and

-- to either limit the number of German tour operators booking accommodation in their hotels or to extend the number of admitted operators only with the consent of the operator concerned.

Such exclusivity clauses served to exclude, in particular, German competitors offering lower-priced package tours such as the Kleve-based Alltours Flugreisen GmbH or the Mönchengladbach-based Allkauf Reisen GmbH from hotels in which TUI or NUR book accommodations. Alltours Flugreisen, for instance, was not able to purchase room quotas in 47 hotels on the Spanish islands for the winter 1993-1994 season. The freedom to contract of the Spanish hotels concerned was unduly restricted by TUI's and NUR's exploitation of their buying power. Those companies substantially hindered Alltours and other operators in purchasing room quotas, thus restricting price competition on the German market for air travel package tours. The prohibited agreements had affected trade between the Member states of the European Community, and they had as their object and effect a restriction and distortion of competition within the common market. The prohibition decision was therefore based on Article 85(1) of the EC Treaty, one of the first decisions to which the FCO applied exclusively European law. The companies concerned have filed appeals against the decision.

Control of abusive practices by dominant firms

Most of the again relatively few abuse proceedings in the reporting period were directed against enterprises in sectors where market dynamics have been fully or partly eliminated as a result of government regulations. The control of abusive practices by firms that are still dominant in sectors which are in the process of deregulation has been developing into a new field of activity for conduct control by the FCO. On most industrial markets, however, competition, often also international competition, continues to be vigorous. This confirms the experience that interference in the behaviour of enterprises is seldom necessary where markets are open.

In view of the methodical problems involved, but also because of the high requirements made by the German courts, the FCO continues to be very cautious when it comes to exercising control of abusive pricing as an instrument for interfering with the freedom of business to set their own prices.

In the period under review, price controls were considered necessary by the FCO only in the field of energy supply via networks, but no formal decisions were issued.

The number of proceedings conducted for hindering abuses was somewhat larger by comparison, although the number as such was small indeed. An essential goal of such proceedings is to keep markets open. Action against business strategies for sealing off markets and deterring market entry therefore proves to be an indispensable tool to supplement control of proposed mergers.

Railway reform and "Post Reform II" have been two very significant steps in Germany towards injecting more competition into these fields. Essentially, the two reform acts provide for the conversion of the various divisions of state enterprises into stock corporations, enabling the privatisation of postal and railway services and freeing them from the constraints imposed by the law governing public service. Although the measures taken are welcome from a market economy point of view, the present state of the deregulation process also poses risks which may hamper development towards greater competition.

As regards the postal sector, there is on the one hand the danger of competitive operations being cross-subsidised by profits from monopoly services, which may be used to hinder private competitors or to squeeze them out of the market and, on the other hand, the unjustified denial of access to networks

operated by the monopolist without holding a pertinent statutory exclusive right. Under the Post Reform Act, it is in principle admissible to use profits earned with monopoly services to offset losses incurred in competitive services, unless the competitive chances of other enterprises are impaired without any factual reason by a lasting, perceptible non-recovery of full cost. The responsibility for identifying such situations lies with the Ministry of Economics in consultation with the Ministry for Post and Telecommunications. The Ministry of Economics may request -- and in some cases actually has requested -- the assistance of the FCO for this purpose. For instance, the FCO for the first time submitted opinions regarding the Datex-P system pricing and the shipment of so-called Postgut (parcels of different weight classes shipped by firms at a reduced rate). In both cases, the FCO found that both services did not operate on a full cost-recovery basis to the disadvantage of private competitors.

In the abuse proceedings against the leading German pharmaceuticals wholesalers for hindering a German drug importer, the Supreme Court has since affirmed the FCO's decision -- in contrast to the Berlin Court of Appeals.

The FCO's decision in an abuse proceeding against Verbundnetz Gas AG (VNG), the only supplier of long-distance gas operating in the new federal laender and the only pipeline operator, which had refused to let another gas supply and distribution company feed natural gas to be purchased from Russia into its supply network, has been reversed in a final decision by the Supreme Court in spite of some basically positive aspects. The Court of Appeals had already set aside the FCO's decision. The reasoning of the Supreme Court was essentially based on the argument that VNG had met the price of the enterprise requesting third-party access. The energy industry goal of cheap energy supply of the consumer would be achieved in this case also without third-party access, the Court held.

Although decisions on individual cases by the Supreme Court -- unlike those by Anglo-American courts -- should not be overrated, one cannot overlook the fact that the efforts of the FCO to ensure that competition is left wider leeway in the field of energy supply via networks have so far not been very successful.

Mergers and acquisitions

Statistics and summary data on mergers within control provisions

In the reporting period, the number of mergers notified to the FCO slightly increased to 1 564 mergers (1 743 in 1992 and 1 514 in 1993) (see Tables 2 and 3). This figure again includes some 300 notifiable acquisitions of east German firms. The expectation expressed in the previous report that but for the cases attributable to German unification there would be about 1 200 mergers annually has been confirmed.

Table 2

Mergers notified pursuant to Section 23 of the ARC

Year	Mergers
1973	34
1974	294
1975	445
1976	453
1977	554
1978	558
1979	602
1980	635
1981	618
1982	603
1983	506
1984	575
1985	709
1986	802
1987	887
1988	1 159
1989	1 414
1990	1 548
1991	2 007
1992	1 743
1993	1 514
1994	1 564
1 January 1995 - 30 June 1995	682

Table 3

Number of mergers notified under Section 23 of the ARC in 1994 by:

Form of merger		Type of merger [1]		
Total	1 564	**Total**		1 564
Acquisition of assets	295	Horizontal of which:		1 301
Acquisition of shares	698	*a)*	without product extension	1 053
Joint ventures (incl. new establishments)	527	*b)*	with product extension	248
Contractual links	15	Vertical		46
Interlocking directorates Section 23(2) No. 4	-	Conglomerate		217
Other links	27			
Competitively significant influence	2			

[1] Horizontal merger without product extension -- acquired enterprise operates on the same markets as the enterprise is acquiring it (e.g. brewery acquires brewery).

Horizontal merger with product extension -- acquired and acquiring enterprises operate on neighbouring markets of the same economic sector e.g. brewery acquires fruit juice manufacturer).

Vertical merger -- in relation to the acquiring enterprise, the acquired enterprise operates at previous or subsequent stages of production (e.g. brewery acquires drinks wholesaler).

As was the case in previous years, a vast majority of notified mergers was subject to the pre-merger notification requirement, accounting again for some 70 per cent of all notified mergers, and just under 80 per cent of mergers were subject to control. Most of the mergers notified to the FCO once more involved acquisitions of small and very small enterprises by large firms, which as a rule did not raise any particular competition concerns. As in the past, the number of truly large mergers having significant effects on competition was comparatively small. It must be borne in mind, however, that in the reporting period some 50 large mergers subject to the EC Merger Regulation had effects on the German market. They are not included in the figures given in this report, because they are not subject to scrutiny by the FCO or to FCO notification rules.

Of the 1 564 mergers in 1994,

1 086	(1 050 in 1993)	were mergers notified in the course of compulsory or voluntary notification prior to completion;
331	(310 in 1993)	mergers were notified after completion and found to be subject to control; and
147	(154 in 1993)	mergers were not subject to control because they fell short of the turnover thresholds of Section 24(8) of the ARC (de minimis clause).

From the beginning of merger control in 1973 to the end of 1994, a total of 19 224 mergers were notified and completed (see Table 4).

Table 4

Number of mergers notified under Section 23 of the ARC from 1973 to 1994 by:

Form of merger		Type of merger [1]	
Total	19 224	**Total**	19 224
Acquisition of assets	4 256	Horizontal of which:	14 286
Acquisition of shares	9 282	*a)* without product extension	11 139
Joint ventures (incl. new establishments)	5 110	*b)* with product extension	3 147
Contractual links	333	Vertical	1 904
Interlocking directorates Section 23(2) No. 4	12	Conglomerate	3 034
Other links	219		
Competitively significant influence	12		

(1) Horizontal merger without product extension -- acquired enterprise operates on the same markets as the enterprise acquiring it (e.g. brewery acquires brewery).

Horizontal merger with product extension -- acquired and acquiring enterprises operate on neighbouring markets of the same economic sector (e.g. brewery acquires fruit juice manufacturer).

Vertical merger = in relation to the acquiring enterprise, the acquired enterprise operates at previous or subsequent stages of production (e.g. brewery acquires drinks wholesaler).

Since the 1973 adoption of merger control, the FCO has prohibited 110 mergers by formal decisions. Of the total of 110 prohibition decisions, 58 have meanwhile become final. Twenty-two decisions were reversed by the courts. Seventeen prohibition decisions were withdrawn or otherwise settled by the FCO. In six cases, the Minister of Economics fully or partially authorised mergers that the FCO had prohibited, while in nine cases the applications for ministerial authorisation were unsuccessful. The balance of seven prohibitions has not yet become final.

Apart from the four mergers prohibited in formal proceedings during the reporting period, eight merger proposals were abandoned by the firms after informal talks (prior to notification) with the FCO. In another seven cases, merger projects notified during the reporting period were withdrawn after the FCO had informed the firms involved of its intention to prohibit the project.

For example, after the FCO had expressed competition concerns, the large German firm Bayer AG abandoned its proposed acquisition of a majority stake in the Austrian firm Wolfram-Bergbau- und Hüttengesellschaft mbH (Bergla). Bayer withdrew the notification of the project. Bayer and Bergla are the most important European suppliers of tungsten powder and cemented carbide. Due to their excellent heat and electricity conductivity, hardness and resistance to wear, both materials are important commodities with many applications, particularly in the heavy metal and hard alloy industries. According to the FCO's findings, the two firms together would have obtained shares of more than 55 per cent and over 75 per cent respectively in the German market. Since the buyers of those high-tech tungsten products make great demands on quality and security of supply, imports from China, with 54 per cent of the world's tungsten resources, do not constitute a sufficient alternative source of supply. Also, many buyers had complained to the FCO about the project.

Over the last few years, there has been a steady increase in the number of those merger cases in which either no notification was filed or no formal prohibition was made after notification. In fact, formal prohibitions seem to be reserved for those cases where the participating firms stick to the proposed transaction because they believe that for factual or legal reasons they stand a good chance of prevailing in subsequent court proceedings. Therefore, the effectiveness of merger control should not be judged only by the number of formal prohibitions, just as the number of notified mergers alone is no sufficient indication of the trend of concentration in a national economy.

Undertakings

As in previous reporting periods, some firms gave undertakings to the FCO or modified their proposed transactions in order to resolve the FCO's competition concerns. In their undertakings, the acquiring and/or acquired firms agreed to restructure the merger by selling part of their operations. However, such undertakings are only likely to be successful if the commitment to sell is met before completion of the notified merger project. Problems may arise if it is agreed that undertakings will be complied with only after the transaction has been completed.

Thus, at the end of 1993, an enterprise refused for the first time to comply with an undertaking it had given. Shortly before the expiry of an agreed deadline for the sale of one of its divisions, Fried. Krupp AG terminated its 1992 agreement to sell by the end of 1993 its automotive suspension springs division. After termination of the agreement by Krupp, the FCO issued an order to divest on the basis of the agreement. The firm lodged an appeal with the Berlin Court of Appeals, which allowed the appeal suspensive effect. The proceedings are still pending and may probably be taken to the Supreme Court, before effective divestiture can take place, if the FCO's order is upheld by the courts.

Undertakings, which are not specifically provided for in the ARC, were introduced in 1975 by the FCO with the explicit approval of the Ministry of Economics as a tool enabling the FCO not to prohibit mergers in their entirety if they result in market dominating positions being created or strengthened only in some regional markets or product markets of minor importance. The use of undertakings was confirmed by the Berlin Court of Appeals. Since 1975, 47 prohibitions have thus been averted.

Merger prohibitions

In the period under review, the FCO prohibited four merger projects, the same number as in the preceding period. The four projects were the following (in chronological order):

The FCO prohibited Philips GmbH, Hamburg, from acquiring a majority interest in Lindner Licht GmbH, Bamberg. The merger would have further strengthened the market dominating position which Philips and Osram, a subsidiary of Siemens, together hold on the German market for general lighting service lamps. Philips GmbH, Hamburg, is an affiliate of Philips Electronic N.V., Eindhoven/Netherlands, one of the major electronics firms world-wide and the leading supplier of electric lamps on both the European and the world market, with Osram ranking second in each case. Lindner Licht GmbH, also a manufacturer of lamps, is one of the few existing competitors of Philips and Osram in Germany.

According to the FCO's findings, the German market for general service lamps is dominated by Philips and Osram, which together hold a market share of almost 80 per cent of the German market. There is a wide margin between the market leaders and the other competitors General Electric Lighting GmbH, Lindner Licht GmbH and SLi Lichtsysteme GmbH. Due to links and agreements existing between Philips and Osram, competition between the two leading suppliers of lamps for general lighting service is structurally limited to a considerable extent. Therefore, Philips and Osram fully met the statutory criteria for presuming oligopolistic market domination.

The acquisition of Lindner Licht GmbH by Philips would have deprived buyers of one of the few alternative sources of supply in Germany and would have further strengthened the market dominating oligopoly of Philips and Osram. Philips has appealed to the Berlin Court of Appeals.

The FCO prohibited a Lower Saxony electricity supplier (Hastra) and a gas producing municipal public utility in Lower Saxony from acquiring a shareholding in a new municipal utility, which was to be set up. In the FCO's view, the acquisition would have helped Hastra and the municipal utility to strengthen their existing market dominating positions as suppliers of electricity and gas respectively in a part of Lower Saxony. The firms concerned have appealed to the Berlin Court of Appeals.

The FCO prohibited Hochtief AG (Hochtief), of Essen, from increasing its stake in Philipp Holzmann AG (Holzmann), of Frankfurt/Main, from 20 to 35 per cent on the ground that Hochtief would gain a market-dominating position as a result of the notified merger project. Hochtief, with construction work valued at DM 8.5 billion, and its numerous domestic and foreign affiliates are mainly active in the building industry. RWE, Germany's largest electricity company, is Hochtief's largest shareholder. Holzmann, with work performed worth DM 12.5 billion, is the parent company of the Holzmann group, the largest German construction company, whose fields of activity, via significant domestic and foreign affiliates, include general construction, transport infrastructure and building materials as well as energy and environmental technology. Holzmann's largest shareholders are Deutsche Bank with more than 25 per

cent, Hochtief with 20 per cent, Bank für Gemeinwirtschaft with ten per cent and Commerzbank with five per cent.

The FCO found a separate domestic market for large industrial building projects, with contracts worth at least DM 50 million, which are so demanding in terms of technology, organisation and finance that their completion requires the capacities and resources available to large firms only. It is in this market for large projects that Hochtief and Holzmann would gain a dominant position. According to the FCO findings, both firms together would account for 34 per cent of that market, thus reaching the threshold beyond which the German Competition Act presumes market domination to be present. Hochtief/Holzmann's combined market share would be more than twice the second-ranked competitor's share (Walter group), and higher than the combined share of the five next-ranked competitors. In the high rise, cooling tower and tunnelling (shield driving method) sectors, the supply structure would narrow considerably. Moreover, the dominant market position in terms of market shares would be secured by the two firms' superior financial resources in relation to their competitors. The synergies resulting from the merger would strengthen the RWE group's construction and waste disposal operations. As a result of the diverse intra-group links, RWE would be able to establish a presence in every single sector of construction. The dominant position of the firms involved in the merger project is also a consequence of their being embedded in a dense network of links with other firms.

Ultimately, the conditions of the German Act's presumption of market domination for mergers of very large firms are satisfied, if each firm participating in the merger records a turnover of at least DM one billion, and two firms record a combined turnover of at least DM 12 billion. If it cannot be ruled out, upon overall appraisal of all aspects relevant to the analysis of the merger, that a market-dominating position will be created, then such a merger can be presumed to meet the conditions for prohibition. To that extent, the burden of proof is reversed; therefore, the onus of resolving any remaining doubts as to whether a market-dominating position will be created lies with the firms concerned. The acquiring firm has lodged an appeal.

The FCO prohibited RWE AG, the largest German electricity supply company, from acquiring a shareholding in a North Rhine-Westphalian electricity supply company (Stromversorgung Aggertal). As a result of the proposed acquisition RWE would have further strengthened its already existing market-dominating position in Stromversorgung Aggertal's supply area. The decision has not yet become final.

At the end of the period under review, the FCO also raised objections against two further merger proposals.

Number and extent of international mergers

As in earlier reporting periods, the FCO examined a number of mergers in which foreign firms were involved either directly or indirectly. Due to a slight decrease in the number of purely German mergers, the share of mergers involving foreign companies rose slightly and regained the pre-unification level (see Table 5).

In the period under review, the FCO continued its practice of submitting its comments to the European Commission regarding a number of cases that are subject to European merger control. In two instances, the FCO requested the referral of a case under Article 9 of the EC Merger Regulation, but the Commission again refused to do so.

Table 5

Mergers involving foreign parties and notified in 1993 and 1994

	1993	**1994**
Completed on the national territory (domestic mergers) of which:	1 330 (88%)	1 367 (87%)
with direct involvement of foreign party/parties	133 (7%)	122 (8%)
with indirect involvement of foreign party/parties	325 (22%)	352 (22%)
without any foreign involvement	892 (59%)	893 (57%)
Completed abroad (foreign mergers) of which:	184 (12%)	197 (13%)
with direct involvement of domestic party/parties	76 (5%)	74 (5%)
with indirect involvement of domestic party/parties	15 (1%)	22 (1%)
without any domestic involvement	93 (6%)	101 (7%)
Total	**1 514**	**1 564**

Definitions:

Place of merger is the registered office of the enterprise whose shares or assets are acquired. A foreign enterprise is involved in a domestic merger provided at least one direct participant is a foreign enterprise (direct) or an enterprise linked with a foreign controlling enterprise (indirect). This applies to foreign mergers accordingly.

Privatisation and deregulation

Privatisation

In the field of privatisation, the government has an impressive track record. Since 1982, the number of government shareholdings and special assets has been cut by more than half from 958 to under 400 as of the end of 1994. Receipts from privatisation over that period amounted to DM 12.5 billion. In the reporting period, there were no spectacular privatisations.

The three postal enterprises Telekom, mail service and postbank were converted into legally independent stock corporations on 1 January 1995. Subsequent partial privatisation of those companies is envisaged. Shares in Deutsche Telekom AG are intended for sale as early as 1996. Details of the

government's other privatisation projects are contained in the government's 1995 Annual Economic Report.

At the end of 1994, the Treuhandanstalt successfully completed its task of restructuring and privatising the formerly state-owned firms in the new federal laender. Through the privatisation of firms, the Treuhandanstalt obtained investment pledges from the new owners worth more than DM 207 billion and guarantees for 1.5 million jobs. Since 1 January 1995, the Treuhandanstalt's remaining tasks have been carried out by several successor agencies. The assets of the few remaining units held by the Treuhandanstalt were transferred to the newly founded limited liability company Beteiligungs-Management-Gesellschaft Berlin mbH (a holding and management company that is to look after the still unsold Treuhand firms and subsequently privatise them).

The reduction of federal real estate, particularly in the new laender, forms an integral part of the government's privatisation policy. The reporting period saw an acceleration in the sale of such real estate. However, the laender and municipalities have the greatest potential for privatisation. To the extent possible, tasks in the fields of environmental infrastructure, surveying, planning of construction projects and approvals procedures and compulsory inspection of motor vehicles should be transferred to the private sector and the professions.

Deregulation

The existing web of government regulations in Germany still exceedingly reduces the scope for private initiative and entrepreneurial creativity, burdening citizens and the business community with avoidable costs. The government will therefore continue its policy aimed at simplifying legal and administrative procedures in all areas. The independent Commission for Simplifying Federal Legislation and Administration submitted a first report at the end of 1994 containing recommendations to reduce administrative obligations on enterprises, citizens and administrative bodies. It is envisaged that those recommendations will be implemented in the course of forthcoming revisions of legislation.

A shortening of planning and licencing procedures is of critical importance. In the context of its Immediate Action Programme for More Growth and Employment of January 1994, the government therefore set up an independent commission of experts to simplify and speed up those procedures (the Schlichter Commission). In December 1994, the group submitted its recommendations to the government, dealing, in particular, with the subjects of general law on administrative procedure and environmental law (mainly emissions control law). A coalition working group has since been considering the question of which proposals contained in the final report should be implemented. It has advocated realising almost all of the 86 proposals of the Schlichter Commission. The legislative procedures required for implementation will now be initiated as rapidly as possible.

IV. The role of competition authorities in the formulation and implementation of other policies

As in earlier reporting periods, the FCO followed requests by the Ministry of Economics and other ministries and institutions to comment, from the competition point of view, on a number of existing regulations as well as on proposed laws and regulations. In addition, the FCO submitted, on its own initiative, opinions on questions of trade, industrial and structural policy to the Ministry of Economics.

In the period under review, the FCO rendered an opinion on the following:

-- the Council directive concerning the legal protection of data banks;

-- the assessment under competition law of common purchasing arrangements of medical doctors;

-- the opening of the German telecommunications services market;

-- the relationship between private and public rescue services in some of the new federal laender;

-- the Recycling Industry Act and individual regulations;

-- cross-subsidisations of the Telekom Datex-P network;

-- the Energy Industry Act;

-- the agreement among the federal laender on broadcasting; and

-- a draft amendment of the Packaging Ordinance.

The Federal Public Procurement Control Tribunal, which was set up at the FCO in June 1994 and has the task of reviewing the decisions taken by bodies that supervise the awarding of contracts by government agencies, reviewed 12 complaints and took six decisions in the period under review. Some complaints were made by bidders who had not been awarded a contract although they had submitted the lowest bids, or because the public procurement agencies had infringed other provisions of the law governing public procurement.

New studies relevant to competition policy

EECKLOFF, Johann, *Industriepolitik im Widerstreit mit der Wettbewerbspolitik* (Industrial policy versus competition policy) Berlin: Duncker & Humblot 1994.

HANSEN, Knud, *Wettbewerbsschutz in Mittel- und Osteuropa. Zum Beitrag des Kartellrechts für den Übergang zur Marktwirtschaft* (Protection of competition in central and eastern Europe. On the role of competition law in the transition to a market economy) Wirtschaft und Wettbewerb H. 12, 1994, S. 1002 - 1012.

HÄRTEL, Hans Hagen/Krüger, Reinarld (u.a.), *Die Entwicklung des Wettbewerbs in den neuen Bundesländern* (Development of competition in the new federal laender) Baden-Baden: Nomos 1995.

MOLITOR, Bernhard, *Ist Marktwirtschaft noch gefragt? Eine ordnungspolitische Bilanz der Jahre 1982 bis 1992* (Is the market economy still desirable? A review of the years 1982 to 1992 under the free-market aspect) Tübingen 1993.

SCHMIDT, Ingo/Binder, Steffe, *Wettbewerbspolitik im internationalen Vergleich. Die Erfassung wettbewerbsbeschränkender Strategien in Deutschland, England, Frankreich, den U.S.A. und der EG* (A country-by-country comparison of competition policies. The treatment of anti-competitive strategies in Germany, Great Britain, France, the U.S.A. and the EC) Stuttgart: Univ. Hohenheim 1994.

GREECE*

(1994-1995)

I. Introduction

For many years, market control was the basic type of state intervention in Greece. Today, price control and market control have been almost completely replaced by the two-fold principle of the protection of free competition and consumer protection.

Act No. 2296/95, which amends the Greek Competition Act 703/73 on the control of monopolies and oligopolies and the protection of free competition (as revised by Acts No. 2000/91 and No. 1934/91) takes into account the needs and the 15 years of experience of the relevant framework. These amendments aim to correct the shortcomings and to create the proper legislative requirements for the restoration, establishment and maintenance of fair competition in all market sectors and effective enforcement of related regulation.

II. Changes to competition laws and policies

The main changes involve: the reform and reorganisation of the control mechanism for competition enforcement, establishing the Competition Committee as an independent administrative authority; and the introduction of general preventive merger control for all sectors of the economy, irrespective of the type of mergers. Briefly the main amendments provide the following:

General preventive control on concentrations for undertakings in all sectors of the economy is introduced under the terms that the minimum aggregate turnover of all undertakings concerned is 50 million Ecus and each of the participating undertakings has a turnover in the national market of more than five million Ecus or all the undertakings have a 25 per cent minimum market share.

Also, two control stages are provided. In the first stage, the Competition Committee decides on the basis of pure competition criteria if a merger restricts competition or not. In the second stage, the Ministers of National Economy and Commerce can permit a merger, which was prevented by the Competition Committee, if it has economic advantages, is in the public interest and compensates the competition restrictions. For transparency reasons, this decision must be explained, published and subject to judicial control. The development of a modern, flexible and effective Competition Committee is the essential condition for competition enforcement and the guarantee for the creation of a healthy competitive environment.

The Competition Committee became an independent autonomous administrative authority with a separate structure and operation, and it is supervised by the Minister of Trade who supervises the legality

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* The original language of this report is English.

of its decisions. The composition of the Competition Committee has changed, and its members are representatives from industry, consumers, trade, small- and medium-sized enterprises, high judge, professors of universities with experience in competition matters and a member of the Council of State.

The competence of the Competition Committee is being enlarged. Its investigative powers have been reinforced, and it can impose provisional measures, fines, etc. The Competition Committee publishes its decisions, which must be explained, in the official press. Also, the Competition Committee submits an annual report every year in April to the Ministers of National Economy and Commerce and to the President of Parliament.

The negative clearance provision was restored in order to create legal certainty for companies. The level of fines was being readjusted using the proportionality principle. Short time limits are also being introduced in order to shorten the investigation procedures and help the Competition Committee to adopt a rapid decisionmaking process.

III. Enforcement of competition laws and policies

Competition authorities

Enforcement statistics

During the reporting period, the Directorate for Market Research and Competition, within the framework of its duties, examined 47 cases arising either from its own initiative or from notifications and also written complaints about anti-competitive practices. On the basis of these investigations, it decided to refer these cases to the Competition Committee.

The Competition Committee issued eight opinions, which the Minister of Commerce took into consideration in its decisions, while 19 decisions were taken by the Competition Committee.

Court orders

For the period under review, one order was issued by the Administrative Court of Appeals.

Description of main cases

The other cases concern fines for refusing to supply information requested, fines or surcharges due to out of date notifications of mergers, applications for negative clearance and other miscellaneous cases.

Notification of mergers

Application statistics

During the period under review, 66 mergers were notified to the Directorate, involving the following sectors of the economy:

Food	15
Beverage	3
Fishing	2
Textiles	2
Misc. manufacturing sector	27
Building materials	3
Cosmetics	2
Computers	3
Insurance	1
Telecommunications	2
Miscellaneous	6
Total	**66**

IRELAND*

(1994)

I. Changes in competition laws and policies adopted or envisaged

The Competition Act, 1991, does not give the Competition Authority a direct role in the enforcement of competition law in Ireland. This has been recognised by the Authority, and others, as a serious weakness in the efficacy of the law. The Competition (Amendment) Bill was published in June 1994. It proposed that power to enforce the Act would be conferred upon the Authority. Thus, the Authority would be enabled, as was the Minister for Enterprise and Employment, to investigate suspected infringements of Sections 4 and 5 of the Act relating to anti-competitive agreements and abuses of dominant position, and to institute proceedings in the courts. The relief which might be sought by the Authority was the same as that of the Minister, namely a declaration or an injunction, but not damages or fines. The bill also provided that the Minister could appoint a member of the Authority who would have specific responsibility for enforcement matters -- the Director of Competition Enforcement. The bill also proposed to remove all merger and takeover agreements from the scope of Section 4 of the Act. It appeared that Section 4 would still apply, however, to anti-competitive clauses outside the merger agreement *per se*, and that Section 5 would apply to any merger which constituted the abuse of a dominant position. In addition, the Bill proposed, *inter alia*, that the Authority should be empowered to issue certificates for categories of agreements, that immunity from damage claims for the period before a decision was taken should be afforded to old notified agreements, and that the Minister might prescribe a fee to accompany merger notifications.

The progress of the bill was delayed due to political developments at the end of the year. The new government, however, announced that it proposed to confer enforcement powers on the Authority, and that it intended to provide that the Authority would be able to seek the imposition of fines by the Court. Further consideration was to be given to the handling of mergers under the Competition Act.

II. Enforcement of competition laws and policies

Action against anti-competitive practices

The work of the Director of Consumer Affairs under the 1972 Act

When the Competition Act came into operation, the Groceries Order, made under the Restrictive Practices Act of 1972, was not repealed. Responsibility for the enforcement of the Order lies with the Director of Consumer Affairs. The main matters which were dealt with by the Director in 1994 were as follows:

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* The original language of this report is English.

Milk

Early in 1994, a number of major retailers commenced selling own brand milk at a price which was two pence per litre below that of its branded milk price which in turn was two pence below the door-step price. In previous reports, it was recorded that, some years ago, despite the abolition of government price controls, the price of milk in Ireland was the same almost everywhere. Following the so-called "Milk War" of 1991 and the undertakings obtained by the Director in the High Court in 1992 from eight major dairies, the pricing situation has become varied. Notwithstanding this, farming interests threatened action (such as boycotts) against retailers who were selling own brand milk below the "normal" price. The Director wrote to the two main farming organisations and indicated that a boycott of retailers in connection with retail prices could be in breach of the Groceries Order. A meeting also took place between the Director and one of the main farming groups. Another significant development which occurred was that the main dairies indicated that they would not be involved in any boycott. It was obvious by this statement and the fact that major dairies were involved in supplying the retailers in question that the dairies were effectively "supporting" the further discounting. No boycott took place, and the retailers continued to sell own brand milk at the reduced price. Indeed, late in the year, one major retailer reduced its own brand price by a further two pence per litre.

Bread

In the spring of 1994, a number of bakeries implemented a simultaneous and similar increase in the price of branded bread. One major multiple retailer refused to implement the increase, and its branded bread supplies were withdrawn. The Director received a complaint from the retailer in question, but no evidence of threats etc. was given to him. He did, however, carry out his investigation, which revealed that the effect of the invoice price increase was to cause the bread in question to be sold below the net invoice price when sold at its previous price position. The supplier was, therefore, legally entitled to withdraw the supplies of bread under the terms of the Groceries Order. The Director is of the view that invoice manipulation can breach the provisions of the Groceries Order relating to resale price maintenance. He was unable to test this view in the Courts in this case because of the lack of evidence. The Director also believes that the Order can be easily amended to avoid this type of situation arising in the future. The only satisfactory aspect of this whole affair was the fact that the retailing group refused to increase the price of its own brand bread thus dampening price increases elsewhere in the own brand market.

Sugar

During the winter of 1993-1994, some fledgling competition emerged at the retail level for the dominant firm Sugar Distributors Ltd. owned by the Greencore Group. One of the three competing firms had brought French sugar onto the Irish market late in 1993 in the form of a generic own brand sold by a multiple retailer. This was soon withdrawn and replaced by a similar brand which was supplied half from Sugar Distributors Ltd. and half by the supplier in question. This supplier effectively only bagged this sugar as it all came from Sugar Distributors Ltd. The supplier who was obviously operating on a very tight margin went out of business at the end of the year. Another supplier in a similar position managed to survive because of the wide diversity of its business. The third competitor, which was a subsidiary of a French company, pulled out of the retail market during the year. The net effect of this fledgling competition was the introduction of a wide range of generic brands selling at 77 pence a kilo as opposed to 87 pence a kilo for premium brands. Sugar Distributors Ltd. responded by introducing a brand normally

sold on the Northern Ireland market at extremely low prices (to retailers/wholesalers, but not to consumers). Accusations of predatory pricing were made. Following discussions with the Director, this brand was withdrawn and was replaced by a "cheaper" Sugar Distributors Ltd. brand which was to be sold alongside the usual Siuicra Brand. The Director's main concern was, however, the complaint he had received about discriminatory pricing and the lack of transparency in the company's published terms. Following meetings and correspondence, the company agreed to amend its supplementary terms register and to give a more transparent indication of its terms of supply to wholesalers/retailers. Despite this, the Director remains concerned that the fledgling competition seen in 1993-1994 may not survive because of the extremely dominant position of Sugar Distributors Ltd. He intends to carry out regular inspections of the sugar market.

The work of the Competition Authority under the 1991 Act

Notifications

The number of notifications of agreements made to the Authority in 1994 was 34, compared to 66 in 1993 and well over 1 100 in 1992, during which year old agreements had to be notified if a certificate of negative clearance or a licence of exemption was sought. Up to the end of 1994, a total of 1 271 notifications had been made, of which 528 had been dealt with at the start of 1994.

Decisions

During 1994, the Authority took 116 decisions and disposed of 277 notified agreements so that by the end of the year, 805 of the 1 271 notifications made under the Act had been dealt with. This was achieved in spite of the Authority having a staff of only 12 people. The Authority in its decisions dealt with a greater number of more significant cases than in previous years.

i) Category licence for cylinder LPG dealer agreements

The Authority granted a category licence permitting exclusive purchase agreements of no more than two years' duration for cylinder LPG between suppliers and retail outlets. Three separate agreements providing for exclusive purchase for up to five years had been notified, and these were refused a certificate or a licence by the category licence. The Authority decided that as the three main suppliers had over 90 per cent of the market and had exclusive agreements with the vast majority of all suitable retail outlets, the agreements restricted competition. The Authority concluded that, as the evidence presented by the parties indicated that average weekly deliveries to retail outlets were relatively small, the agreements yielded little by way of efficiency gains, and that their duration and the fact that so many retailers were tied up by such agreements was an indication that their aim was to restrict competition. It also considered that a provision in the agreements requiring the retailer to display prominently in his store a notice from the supplier showing the current retail price constituted a form of resale price maintenance and was also anti-competitive. The Authority decided that there might be some merit in permitting exclusive purchase agreements in this sector, but only if they were for a shorter duration and decided on a two-year maximum in the category licence which also specifically requires that retailers be free to set their own prices. The category licence is granted for five years and is subject to reporting conditions since the Authority considered that there was a need for ongoing monitoring of the sector.

ii) Category licence for franchise agreements

A number of notifications were made of franchise agreements for the sale of products or the supply of services. A draft category licence was published in mid-year, and the category licence was granted on 17 November 1994. The category licence is based upon EU block exemption Regulation No. 4087/88, and it adopts the various definitions given in that Regulation, including that for "franchise agreement". The Authority considered that franchise agreements as such are not restrictive of competition, nor are obligations in franchise agreements which are necessary to support the essential ingredients of the franchising relationship. The category licence permits certain specified restrictions on competition. A number of other obligations are regarded as not generally infringing Section 4(1), and they may also be included in these agreements. The category licence also specifies situations or clauses in agreements which are not permitted. It was granted for a period of just over five years.

iii) Exclusive distribution agreements

As stated in last year's annual report, the Authority considered that a large number of exclusive distribution agreements notified to it did not satisfy the requirements of the category licence which it had granted in November 1993. This was because the agreements appeared to contain restrictions on the distributor's freedom to set prices, restrictions on passive sales outside of the exclusive territory, post-term non-compete provisions or other restrictions not permitted by the licence. In a small number of cases, the parties were able to demonstrate that the agreements did conform with the requirements of the category licence. In a number of other cases, the agreements were amended often only after the Authority issued a Statement of Objections. In a further number of cases, the notifications were withdrawn again often after the Authority issued a Statement of Objections. In some of these cases, the agreements were said to have been terminated. In one case, the Authority refused a certificate or licence. The Authority also granted several licences to agreements which were related to exclusive distribution agreements, including loan agreements to exclusive distributors of fuel oils.

Mergers and sales of business

The Authority completed dealing with notified mergers and sale of business agreements which pre-dated the Competition Act during the year. In these cases, it was only concerned with non-compete provisions in the agreements, since it considered that the merger or sale of business had been discharged by performance before the Act commenced and did not come within the scope of Section 4(1). In the case of other mergers and sales of business, it examined both the merger/sale aspect and the non-compete clauses, if any. In many cases, a certificate was issued, sometimes only after the agreements had been amended, but refusal decisions were taken in a number of cases. The more important decisions are described below.

Irish Distillers Group/Cooley Distillery

A proposal was notified to the Authority whereby Irish Distillers Group (IDG) would acquire all the shares in Cooley Distillery, along with all stocks of Irish whiskey held by companies associated with

Cooley. Irish Distillers accounted for virtually 100 per cent of the Irish whiskey market, 76 per cent of the market for all whisk(e)y, 72 per cent of gin sales and 46 per cent of all spirits. Cooley was a small distiller of Irish whiskey, which had restarted some years before, and whose products were just beginning to be released on the market. It was, however, in financial difficulties.

The Authority concluded that the relevant market was that for Irish whiskey within the State, while noting that the arrangements might also have some implications for the wider whiskey market. As IDG and Cooley were the only Irish producers of whiskey, the arrangements would have resulted in all of the existing distilleries in the State being brought under the control of IDG. Therefore, the only way for a new entrant to commence producing whiskey in Ireland would be through the construction of a new plant. This would involve substantial costs as well as a high level of working capital due to the long maturing period necessary before the product was ready for sale. The Authority considered that the costs involved in building a distillery and in holding stocks of whiskey until maturity constituted sunk costs and posed significant barriers to entry into the relevant market. The Authority considered Cooley to be a potential competitor in the Irish whiskey market. If the arrangement were to proceed, given the public announcement by IDG that it intended to close Cooley down following the acquisition, any possibility of Cooley becoming a competitor would be eliminated, while the barriers to entry would make it unlikely that any other new entrant would emerge.

The Authority did not accept the parties' submission that the arrangements satisfied the failing firm defence. It was not clear that the assets would not be purchased at a price above the liquidation value but below the price which IDG was prepared to buy. It was also relevant that IDG's stated intention was to close the Cooley distillery. In sum, given the concentrated nature of the market, the absence of any domestic competitors, the barriers to entry, the fact that other domestic firms were unlikely to enter the market and the limited competition from overseas producers, the Authority considered that the effect of the notified agreement would be to prevent, restrict or distort competition in the market for Irish whiskey and in the broader whisk(e)y market in the State. The Authority believed, for similar reasons, that the arrangements would have an adverse effect on competition in the market for certain other drinks, albeit to a lesser extent. It concluded that the agreement violated Section 4(1) of the Act.

The arrangements did not, in the Authority's opinion, meet any of the requirements for a licence under Section 4(2). The arrangements would lead to a reduction in the production of Irish whiskey. In addition, the new alternative methods of production used by Cooley constituted a form of technical progress which would be prevented by the arrangements. The arrangements would not result in any benefits which could be shared with the consumer. On the contrary, consumers would be denied any benefits they might obtain from the availability of a new source of Irish whiskey. In addition, since IDG accounted for almost 100 per cent of Irish whiskey sales and 76 per cent of all whisk(e)y, the arrangements would, in the Authority's opinion, afford the undertakings the possibility of eliminating competition in respect of a substantial part of the market in question. Accordingly, the Authority refused to grant a licence to the notified agreement. The arrangements were subsequently abandoned.

Barlo Group/Kingspan

The notification concerned arrangements for the acquisition by Barlo Group plc of the assets and property (but not the actual company or its liabilities) of Kingspan Veha Ltd. Both Barlo and Veha were involved in the production and sale of radiators for commercial and domestic use. In considering the effect of the merger on competition, the Authority noted that both Barlo and Veha each had over 30 per cent of the Irish market and a combined market share of over 70 per cent. Furthermore, no other

manufacturer in the State had a share of more than 10 per cent. The Authority concluded that, although the takeover would result in a high degree of concentration in the Irish market, the barriers to entry were such that they did not act as a major deterrent to those wishing to become involved in the business of radiator manufacture and sale. The radiators were generally of a standard design which was relatively easy to reproduce. It was also noted that a significant degree of radiator sales in Ireland was accounted for by imports and that a significant proportion of radiators produced in this country by Barlo, Veha and at least one other producer, was exported to other EU countries. The Authority concluded therefore that competition, both actual and potential, existed in the form of imported products from manufacturers in Europe and beyond and that the arrangements were unlikely to result in a diminution of competition within the State.

The Authority also noted that Veha was in financial difficulties and that its parent company, Kingspan, did not wish to incur any further losses. The Authority noted the chequered history of the Veha plant, which had a number of owners who had failed to operate it profitably, and concluded that, in the absence of Barlo, the plant would be unlikely to attract any alternative purchaser and would almost certainly close. This would inevitably lead to a higher degree of market concentration in any event. The Authority concluded, therefore, that the acquisition did not infringe Section 4(1), and it issued a certificate for the agreement.

Hickson International/Angus Fine Chemicals

The notified arrangements concerned the acquisition of Angus Fine Chemicals Ltd. (AFCL), a Cork based company involved in the production of custom fine chemicals (organic chemicals), by Hickson International plc (Hickson), a chemical producer based in West Yorkshire, England, from Angus Chemical Company (Angus) of Illinois, USA. The arrangements included a number of related agreements. The Authority decided that certain restrictions in the notified agreements violated Section 4(1) and did not meet the requirements for a licence. These clauses involved an indefinite prohibition on the use and disclosure of information, including technical know-how. The Authority decided that such a prohibition was justified in respect of know-how licensed to AFCL by its customers, but was not justified in respect of know-how concerning the business itself. Following amendment of these clauses, they were considered no longer to infringe Section 4(1), and a certificate was issued for the acquisition agreement. The supply agreement obliged the purchaser to buy 90 per cent of its requirements of a particular product, which was used in the manufacture of another product under contract for one of its customers, from Angus. The Authority considered that such a provision restricted competition for the supply of the product and violated Section 4(1). The provision satisfied all the conditions of Section 4(2), and a licence was granted for five years from the date of notification.

David Allen Holdings/Adsites

David Allen Holdings acquired the option to purchase 200 of Adsites' 48 sheet outdoor advertising panels, which were marketed by David Allen under an exclusive licence agreement. David Allen exercised the option in September 1994. The effect of this acquisition was to increase David Allen's market share of such panels from 56 per cent to 64 per cent. The Authority maintained that the market was primarily that for 48 sheet advertising posters, that it was a highly concentrated one, and that the effect of the agreement was to increase that level of concentration. The Authority considered that, where there were only relatively few competitors and one firm had a large market share, the elimination of a

competitor and its acquisition by the largest firm could be expected at least to restrict or distort competition unless there were offsetting factors at work. It believed that there were significant barriers to entry in this instance, and the market was not subject to imports. The Authority therefore concluded that the arrangements would result in a significant diminution of competition in the relevant market and that they violated Section 4(1). The Authority did not believe that the relevant market included all media fora, as claimed by the notifying party, and furthermore it believed that it would be possible for David Allen to increase prices significantly for the rental of large poster sites. Even if all advertising posters were to be considered part of the relevant market, the agreement would still violate Section 4(1) since this market was also highly concentrated. The Authority concluded that none of the requirements of Section 4(2) were satisfied, and it refused to grant a licence to the arrangements. The panels in question were subsequently disposed of by David Allen to a third party.

In a related case, David Allen had been granted an exclusive licence to market and sell the Adsites panels for three years from January 1992. The Authority decided that the agreement involved two competitors deciding to cease competing with one another in respect of a particular product, and to allow one to have sole responsibility for the joint marketing of that product, and that it clearly violated Section 14(1). It decided that the requirements of Section 4(2) were not satisfied, and it refused to grant a licence for the agreement. *Falcon Holidays/Ben McArdle*

The tour operator Falcon Holidays notified an arrangement whereby it made it mandatory for persons buying Falcon package holidays to take the travel insurance offered by the insurance broker Ben McArdle Ltd. The Authority noted that the requirement was imposed by tour operators generally, and not by the State. While this restricted the freedom of choice of consumers as to whether they purchased insurance or not, the Authority did not consider that this affected competition. The notified arrangements, however, meant that the Falcon holidaymaker had no choice of insurer and was prevented from securing insurance from other sources. The Authority considered that this clearly restricted competition. The arrangements also affected competition between insurance brokers and between insurers in that they were prevented from selling insurance to Falcon customers. Because of its market share of the package holiday market, Falcon also accounted for a significant share of the package holiday insurance market, which was effectively closed. Indeed, a large part of the entire holiday insurance business was provided exclusively by McArdle. The arrangement also prevented travel agents from selling travel insurance as they had done in the past. The notified agreement, therefore, violated Section 4(1).

The Authority considered that Falcon was perfectly entitled to offer its insurance package to its customers, provided it was made clear that there was no compulsion on the customer to take it. The Authority also observed that the fact that almost all tour operators in the State operated similar schemes made it feasible for Falcon to operate their particular scheme. The Authority considered that there was no reason why the benefits of mandatory travel insurance could not be obtained were consumers free to make their own travel insurance arrangements, as they were in Northern Ireland and Britain. The arrangements could not be regarded as indispensable, and they were likely to eliminate competition, and so did not satisfy the requirements of Section 4(2).

Following the issue of a Statement of Objections, Falcon agreed to amend the notified arrangements, by allowing customers the option of taking Falcon's pre-arranged insurance policy or of making alternative arrangements for insurance. In the Authority's opinion, the amended arrangements would not infringe Section 4(1), neither would the arrangement whereby Falcon customers might have to sign an undertaking that they would organise their own holiday insurance cover. A certificate was issued for the amended agreement.

Irish Stock Exchange rules in relation to dealing in Irish Government Securities

The notification related to the rules of the Irish Stock Exchange, dated January 1987, in relation to dealing in Irish Government Securities (gilts) by member firms. The rules set out the basis on which member firms of the Exchange could deal in Irish gilts. In particular, they provided that brokers could operate in an agency capacity only and were obliged to charge a fixed rate of commission on transactions in gilts with more than five years to maturity. The Authority indicated that it considered price-fixing to be anti-competitive, regardless of the level at which prices were fixed. The Authority concluded that the setting of fixed commissions eliminated the possibility for stockbrokers to compete on the basis of price and range of services offered, and violated Section 4(1). If the requirement that firms only operate in an agency capacity were removed, some stockbrokers could conceivably decide to operate as market makers and this would obviously have an effect on competition in the gilt market. The Authority considered that, essentially, the agency-only rule prevented the possible emergence of market makers in the gilt market, and, therefore, competition in the market was distorted to some degree. This also offended against Section 4(1). It also considered that neither restriction satisfied the requirements of Section 4(2), and it refused to grant a licence for the arrangements. Both rules were abolished by the Stock Exchange.

The Net Book and related agreements

The Net Book Agreement is a voluntary agreement between UK publishers and administered by the Publishers Association, which imposed a minimum net price on books sold within Ireland. It comprises eight agreements, seven of which provided some form of exemption from the NBA. The most significant clause in the agreement was that which provided that, except in specified circumstances, books covered by the agreement (known as net books) could not be sold at less than the net published price, i.e. the price fixed by the book publisher.

The Authority noted that the agreement involved a degree of resale price maintenance (RPM). In assessing its effects, the Authority considered various economic theories on RPM. It concluded that the weight of evidence indicated that RPM restricted competition and that agreements involving RPM generally violated Section 4(1). As the NBA was such an agreement, it had the object and effect of restricting competition in the market for books within Ireland. In considering the parties' application for the grant of a licence under Section 4(2), the Authority concluded that RPM, in this or any other case, did not contribute to improving the production of goods or provision of services or to promoting technical or economic progress. Consumers could not therefore share in such benefits, and the restrictions could not be regarded as indispensable to the achievement of such objectives. UK published books accounted for a substantial proportion of books sold in Ireland. As most UK books were net books, the restrictions contained in the NBA eliminated competition in respect of a substantial part of the relevant market. Consequently, the NBA did not satisfy any of the requirements for a licence set out in Section 4(2) of the Competition Act. The primary aim of the remaining agreements was to ensure the effective operation of RPM. Thus they also failed to satisfy the requirements of Section 4(2), and a licence was refused in respect of all the notified agreements.

Following this decision, the Authority dealt with several related agreements. First, it considered a currency conversion agreement between members of the Booksellers Association. This involved a currency conversion chart for determining the exchange rate to be applied to the cover price of books imported from the United Kingdom into Irish pounds for sale to consumers. While there was no formal agreement between the members of the Association, the Authority decided that it was a decision by an association of undertakings and a concerted practice to directly or indirectly fix retail selling prices

throughout Ireland of books imported from the United Kingdom and was prohibited under Section 4(1) of the Act. The arrangements did not fix specific prices, but they were drawn up to facilitate the operation of the NBA in Ireland. Since they did not satisfy the requirements of Section 4(2), a licence was refused.

Secondly, a major Irish publisher, Gill & Macmillan, notified its standard terms and conditions for selling books to bookshops. These applied to books published by Gill & Macmillan itself, and also to those which it distributed on behalf of other Irish publishers. They made provision, *inter alia*, for payment dates, delivery and return of overstocks. Clause 16 involved a restriction on the price at which booksellers could sell the books. Specifically, they could not be sold at retail level at less than the unit price indicated on the invoice. The Authority considered that Clause 16 represented full-scale resale price maintenance. For the reasons given in the NBA decision, the Authority considered that the inclusion of this clause meant that the agreement violated Section 4(1), and did not satisfy the conditions for the grant of a licence under Section 4(2). None of the other provisions of the agreement was considered to infringe Section 4(1). Following the issue of a Statement of Objections, Gill & Macmillan stated that it had decided to delete Clause 16, and that it would inform the other publishers and its customers of the deletion. Because of the deletion of the offending clause, the Authority considered that the amended agreement no longer violated Section 4(1), and it issued a certificate.

Finally, Gill & Macmillan notified nine agreements with various Irish publishers under which it agreed to act as sole distributor for their books, for which it imposed a service charge. The agreement was virtually a standard agreement, and it provided for certain tasks to be undertaken by Gill & Macmillan. In addition, the agreements implied acceptance of the terms and conditions of sale by Gill & Macmillan, including Clause 16, described above. The Authority considered that the essential feature of the arrangements was that Gill & Macmillan supplied the service of storage and physical distribution of books on behalf of publishers. The Authority considered that such distribution arrangements did not, in principle, violate Section 4(1). It also considered that none of the clauses in the notified agreements violated Section 4(1), but, because they implied acceptance of Clause 16 of Gill & Macmillan's terms and conditions, no certificate or licence could be granted. Following the issue of a Statement of Objections and the deletion of Clause 16, the Authority concluded that the agreements did not violate Section 4(1), and it issued a certificate for the agreements.

Exclusive purchasing agreements

Musgrave/SuperToys

The Authority objected to an agreement between a wholesaler and a group of toy retailers trading under a common group name, because the arrangement involved all of the retailers agreeing on the prices to be included in a catalogue, which they distributed to consumers, and it required them to abide by those prices. Retailers could reduce prices in response to local competition, but could not advertise such price reductions. It subsequently emerged that the prices agreed by the retailers at their meetings were suggested by the wholesaler. The Authority accepted an amendment whereby it was made clear that the retailer was not obliged to adhere to the catalogue price and on the basis that future editions of the catalogue would carry an indication on the cover that the prices quoted were recommended. It issued a certificate to the amended agreement.

Musgraves licensee and franchise agreements

In this case, the Authority refused a certificate or licence to a series of agreements between a wholesaler and two groups of symbol group stores whose members agreed to purchase supplies exclusively from the wholesaler or suppliers nominated by it. In total, almost 400 retail outlets with a combined share of almost 15 per cent of the national grocery market were parties to the agreements. The agreement required that the retailers stock and display all of the wholesaler's own brand goods at its recommended price. Such goods represented 15 per cent of all dry grocery goods sold by the retailers. The agreements also required that they abide by the prices set by the wholesaler for items which the wholesaler specified as being on national promotion. The agreements also required that all equipment, furniture and fittings be purchased from suppliers nominated by the wholesaler. In addition, the agreements prevented the retailers from selling their stores to a competitor of the wholesaler, required them to give it first option to purchase the stores and prevented them from operating a grocery store for one year after termination of the agreements. Some agreements which related to individuals operating stores owned by the wholesaler obliged the retailer to purchase insurance for their stocks through the wholesaler and to employ an accountant nominated by the wholesaler to audit their accounts. These requirements were also found offensive. The Authority had extensive discussions with the wholesaler, but it proved impossible to secure amendments to the agreements which satisfied the Authority.

Burmah Castrol hire purchase, equipment and new cash loan agreements

Burmah Castrol notified several agreements concerning the loan of cash or equipment for the dispensing of lubricating oil. Under the equipment loan agreement, Burmah loaned equipment to the reseller, in return for which the reseller agreed to use the equipment exclusively for the dispensing of Castrol products. Each agreement was for an indefinite period. Under the hire purchase agreement, Burmah supplied equipment on hire purchase terms, and the reseller agreed to use and stock Castrol lubricants exclusively in the equipment. These agreements had a duration ranging from one to ten years. In the opinion of the Authority, a requirement regarding the exclusive use of equipment would not *per se* violate Section 4(1), unless it had the effect of ensuring exclusive purchasing of products from the supplier. The Authority considered that the agreements had the effect of ensuring exclusive purchasing in many cases, and so violated Section 4(1). The Authority considered that the exclusive purchasing requirement in the equipment loan agreement, again for an indefinite period, would have a significant impact on competition and violate Section 4(1).

The Authority considered that the exclusive purchasing requirement did not satisfy the conditions of Section 4(2). It stated, however, that it could take a more favourable view of exclusive use of equipment requirements. It considered that the possibility of eliminating competition would not be afforded if such requirements were limited to the period of the loan, or to five years, whichever was the shorter. In these circumstances, the Authority considered that the conditions of Section 4(2) would be satisfied. The notified agreements, however, did not comply with this criterion, and so they did not satisfy the conditions of Section 4(2). Burmah proposed amendments to the agreements which were not acceptable to the Authority, and it refused to grant a licence to the agreements.

Under the new cash loan agreement, Burmah Castrol made a cash loan to the reseller for the purchase of lubrication equipment, in return for which the reseller agreed to use exclusively on the premises, lubricants, additives and brake fluids supplied by Burmah Castrol. The maximum period was stated to be five years. The agreement amounted to an exclusive purchasing agreement and, for the reasons given above, the Authority considered that it violated Section 4(1). The Authority considered that

the agreement did not satisfy the requirements of Section 4(2). Burmah Castrol amended the agreement by requiring that the equipment whose purchase was financed by the loan should be used exclusively for its products (for a maximum period of five years). The Authority granted a licence for the amended agreement.

Commercial agency agreements

The Authority gave its view on a number of commercial agency agreements during the year. It stated that it considered that a commercial agent was a self-employed intermediary between the principal and a purchaser or seller. He was an auxiliary organ, forming an integral part of the principal's business, and was bound to carry out the instructions of the principal. His position was similar to that of an employee. Being integrated into the principal's business, the commercial agent could undertake no autonomous commercial behaviour, and certain restrictions on him were fundamental to the relationship. The Authority considered that profits or losses essentially accrued to the principal and not to the commercial agent. The Authority stated that, since the commercial agent was an auxiliary organ, similar to an employee, an agreement between a principal and a commercial agent did not, in principle, violated Section 4(1) of the Act. It stated, however, that certain clauses in a commercial agency agreement might occasionally infringe Section 4(1). Accordingly, it issued certificates to several agreements, sometimes after amendments had been made. It took a similar view towards agreements which involved delivery of products on an exclusive basis on behalf of a supplier, in return for which a fee was paid.

Assignment of copyright

Performing Right Society

The Performing Right Society (PRS) and its subsidiary the Irish Music Rights Organisation Ltd. jointly notified three standard form agreements relating to the assignment by creators and publishers of copyright in musical works to PRS. Directly or indirectly, this assignment enabled PRS to administer the performing right in Ireland, in the United Kingdom, and throughout the world. The Authority recognised that the essential feature of the copyright arrangements was that they involved a transfer of ownership of property (the performing right) from the creator or publisher to PRS, thereby granting PRS the exclusive right necessary to exploit the copyright. The arrangements precluded each member of PRS from administering the performing right himself. They also involved a restriction on the freedom of copyright users to purchase the performing right from any supplier other than PRS. In the view of the Authority, the arrangements, taken in their collective context, constituted an exclusive collective copyright enforcement system involving independent undertakings, and were restrictive of competition and violated Section 4(1). Besides the basic exclusive assignment, the Authority considered that the following provisions also violated Section 4(1):

-- the form and duration of the assignment agreement;

-- the restriction on the times at which rights might be divided by category or by country;

-- restrictions on termination of membership; and

-- restrictions on allowing members to administer the performing right themselves.

The Authority accepted that a collective copyright enforcement system, in general, produced an improvement in the provision of services. There were considerable practical difficulties involved in the administration and enforcement of performing rights, and these pointed to the need for a central collective licensing/enforcement system on behalf of creators and publishers, many of whom were based outside Ireland. It accepted that a collective system of performing right administration involved efficiencies, and that consumers would be allowed a fair share of the benefits. Under the PRS system, the assignment of the performing right is done on an exclusive basis. The Authority contrasted this situation with that in the United States, where either exclusivity was prohibited in the case of one society, or where affiliates of another society had to be granted permission to licence individual users themselves. The Authority concluded that preventing PRS members from granting non-exclusive licences to individual users for particular purposes was not indispensable for PRS to operate effectively as a collective copyright enforcement agency. It considered that the members should have the freedom to choose whether to allow PRS alone to administer all or part of the performing right, or to administer it themselves on individual occasions. The Authority also considered that the duration and form of the assignment agreement, the restriction on the times at which members could divide rights, and the restrictions on termination of membership, were not indispensable. The three-year period for the exercise of these rights was considered by the Authority not to be indispensable, though a reduction of the period to one year would satisfy its concerns. The Authority refused to grant a licence to the agreements.

Television and cable television

Two related agreements were notified involving the holders of copyright in UK television programmes, namely the Irish Music Rights Organisation and Irish cable relay/MMDS operators. The agreements related to the licensing of the retransmission of programmes within Ireland, and the collection and apportionment of licence fees. The Authority took the view that collective licensing arrangements between actual or potential competitors violated Section 4(1). The Authority considered that the agreements, as amended to satisfy concerns expressed by the European Commission, satisfied all the conditions of Section 4(2), and a licence was granted to both agreements.

Agreements relating to property

Having disposed of the remainder of the shopping centre leases, to which certificates were granted, the Authority dealt with a large number of other kinds of agreements relating to property in 1994. These included sole concessions, leases and sales of property. The Authority stated that it considered that standard restrictions and obligations, which were necessary for the maintenance of a proper relationship in regard to the operation of a concession and the occupation of the premises, did not raise issues under the Act. The Authority had already stated, in respect of shopping centres, that it considered that exclusive user clauses did not violate Section 4(1) of the Act, and it took a similar view about sole concessions to use business premises in a building complex. Generally speaking, there were competing businesses within a short distance of the particular premises. A similar view was taken by the Authority regarding property leases. The standard landlord and tenant restrictions and obligations were not regarded as raising issues under the Act.

Judicial review

Reference was made in the 1993 report that an operator of a petrol company station had been granted leave to seek a judicial review of the motor fuels category licence, *inter alia*, on the grounds that the procedures adopted by the Authority were in breach of natural justice and fair procedures. The action was not successful and, on 24 June 1994, the High Court held that the procedures of the Authority were eminently fair and reasonable. The practice of the Authority in issuing a draft of the category licence and inviting submissions was found to have given parties affected a very detailed appraisal as a basis on which to make submissions. The judgement has been appealed to the Supreme Court.

Restrictive practices in the legal profession

The predecessor of the Authority, the Fair Trade Commission, prepared a comprehensive report into restrictive practices in the legal profession, which was published in 1990. Many of the Commission's recommendations have been incorporated in the Solicitors Act, 1994, and in other proposed legislation, such as the Courts and Court Officers Bill, during the year.

Newspaper study

In the light of concern expressed by Irish newspaper publishers at the pricing practices of UK newspaper publishers, the Minister requested the Authority, in October 1994, to undertake and report on a study and analysis of the practice and method of competition affecting the supply and the distribution of newspapers in this country, including an analysis of any developments outside Ireland which impinge on Ireland. Shortly afterwards, the Minister requested that the issues arising from transfrontier competition in the sector should be the subject of an interim study which should be carried out as soon as possible.

On 22 December 1994, the purchase was announced by Independent Newspapers plc, the major Irish newspaper publisher, of a 24.9 per cent minority interest in Irish Press Newspapers Ltd. and Irish Press Publishing Ltd., another major newspaper publisher, and its making of a £ two million short-term loan to these companies. On 29 December, the Minister wrote to the Authority requesting it to extend the study to include the issue of possible dominance and its implications for competition in the newspaper industry. The Minister asked for an early report in regard to this matter.

III. Mergers and concentrations

Competition Authority

No mergers were referred to the Authority for investigation during 1994.

Statistics on concentrations

Concentrations notified to the Minister in 1993 and 1994 were:

	1993	1994[1]
Carried forward	8	4
Notified in year	115	127
Outside Act	58	73
Did not proceed/withdrawn	1	4
Allowed	57	54
Prohibited	-	-
Referred to Commission/Competition Authority	1[2]	-

[1] Figures are provisional.
[2] The proposal subsequently did not proceed.

ITALY*

(1994)

I. Developments in competition policy

Summary of action taken by the Authority

The protection of competition and corporate behaviour

In enforcing the Competition and Fair Trading Act No. 287/90 (the Act), in 1994, the Authority pronounced on 25 agreements, 14 cases of alleged abuse of dominant position and 597 concentrations between companies (Table 1). It ascertained seven infringements of the prohibition on agreements restricting competition within the scope of Section 2 of the Act and five cases of abuse of dominant position by companies in breach of Section 3. None of the concentrations examined by the Authority during the year was prohibited. In the same period, the Authority submitted 78 opinions concerning the enforcement of the Act to the Bank of Italy and to the Broadcasting and Publishing Authority. In the first quarter of 1995, the Authority completed the examination of another 184 procedures relating to seven agreements, six cases of alleged abuses of dominant position and 171 concentrations, and issued 18 opinions to the Bank of Italy and to the Broadcasting and Publishing Authority.

In order to gather information on the existence and nature of any distortion of competition in particular economic sectors, the Authority completed three general fact-finding investigations into the dairy industry, cinemas and liquefied petroleum gas for heating purposes, and began another four investigations into methane gas, fuel distribution for vehicles, pharmaceuticals and professional services.

It also ruled on 213 cases of alleged misleading advertising, finding 105 breaches of Legislative Decree No. 74 of 25 January 1992.

Table 1

Authority decisions
(number of cases)

	1993	1994	January-March 1995
Concentrations	501	597	171
Agreements	26	25	7
Abuse of a dominant position	20	14	6
Misleading advertising	166	213	55

* The original language of this report is English.

Promoting competition

Pursuant to Sections 21 and 22 of the Act, the Authority has repeatedly used its powers to point out to Parliament and the government legislation or regulations unduly restricting the operation of markets. In the period from January 1994 through March 1995, it submitted opinions on laws and regulations dealing with telecommunications, electricity, vehicle fuels, vehicle components, harbour services, insurance, cinemas, retailing of newspapers and professional services.

In July 1994, it issued a report on "Competition and Regulation in Public Utility Services". In recent years, demand and technological developments have created the conditions for increased competition in the provision of public services. The Authority emphasised that, even though in some cases a monopoly may be more efficient than a competitive market, market access should not generally be restricted by legislation. In fact, the removal of statutory barriers to entry in industries that have been protected for a long time from competition favours the transition towards a regime in which the scope of the monopoly is determined by market forces. Arguably, liberalisation of public utility services may also be made wholly compatible with the essential requirements of security, continuity and universality of services.

Lastly, the Authority has repeatedly maintained that privatisation in Italy may be an important means of establishing competitive market structures under circumstances in which mere access liberalisation is not sufficient. Corporate reorganisation, carried out prior to the privatisation of a company operating under a statutory monopoly, in some cases may make it possible to sell off plants or different activities separately, enhancing market competition. The more competition on the market, the less need there is to regulate firm behaviour.

Apéritifs

The Campari-Bols concentration

In 1994, the Authority investigated the acquisition by Davide Campari Milano Spa of the controlling interest in all the companies belonging to the multinational Koninklijke Bolswessanen N.V. operating in Italy. This operation gave Campari a leadership position on the Italian apéritif market as a result of the merger between the second and third largest companies operating on it. Because of factors likely to restrict Campari's market power, at the end of the investigation the Authority found that this operation did not appreciably reduce competition on a lasting basis within the meaning of Article 6 of the Act. It found that the main operators on the apéritif market, despite a considerably smaller market share, also had at least one extremely important brand name being part of the range of products generally on offer in all bars. Some market niches were also occupied by small manufacturers with well-established brands, even though this was circumscribed to certain areas or to limited groups of consumers. Lastly, the lack of technological entry barriers suggested that, in the event of a significant increase in the price of the products concerned, other beverage manufacturers which already had links with the distribution chain could profitably enter the market within a short time.

Cement and concrete

Conduct intended to hamper cement imports into Sardinia

This investigation, completed in February 1995, concerned the Italcementi company, the main cement manufacturer in Sardinia. From the early 1980s until 1992, Italcementi held a stable market share

averaging 75 per cent of cement sales in the region, with the residual demand being met by the Unicem Spa company, which also had manufacturing facilities on the island.

Since March 1993, a number of other companies have begun marketing imported cement in Sardinia, costing about 20 per cent less than the price usually charged by local manufacturers. Although imports started to erode significantly its market share, which fell from 67 per cent to 55 per cent during 1993, Italcementi did not change its cement prices in response to these market developments. However, having acquired ten concrete production facilities between April and June 1993, it began to sell its concrete at prices lower than the variable cost of production, amounting to a 40 per cent discount relative to going market prices.

This commercial policy on the concrete market was designed to dissuade the many independent pre-packaging companies from purchasing their cement from importers. It also emerged that Italcementi had entered into contractual agreements for long-term supplies with the main concrete purchasing companies operating in the Cagliari area, providing conditions in terms of discounts and minimum purchases that excluded third parties from access to the market.

The Authority ruled that Italcementi's conduct was part of an overall plan to restrict access to the Sardinian cement market and constituted an abuse of dominant position. Considering the seriousness and the duration of the breach, it fined the company 3.7 billion lire.

Motor vehicles

Report on the patentability of motor vehicle body spare parts

In September 1994, the Authority submitted a report to Parliament and the government under Section 21 of the Act regarding possible distortions of competition on the market for motor vehicle body spare parts, resulting from the way in which the law on patents for models and ornamental designs was being implemented. By considering spare body parts of patented vehicles as ornamental models, Italy's current legislation seemed to give motor vehicle manufacturers an excessive patent protection. So far, no clear interpretation had been given by the courts on this subject.

In the opinion of the Authority, the patentability of spare body parts restricts the possibility to reproduce or sell spare parts and thereby imposes restrictions on competition that appear to have no justification in terms of the function which patents are designed to perform. It found in particular that, since the motor car model was itself covered by patent rights, the patenting of detached spare motor car body parts did not add any autonomous incentive to innovation in the sector. The Authority therefore urged the legislator to adopt measures to deny patent protection, or at least limit its duration, for detached motor car body parts, to prevent competition on the relevant market from being unjustifiably restricted to the detriment of consumers.

Electricity

Promotion of competition

In June 1994, the Authority submitted a report under Section 22 of the Act, containing a number of proposals for the structural reorganisation of the electricity industry. Firstly, the Authority drew attention to the possibility that the future privatisation of Enel, the state-owned electricity company, might simply replace a public monopoly with a private one. This would seriously jeopardise any future possibility of developing competition in the industry, thereby aggravating the problems and difficulties of regulating corporate behaviour to adequately protect consumers' interests.

The Authority therefore pointed to the need to thoroughly review the whole system created by the 1962 Nationalisation Act, with particular reference to the statutory monopoly covering the production, import and export, transport, transformation, distribution and sale of electricity. The Authority argued that substantial liberalisation can be made compatible with essential requirements of security, continuity, efficiency and universality of electricity supply. At the same time, it emphasised the need to couple the liberalisation of market access with a revision of the present structure of the industry, using privatisation as a means of making a clearer distinction between activities subject to competition (the production and supply of electricity to major users) and regulated activities (managing the transmission and distribution network, and transporting and supplying electricity to smaller users). More specifically, the Authority proposed the following: a sharp separation between the different phases of production, transmission and distribution, in terms of ownership and management, in order to prevent the market power that could be exercised by the network infrastructure management companies from appreciably distorting the operation of the markets opened up to competition; the individual disposal of Enel's generation facilities to encourage the emergence of a variety of independent and competing electricity producers within a reasonably short time; the centralisation in a single company -- possibly to be left under State control -- of transmission to avoid wasting the benefits deriving from the coordinated operation of production facilities and to guarantee constant control over electricity flows through the national grid; the continuing control of hydroelectric resources by the single company in charge of transmission; and the comprehensive reorganisation of the existing electricity distribution system by setting up a variety of local undertakings to be assigned ownership of the distribution networks within their particular areas of operation.

The Authority also suggested to modify the regulatory framework, emphasising the need to create an authority, autonomous and independent of the government, with regulatory powers in the area of technical standards and tariffs and overseeing compliance with universal service obligations. The Authority also prompted the gradual deregulation of electricity prices for large end-users, and the design by the electricity regulatory body of specific regulations governing the legal, technical and economic conditions for providing both the electricity service to the other categories of users and third-party access to the networks.

Motor vehicle fuels

Report on motor vehicle fuel prices

The Authority submitted a report to the Prime Minister and the Minister of Industry regarding a resolution adopted by the Inter-Departmental Committee for Economic Policy (CIPE) and the ministerial decree implementing it, on the pricing of motor vehicle fuels. The CIPE resolution required the oil companies to issue recommended prices for the public sale of fuel, while the ministerial decree required

the retailers to advertise these prices visibly at all sales outlets. The Authority pointed out that such measures could facilitate the adoption of concerted price-fixing policies in the industry.

Liquefied petroleum gas (LPG) for domestic use

Fact-finding survey

In March 1995, the Authority completed the general-fact finding survey of the market for LPG for domestic use sold in small gas tanks. It revealed that while in other European countries there were various types of contracts for LPG distribution for domestic use, the practice in Italy was almost invariably to provide the cylinder on free loan in exchange for the exclusive supply of fuel for a period covering several years. Frequently the cost of dismantling the fuel tank is charged to the customer, making it even more difficult to change suppliers.

This widespread contractual practice restricts the possibility for the user to make a choice between the different forms of fuel supply, including ancillary services. While the suppliers are on a substantially equal footing in competing for potential customers who have not yet concluded a supply contract, other LPG customers tend to be tied to distribution companies due to free loan and exclusive supply agreements. There is also a strong disincentive in the standard contractual conditions against looking for a new supplier on the expiry of a contract because of the need to replace the fuel tank.

The Authority found that these practices are not necessary to ensure the safety of LPG tanks, which is guaranteed by compliance with current legislation and inspection procedures. Most of the medium and small companies questioned for the survey confirmed their preference for the present contractual procedures and felt that they could not be changed unless the larger companies were also willing to introduce changes. This confirms that larger companies play a role which acts as a powerful constraint on the behaviour of other operators in the industry. The fact-finding survey came to the conclusion that in the light of experience in other countries, where alternative contractual systems are used, Italy's present contractual practice appreciably distorts competition because of its extent and because of the standardised contractual terms.

Retail distribution of newspapers, magazines and periodicals

Report on legislation on the distribution of publications

In October 1994, the Authority submitted a report to Parliament and to the government on the subject of current legislation governing the distribution of newspapers, magazines and periodicals. Under this legislation, the municipal authorities are required to issue plans for the siting of newspaper and periodical sales outlets, in compliance with regional policy guidelines aimed at defining market structure at the local level, and particularly the optimum number of newspaper and magazine sales outlets. The law also expressly identifies bookshops, department stores and tobacconists as being parallel outlets to the network of street newspaper vendors, but only allows them to enter into the market provided that they are identified as newspaper sales outlets in municipal plans, thereby restricting their operations.

The Authority stressed that the establishment of new sales outlets for newspapers and periodicals should not be governed by any planning rationale and that the structural regulation of the market is likely to impede the development of competition in the newspaper and magazine distribution market. Considering that liberalisation of market access and a genuine multiplicity of sales outlets would lead to a wider readership of newspapers and magazines, the Authority suggested a reform of the current legislation,

abolishing the present system of local government control over the structure of the daily and periodical press distribution markets.

The Authority also pointed out that the liberalisation process could leave unchanged the current statutory obligation on retailers to ensure the equality of treatment of all newspapers, as is the case in France and Germany. Alternatively, this obligation could be abolished by Parliament in view of the economic constraint that it imposes on free enterprise. But if this approach were adopted, judging from the experience of other countries, particularly the United Kingdom, the authorities should revise the rules governing the contractual relationship between newspaper and periodical retailers and publishers based on the right to return unsold publications.

Transportation services

Abuses on the motorway toll collection market

In 1994, the Authority investigated Autostrade Spa, which has the exclusive franchise to manage most sections of the Italian motorway network. Under the terms of the franchise, the company also collects the toll charges. Since the franchise does not stipulate modes of payment, the Authority held that it did not include exclusive rights to run payment services relating to motorway toll collection.

Over the past ten years, throughout its own network Autostrade Spa has set up a system of automatic toll payments using the "Viacard" and the "Telepass" payment systems. The Viacard payment system uses two types of cards: a prepaid card which can be bought in different denominations and gradually debited until it is spent, and a credit card system with a direct debit charged to the user's bank account. Telepass is an optical reading system which directly debits the user's bank account with the toll charge using a special device installed in the car. During 1993, Autostrade embarked on a plan to convert an increasing number of toll booths into "unmanned computerised stations" where only the Viacard or Telepass systems can be used to pay toll charges, without any possibility for motorists to pay cash. While reducing toll collection times, this system also forced motorists to acquire specific devices and instruments to be used only for that specific service, and hence imposed a burden on motorway-use particularly for the occasional user. The Authority found that this additional toll payment burden on users was not strictly necessary to introduce innovation into the toll collection procedure, and therefore ruled that the ways in which the Autostrade company had embarked on the automatic collection system constituted an abuse of dominant position on the motorway services market.

After the investigation had begun, the Autostrade company adopted a number of measures to improve the service and took up the suggestions made by the Authority to give motorway users the possibility of paying the road toll with alternative methods. In particular, the Viacard optical readers were gradually replaced by devices that were able to read also other types of magnetic cards (both credit and debit cards). Moreover, on all exit roads fitted with "unmanned computerised stations" a manned booth has also been installed, so that motorists are able to pay cash from inside their vehicle. Lastly, the Autostrade company is currently examining a plan to replace toll collection personnel with automated toll payment points where toll charges can be paid from the vehicle by magnetic card, or using Italian or foreign banknotes with change given.

Agreements on the provision of breakdown services for motorists

In 1994, the Authority was informed that a list of standard prices for the provision of breakdown services on the ordinary road network had been drawn up by the Automobile Club Italia - ACI Servizio di

Soccorso Stradale Spa and the Associazione Nazionale Centri Soccorso Autoveicoli (ANCSA). In view of the fact that motorists are usually in an emergency situation when requiring the breakdown services, the Authority acknowledged that consumers would benefit from the availability of a list of prices for such services. However, it requested these prices to be the maximum recommended ones that could be charged by the breakdown service providers. After a number of meetings between the Authority and the parties concerned, the service providers agreed that the standard charges for breakdown services were to be considered maximum charges.

Abuse of dominant position in the passenger shipping industry

In April 1994, the Authority began investigating a number of companies belonging to the Lauro group, providing ferry and hydrofoil services between the island of Ischia and the port of Pozzuoli. The investigation was spurred by a complaint against the practice of offering loyalty rebates to customers provided that they used services of the Lauro shipping companies exclusively. The Authority identified two distinct passenger shipping markets: the ferry market and the scheduled hydrofoil services, taking account of the different crossing times and fares which considerably limited the choice between one service in preference to another. The geographical relevant market was identified as the Pozzuoli-Ischia route, in view of the fact that users had virtually no alternative choices open to them. The investigation concluded that the Lauro group abused of the dominant position it held on the relevant markets by using a loyalty rebate system that effectively constrained customers.

Reports regarding the reform of harbour legislation

In April 1994, the Authority reiterated to the Minister of Transport the need to draw a clear distinction between the control and the management of harbour activities, identifying a number of possible ways in which the operation of the market might be impeded by provisions governing conditions of access to harbour operations.

In July 1994, the Authority submitted its opinion to the Minister of Transport on a draft decree implementing the new harbour legislation, Law No. 84/1994. It found that some of the criteria laid down in the draft decree might give incumbent companies on the market for port operations an advantage relative to potential new competitors, thereby impeding efficient resource allocation. Moreover, it argued that the decree should require that permits be given to the maximum number of companies consistent with the structural characteristics of the harbour concerned and that the criteria for issuing licences reward the ability of companies to provide services at the lowest prices.

Report on charges for port piloting services

In June 1994, the Authority requested the Minister of Transport to revise the present tariff system for port piloting services, in order to remove distortions to competition. These resulted from a 30 per cent reduction on charges for piloting services in Italian ports offered only to Italian ships or ships registered within the European Union. Since ministerial decrees make the piloting service in Italian ports compulsory, the discriminatory charges for these services created an unjustified economic disadvantage to the detriment of companies which did not use ships registered within the European Union.

Abuse of dominant position by Alitalia on the Roma-Milano route

In October 1993, the Authority began an investigation into the alleged abuse of dominant position by Alitalia on the Roma Fiumicino-Milano Linate route. It considered this route as a distinct relevant market, noting that users could hardly substitute Milano-Linate with Milano-Malpensa airports, due *inter alia* to the considerable distance between Malpensa and the centre of Milano and the lack of adequate links between the two airports. Alitalia was the only airline servicing the Roma Fiumicino-Milano Linate route. In the period January-June 1993, the company had routinely cancelled flights to below the number scheduled for that route, with only a very small number of the cancelled flights being due to weather conditions or causes independent of the operational choices of the airline. It turned out that, due to cancellations by Alitalia, slots that could have been filled by other companies remained unused. The investigation concluded that Alitalia abused of its dominant position by restricting the range of services on offer and impeding access to the market by competing airlines, to the detriment of consumers.

As a result, Alitalia rescheduled weekly flights on that particular route increasing their number by 35 per cent and spreading daily services more evenly over time. At the same time, the Ministry of Transport brought into full application at Linate Airport the provisions of EC Regulation No. 95/1993 governing the allocation of time bands in Community airports, and laying down rules to allocate to new market entrants any slots which were not being adequately used by incumbents.

Abuse of dominant position on the catering market at Roma Fiumicino Airport

In July 1994, the Authority took action against the Roma-Fiumicino airport management company, Aeroporti di Roma, for alleged abuse of dominant position on the catering market at the same airport. The procedure began as a result of a complaint from the De Montis Catering Roma Srl company, whose request to Aeroporti di Roma to provide catering services had been refused.

The Authority noted that catering services at Roma-Fiumicino Airport constituted a distinct relevant market. The refusal of Aeroporti di Roma to negotiate with De Montis on the terms and conditions of access to Roma-Fiumicino airport could not be justified on the grounds of necessity, such as a lack of space on the premises or for acceptable economic reasons. It therefore concluded that the Aeroporti di Roma company had abused its dominant position with regard to the management of the airport infrastructure by preventing third-party access to the catering market over which it held a *de facto* monopoly.

During the proceedings, De Montis and Aeroporti di Roma concluded a sub-franchise agreement to provide catering services at Roma-Fiumicino airport. Under this agreement, De Montis was required to pay Aeroporti di Roma a fee for the use of the infrastructure and the facilities supplied and maintained by the franchisee. Aeroporti di Roma would also continue to provide the same services and could also sub-franchise them to other operators.

Telecommunications

Report on the single telecommunications carrier

In 1994, state-controlled telecommunication companies were incorporated into a single carrier, Telecom Italia S.p.A., resulting from the merger of Sip, Italcable, Sirm, Iritel and Telespazio. Since all

these companies were already controlled by the state-owned holding company IRI S.p.A., the Authority considered that the concentration was not likely to distort competition on the relevant markets. However, at the time Telecom Italia was incorporated, the Authority submitted a report under Section 22 of the Act to emphasise the need to hasten the liberalisation of access to telecommunication markets.

First of all, the Authority noted that the adjustment of the national telecommunication services market to the dynamics of international competition had been severely delayed by the failure to incorporate into national legislation the European Commission Directive 90/388, which is the central core of Community policy for the liberalisation of telecommunication services. It expressed the hope that action would be taken in order to remove constraints on the construction and use of alternative network infra-structures, because these constraints are no longer justifiable on technical or economic grounds, in view of the technological innovations concerning both the switching and transmission functions. In this connection, the Authority ruled that it was necessary to re-examine the current conventions and agreements between the Ministry of Telecommunications and the companies that had been merged into Telecom Italia, in order to adapt them to a more competitive environment.

Telsystem-Telecom

In 1994, Telecom Italia was charged with alleged abuse of dominant position on the market for services for closed user-groups by Telsystem S.p.A., a company created to provide the service of linking telephone exchanges between customers' offices using a network infrastructure exclusively composed of switching nodes and dedicated lines leased from Telecom. Telsystem was to pay Telecom a fixed charge for the lease of dedicated local and trunk lines, while its own customers would pay for the use they actually made of the lines. According to Telsystem, despite repeated requests, Telecom refused to lease the lines they required to link the head offices of Telsystem's customers, justifying this refusal on the grounds that the Telsystem service was within the exclusive domain of the public carrier and was not one of the services that had been liberalised by Community Directive 90/388.

At the end of the investigation, in January 1995, the Authority ruled that Directive 90/388 did in fact apply to those services. Furthermore, even though Directive 90/388 had not yet been incorporated into Italian law, the deadline set by the Commission for doing so had already expired. In view of this, and in consideration of the fact that the directive explicitly provided unconditional and clear-cut substantive provisions for its immediate and direct application, the Authority applied the case-law developed both by the European Court of Justice and the Italian Constitutional Court, and ruled that all the conditions obtained from the directive had to be immediately applied in Italy. The directive limited the statutory monopoly defined by the Postal Code of 1973, restricting it solely to the management of the network infrastructure and the provision of the public voice telephone service.

Considering Telecom’s conduct with Telsystem to be an abuse of dominant position, the Authority ordered Telecom to immediately supply Telsystem with the links it required.

Report regarding the TACS tariffs

In December 1994, the Authority felt it necessary to draw the attention of the government to the possible negative repercussions on competition which would result from a move, contemplated by the Inter-Ministerial Committee for Economic Planning, to let Telecom Italia freely set tariffs for the analogue mobile telephone service, TACS. The Authority pointed out that, in order to bring any real benefits to consumers, liberalisation of the TACS mobile telephone service tariffs had to go hand-in-hand with

opening up the service to competition. Furthermore, if the only carrier operating on the national market, Telecom Italia, were allowed to freely fix its own tariffs and charges, this could have negative repercussions on the development of competition in the adjacent GSM digital mobile telephone service market, which had recently been opened up to competition from a second carrier. For this would enable Telecom Italia to lower the tariffs for the TACS service strategically, preventing users from moving across to the GSM mobile telephone service.

Report on the maritime mobile telephone service

In December 1994, the Authority reported to the government and Parliament on a number of restrictions and distortions of competition for the maritime mobile telephone service, the installation and maintenance of maritime telecommunications equipment and the marketing of this equipment, resulting from present legislation. The administrative management of this service, which mainly consists of account-keeping and of dealing with the Ministry for the delivery of a licence, as well as the installation and maintenance of the on-board equipment, are carried out on the basis of two identical franchises by only two companies: Sirm and Telemar. According to the Postal Code, the rental charge set out in the standard contract between the two franchisees and the shipowners must be identical, being agreed upon by the two companies in the course of the same negotiations with the Ministry. Sirm and Telemar, according to the two franchisees, may also market radio equipment for on-board installation, competing with other companies.

The Authority noted that the present duopoly structure of the markets for administrative management and installation and maintenance of the maritime mobile radio service did not seem to be justified on technical or safety grounds and was likely to restrict competition. Moreover, maintaining special rights over the on-board radio equipment installation and maintenance markets, in breach of Directive 88/301, seemed to interfere with competition on the adjacent market for the marketing of on-board radio equipment. In its report, the Authority emphasised the importance of revising and reviewing present legislation in order to open up the relevant markets to full competition.

Report on the GSM cellular mobile telephone service

In March 1995, the Authority submitted a report to the government on possible obstacles to the development of competition on the mobile telephone market using the GSM system, in which a second franchise for the service has recently been issued. The report stressed that establishing and maintaining effective competition between the two carriers (Telecom Italia and Omnitel Pronto Italia) could be hampered by various factors that might prevent them from operating on an even playing field. According to the Authority, total compliance with the principle of equality of treatment could possibly make it necessary to ensure that both carriers should inaugurate the commercial service at one and the same time.

Financial services

ABI Inter-bank agreements, standard banking rules and the Bancomat agreement

In 1994, the Authority issued its opinion to the Bank of Italy regarding a number of agreements between banks promoted by the Associazione Bancaria Italiana (ABI -- the Italian Banking Association) to which virtually every bank operating in Italy belongs. In performing its statutory activities to protect the interests of its membership, ABI issues technical circulars to encourage inter-bank agreements, as well as standard conventions to regulate relations between its member banks and their customers.

The following inter-bank agreements were deemed to be likely to restrict competition:

-- agreements laying down minimum prices to be applied for safe-deposit box services;

-- agreements establishing the commissions to be charged to customers for automatically direct-debiting their current account to pay telephone and gas bills, and urging the banks to charge prices that would discourage users from paying bills directly at the counters; and

-- agreements laying down the commissions to be charged to a debtor to perform the transactions needed so that trade receivables would be paid to the payee's bank.

In the latter case, the Authority held that the conditions were obtained for an individual exemption under Section 4 of the Act. It referred in particular to the reduction of the transaction costs implied by the establishment of inter-bank commissions for this service and to the substantial improvement in the conditions of supply that would ensue in terms of both the quality of the service and lower charges, given that the fixing of inter-bank commissions did not lead to fixing the final prices of the service charged to the customer.

Other agreements were also examined relating to standard contracts for the main banking operations (known as the standard banking rules). These specimen contracts have been regularly issued by ABI to its member banks since the 1950s, using circulars detailing the contents of all the contractual clauses. During the investigation, it was found that virtually all the standard bank rules contained clauses restricting competition, laying down prices either directly or indirectly in breach of Section 2 of the Act; ABI was therefore persuaded to delete a number of the clauses set out in the standard banking rules and to amend the wording of others.

Lastly, the Authority issued an opinion relating to possible breaches of Section 2 of the Act concerning the provision of the Bancomat service. This service enables customers to use a special bank card to carry out current account operations -- mainly making cash withdrawals -- from any of the automatic dispensers belonging to the banks in the Bancomat circuit. This was the result of an inter-bank agreement undersigned by about 700 banks, and subsequently set out in a regulation which was circulated and amended by ABI (the so-called Bancomat agreement). The Authority ruled that it was possible to give an exemption under Section 4 of the Act for the fixing of the inter-bank commission under the terms of the agreement. This assessment took into account the method used to establish the amount of this commission (based upon a survey of the direct costs to the individual banks), the reduction of transaction costs resulting from standardising commissions, the fact that this does not lead to the fixing of the prices charged to the customer and the intention expressed by ABI during the investigation to amend the agreement so that the commission would henceforth be considered a "maximum commission". However, the Authority felt that it was vital, for the purposes of authorising the waiver, to delete a number of clauses imposed on users and customers which were not strictly necessary for the provision of the service.

Abuses in the performance of tax collection activities

In 1994, the Authority submitted to the Bank of Italy three opinions regarding the conduct of banks with an exclusive franchise to collect taxes in specific parts of the country (Cassa di Risparmio di Reggio Emilia, Cassa di Risparmio di Lucca and Banca Popolare dell'Etruria e del Lazio). The Authority examined the conditions under which the franchisee banks performed the service of collecting tax payments made by other banks on behalf of their own customers. The franchisee banks requested other banks to pay a commission for this service. However, each franchisee offered a similar service to their

own customers without charging any commission at all. Even when taxes were paid in cash, which was more costly to the franchisee than receiving payment from its correspondent banks, no commission was charged. The Authority ruled that the franchisee's request for a commission was an abuse of a dominant position, which placed the other banks operating in the same tax collection district at an unjustified competitive disadvantage.

Insurance services

General risk insurance

In May 1993, one of the national consumer associations submitted documentary evidence to the Authority alleging that a number of leading insurance companies had concluded agreements to standardise contractual terms and conditions and premiums for non-life insurance policies. The Authorities conducted its investigations into 16 insurance companies, covering accident, illness, miscellaneous vehicle risk, fire, miscellaneous third-party liability and theft policies.

It was ascertained that the insurance companies had met periodically, if not routinely, between the beginning of 1990 and the first few months of 1993 in order to exchange information on their corporate activities and to establish common policies regarding a number of standard non-life insurance policies. The agreements for communicating corporate data between companies and to mutually monitor their activities to ensure compliance with the commitments and recommendations adopted at these joint meetings were deemed to restrict competition, even though their substance and effectiveness differed from one case to another. In particular, the Authority found that the companies had concluded agreements on common policies relating to commercial premiums, excess clauses and overdrafts for certain categories of general risks. The companies had also agreed not to compete against one another when certain insurance contracts for industrial risks were renewed and reformulated. The most serious breaches of law were for miscellaneous motor car risks because of the particularly restrictive and far-reaching nature of the agreement, which expressly laid down the commercial premium rates and excess clauses to be applied. The binding character of the agreement was reinforced by a system under which compliance with the commitment was very carefully monitored.

The Authority ruled that the conditions existed for imposing a fine on the companies that had been found involved in such practices (i.e. Generali, Assitalia, Fondiaria, Ras, Sai, Reale, Toro, Unipol, Milano, Lloyd and Zurigo). The fine was 1 per cent of the turnover of each insurance company for the policies forming the object of the agreement and for the last financial year that closed prior to the notification of the warning, and on the whole amounted to 20 billion lire.

Agricultural risk insurance

In December 1993, an investigation began into alleged anti-competitive agreements for hail insurance. The Authority discovered various restrictions on competition imposed by the Ciag-Consorzio Italiano Assicuratori Grandine, a voluntary consortium to which several companies authorised to underwrite hail policies belong. These restrictions included market sharing, controlling the policies issued by the members of the consortium, limiting the spreading of new policies and controlling the activities of the insurance adjusters.

Report on the reception of the EC directives on life and non-life insurance

In March 1995, the Authority pointed out, under Section 22 of the Act, several measures contained in the draft legislative decrees enacting Directives 92/96 (the Third EC Life Insurance Directive) and 92/49 (the Third Non-Life Insurance Directive), which might restrict competition on the insurance markets. The Authority noted that these draft decrees unduly discriminated against foreign insurance companies, restricting the right of the customer to cancel a policy if the insurance portfolio were transferred to a company with its registered office in another member state of the European Union. It was also noted that the procedures followed by the insurance monitoring body to guarantee that premiums be set in accordance with actuarial calculation principles were likely to artificially encourage uniform tariffs and policies. Lastly, the Authority noted that the draft decree on life insurance explicitly prohibited companies of other European Union member states from concluding agreements for the management of pension funds or from setting up complementary pension schemes through open-ended pension funds. The Authority pointed out that this exclusion was not only a serious obstacle to the freedom of other European Union companies to provide their services, but also an unjustified restriction on potential competition regarding the management of pension funds.

Professional services

Fixing fees for apartment building management services

During 1994, the Authority addressed the question of agreements restricting competition for the provision of the professional services supplied by managers of apartment buildings, since a number of professional associations of managers of apartment buildings and the National Council of Surveyors had laid down fee tables. The members of these professional associations account for over two-thirds of professional managers of apartment buildings.

On the basis of the definition of "undertaking" adopted by the Authority, associations of individuals providing professional services, such as managers of apartment buildings, are deemed to be associations of undertakings. Consequently, any resolution regarding minimum fees and charges, rules of conduct and articles of association applicable to managers of apartment buildings are deemed to be "agreements" within the meaning of the Act.

During the course of the investigation, the Authority also examined the recommendation of the National Council of Surveyors to its membership to apply an agreed set of charges for apartment building management services. This recommendation, which was issued before any statutory approval by the Ministry had been given, was deemed to be likely to direct and co-ordinate the conduct of the members in the matter of fixing the prices of the service, and was therefore considered to be an agreement within the meaning of the Act.

The investigation confirmed that the charges laid down by the associations were compulsory, and that they were minimum charges. The Authority emphasised that the fixing of minimum prices was a restriction on competition and could not be justified on the grounds that it was necessary to guarantee an adequate quality of service. It was implausible to think that a person who was not subject to price competition, and who was therefore able to charge the guaranteed minimum remuneration, would in some way be encouraged to improve the quality of the service provided or at least guarantee an acceptable level of the service. The agreements establishing minimum charges for apartment building management services were therefore ruled to be in breach of Section 2 of the Act.

Report on regulations regarding customs forwarding agents

In December 1994, the Authority reported to Parliament and to the government on the distortion of competition caused by provisions contained in a government bill concerning customs forwarding agents. The bill provided that charges for professional services of customs forwarding agents had to be laid down by the National Forwarding Agents Council and approved by decree of the Minister of Finance. Provisions were also made for these fees to become compulsory, thereby prohibiting customs forwarding agents from charging lower prices than those laid down by the National Council.

The Authority pointed out that the European Commission and the European Court of Justice had repeatedly spoken out against price-fixing for services of forwarding agents, even when this practice was specifically authorised by statute. Moreover, the Authority itself had acted on various occasions in the matter of compulsory fees and charges laid down by trade associations, declaring them to be incompatible with competition law. It therefore expressed the hope that the legislation being prepared for customs forwarding agents should not include any provision relating to price-fixing in breach of national and Community competition law. The Authority also noted that the streamlining of procedures for declaring and clearing goods to the sole benefit of customs forwarding agents distorted the market by introducing unjustified discrimination against other operators, namely international forwarding agents and international airfreight couriers.

Report on auditing services

In March 1995, the Authority reported to the Minister of Labour on the distortion of competition introduced by the usual interpretation of a provision of Act No. 59/1992 governing the obligation for co-operative companies and their membership to have their annual financial statements audited. This law provided that national associations representing co-operative companies were required to conclude agreements with auditing firms registered on a special list or in possession of ministerial authorisation to audit their accounts, and required co-operative societies to choose auditing firms exclusively from among those which had signed such agreements.

However, it did not make it clear whether the national associations representing co-operative societies were required to conclude the agreement with all the companies eligible under the law or whether the associations had a wide range of discretion in choosing which auditing firms they wished to work with. This latter interpretation, which would seem to be the one adopted by the associations, introduced an unjustified restriction on competition to the detriment of the co-operative companies by preventing certain auditing firms from gaining access to this particular market segment.

The Authority therefore found that it was appropriate for the Minister to issue an authentic interpretation of this provision to define clear and non-discriminatory criteria for deciding which auditing firms were to be admitted to the agreement with the associations of co-operative companies.

Recreational and cultural activities

Report on the rules governing the movie-theatre business

In Italy, the movie-theatre business is governed by a system of licences for opening new theatres based on a local planning system. A ministerial decree issued on 8 September 1994 provided that each municipality could have a maximum number of cinemas depending upon the resident population and the number of cinemas that already existed. The opening of multi-screen movie-theatres was subject to a

licence issued for each individual theatre; converting a large cinema into a multiplex cinema was also subject to constraints based on the number of seats already authorised.

In November 1994, the Authority pointed out, pursuant to Section 21 of the Act, that current movie-theatre legislation distorted competition. The structural regulation of the movie-theatre market was not designed to protect the safety of the audience, which was covered by other specific regulations. At the same time, the licensing system envisaged in the decree unduly distorted competition by restricting the possibility of access by new movie-theatre operators.

The Authority noted that existing constraints on extending and opening movie-theatres, including multiplex movie-theatres, might negatively affect scheduled movie supply from both a qualitative and quantitative viewpoint, due to possible problems in finding appropriate market outlets, at least through the cinema circuit. The Authority therefore suggested to repeal the provisions setting up a planning system for movie-theatres, because they placed unjustified constraints on competition.

Fact-finding survey of the cinema industry

In October 1994, the Authority concluded the fact-finding survey of the cinema industry that had begun in November 1992. It covered the three main areas of the production process: production, distribution and public exhibition.

The survey showed a tendency for the number of movie-theatres to fall and the existence of vertical links between companies operating at the various stages of the production process. The economic incentives to vertical integration are evident. Film distributors find it convenient to integrate with both movie producers, to influence product characteristics, and theatre managers, to control the ways in which the product is offered to the public (for example with regard to advertising and scheduling). Television broadcasters have incentives to integrate with movie-theatre managers, mainly in order to promote movies that will subsequently be shown on television.

The Authority pointed out that vertical integration between production, distribution and movie-theatre programming could lead to market foreclosure and distortion of competition if the companies concerned were major players on their respective markets. These restrictions on competition, which could also stem from the cumulated effect of the presence of several vertically integrated companies, may affect market outlets for movie production and distribution companies as well as access to movies for movie-theatre managers.

The Authority also emphasised that, in view of the existing statutory constraints on opening up new movie-theatres, the establishment of dominant positions on local movie-theatre markets could reduce or substantially eliminate competition on a lasting basis, with possible negative repercussions on prices and on the quality of the service provided.

Titanus Distribuzione-Cinema 5

During the fact-finding survey of the cinema industry, the Authority discovered an agreement concluded between Cinema 5 Spa and Titanus Distribuzione Spa for the mutual exchange of minority interests in their subsidiaries (Cinema 5 Gestione Spa and Safin Cinematografica Spa) managing movie-theatres in Rome. In July 1994, the Authority began an investigation into the agreement on the grounds that the cross-holding of minority stakes in directly competing companies may be a means of influencing the commercial conduct of the companies involved and therefore might constitute an agreement within the

meaning of Section 2 of the Act. The presence of the same group of individuals on the board of directors of both Cinema 5 Gestione and Safin was a circumstance that further facilitated the co-ordination of the companies commercial policies.

The agreement to exchange equity interests in Cinema 5 Gestione and Safin had in fact led the two companies, owning about 70 per cent of movie theatres operating in the city of Rome, to jointly programme their own circuits during the period September 1992-January 1993. The Authority therefore ruled that the agreement between the two companies was likely to significantly interfere with competition in breach of Section 2 of the Act.

Cecchi Gori-Safin

In January 1995, the Authority concluded an investigation into the failure to submit prior merger notification concerning the acquisition by the Cecchi Gori Group of the controlling interest in Safin Cinematografica Spa. The Authority pointed out that the Cecchi Gori group, which already owned a control stake in the Teseo Cinema Srl movie-theatre circuit, now controlled about 50 per cent of all the movie-theatres in Rome as a result of the acquisition. The Authority found that this market position could enable the Cecchi Gori group to act independently of suppliers and consumers. The only remaining operator able to compete effectively with the Cecchi Gori circuit was the Cinema 5 circuit, which owned 33 per cent of the movie-theatres in Rome. At the same time, the Authority noted that other operators on the market might eventually be able to set up a third competing circuit. At the time of the investigation, about 30 movie-theatres licences for theatres that had been closed down over the years were available in the city of Rome for any other operators wishing to purchase them. On this basis, the Authority ruled that through this acquisition, the Cecchi Gori group had acquired a dominant position in the city of Rome, which nevertheless did not seem, at the present time, to be likely to eliminate or substantially reduce competition on a lasting basis in view of the actual and potential structure of the market. The operation was therefore found to be lawful, in compliance with Section 6 of the Act.

Broadcasting and publishing

The agreement between SPE-SPI-Publitalia

In 1994, the Authority issued an opinion to the Broadcasting and Publishing Authority regarding an agreement between three advertising franchisees, namely the SPE and SPI companies, which held the advertising franchises mainly for the daily and periodical press, and the Publitalia 80 company, which held the franchise for advertising on all three television networks belonging to the Fininvest group. Through this agreement, SPE and SPI undertook to separately assign to Publitalia 80 all the advertising they had acquired on a exclusive basis relating to 336 customers for all tabular and non-tabular advertising, as well as the exclusive advertising collected on 38 companies for media-support advertisements of some types of non-spot television commercials. The agreement was for one year but was tacitly renewed, unless terminated, under the conditions expressly set forth in the contract. This sub-assignment related to the 13 newspapers for which SPE and SPI had exclusive franchises and which were mostly regional in scope.

SPE and SPI are two of the largest daily advertising companies in Italy. Publitalia 80 held a dominant position on the national market for television advertising, with a market share of 69 per cent in 1993. The Authority noted that the agreement could lead to an increasing interest in advertising on the newspapers involved in the sub-assignment, in connection with the supply of commercials screened on

television. Moreover, with regard to the market for television advertising, the Authority pointed out that the agreement strengthened the dominant market position of Publitalia 80, permitting it to supply multi-media packages.

JAPAN*

(1994-1995)

Introduction

In December 1994, Mr. Shohei Shibata, former Secretary General of the Executive Office of the Fair Trade Commission (the "FTC" or the "Commission"), took office as the Commissioner of the FTC to replace Mr. Kagechika Matano, who had resigned.

I. Changes to competition laws and policies adopted or envisaged

The policy "Regarding the Policy for Promoting Deregulation Hereafter" approved at the Cabinet meeting in July 1994 proclaims that, in order to make the Japanese market more competitive and open, competition policy will continue to be actively implemented, by further promoting fair and free competition, in line with the policy previously addressed, including, *inter alia*, the promotion of strict and appropriate enforcement of the Antimonopoly Act.

Summary of new provisions in competition laws and related legislation

The implementation of Japan's antimonopoly policy is based upon the Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (Act No. 54 of 1947, the "Antimonopoly Act"), along with two other supplementary Acts: the Act Against Delay in Payment of Subcontract Proceeds, etc. to Subcontractors (Act No. 120 of 1956, the "Subcontract Act") and the Act Against Unjustifiable Premiums and Misleading Representations (Act No. 1345 of 1962, the "Premiums and Representations Act"). No revisions were made to the acts during the period covered by this report.

Strengthening deterrence, enforcement ability and other related measures

Rigorous actions against violations of the Antimonopoly Act and measures to enhance deterrence

In order to promote free and fair competition, rigorous enforcement of the Antimonopoly Act is the fundamental requirement. To meet this requirement, the FTC has rigorously dealt with conduct violating the Antimonopoly Act, such as price-fixing cartels, bid-rigging, resale price maintenance and obstruction of parallel imports, and at the same time has been actively investigating violations in the distribution and services field and in government-regulated industries.

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* The original language of this report is English.

To strengthen deterrence of violations of the Antimonopoly Act and enhance enforcement ability in dealing with violations, the Commission took the following measures in 1994.

Expanding and enhancing the investigation organisation of the FTC

As measures to strengthen the detecting and investigating organisation of the FTC against violations of the Antimonopoly Act, the government's draft budget for fiscal year 1995 envisages increasing the staff of the investigation department by 17 persons, from 203 in fiscal year 1994 to 220 in fiscal year 1995, together with the addition of one more unit to the investigation department in a local office. It is noteworthy that the FTC, and in particular its investigation department, has continued to expand annually, in terms of personnel and organisational structure, even while the government is carrying out administrative and fiscal reforms. The prescribed number of investigation department personnel has been expanded by almost 70.5 per cent in six years, from 129 in fiscal year 1989 to the proposed 220 in fiscal year 1995, as mentioned above.

Publication of formal actions

In order to ensure transparency, to enhance the deterrent effect and to prevent similar illegal activities, the contents, including the names of the offenders, the nature of the offence and the circumstances surrounding it, of all formal actions, such as recommendations and surcharge payment orders, have been made public. Furthermore, all warnings have been made public other than in exceptional cases.

Ensuring the transparency of law enforcement

Formulation of guidelines

For strict and effective enforcement of the Antimonopoly Act, it is imperative that the purpose and the contents of the Act, and its enforcement policy, be fully understood by firms and consumers in Japan and abroad, and that such understanding be reinforced by ensuring the transparency of law enforcement. From this point of view, the FTC, in addition to strict enforcement of the Antimonopoly Act, has also formulated and published guidelines under the Antimonopoly Act. In formulating these guidelines, the opinions of as wide a spectrum as practicable of related agencies, firms, associations and other parties are sought regarding the original draft. In addition to the prior consultation system provided for by some of these guidelines, the FTC has responded appropriately to requests for individual consultations by firms, etc.

To enhance prevention of bid-rigging and to promote lawful activities on the part of firms and trade associations, on 5 July 1994, the FTC formulated and published "The Antimonopoly Act Guidelines Concerning the Activities of Firms and Trade Associations in Relation to Public Bids" (Bidding Guidelines) (for further details of the Guidelines, see FTC/Japan Views, No. 18).

On 30 June 1994, the FTC formulated and published "Antimonopoly Act Guidelines Concerning Administrative Guidance" (Guidelines for Administrative Guidance), citing specific examples of administrative guidance which may pose problems under the Antimonopoly Act.

In June 1994, the FTC formulated and published "Administrative Procedure Standards for Authorisation of Stockholding by Financial Companies" to ensure further transparency of the application

of the Antimonopoly Act by clarifying its stance regarding the authorisation of stockholding by financial companies. Additionally, to ensure even greater transparency in the application of Antimonopoly Act by further clarifying the former standards for the Administrative Procedures Standards concerning mergers and stockholding, in August 1994, the Commission revised and published its "Administrative Procedure Standards for Examining Mergers by Companies" and its "Administrative Procedure Standards for Examining Stockholding by Companies" (for further details of these three sets of standards for administrative procedures, see FTC/Japan Views, No. 19).

To clarify the range of activities permissible for venture capital, the Commission revised its "Concerning the Treatment of Venture Capital Firms under the Antimonopoly Act", which was published in 1972, and in August 1994, formulated and published "Interpretations of the Application of the Provisions of Section 9 of the Antimonopoly Act with Respect to Venture Capital Firms" (for further details of the interpretations, see FTC/Japan Views, No. 19).

Support for the development of Antimonopoly Act compliance programs

Triggered by such things as the publication of the "Guidelines Concerning Distribution Systems and Business Practices" (July 1991), moves to develop Antimonopoly Act compliance programs by firms have been initiated, including the compilation of Antimonopoly Act compliance manuals. The FTC also provides active support and assistance to voluntary attempts by firms and others regarding the development of compliance programs.

Measures addressing bid-rigging

Active elimination of Antimonopoly Act violations

The FTC is making every effort to eliminate bid-rigging, and of the 30 cases of recommendation decisions in 1994, 21 were related to bid-rigging. The Commission will continue to deal strictly with bid-rigging.

Prevention of bid-rigging

To enhance the prevention of bid-rigging and promote lawful activities on the part of firms and trade associations, in July 1994, the FTC formulated and published the Bidding Guidelines referred to above. The guidelines cover the activities of firms and trade associations in connection with public bids in general, including public works and procurement of goods, and give examples for certain primary categories of conduct, which are classified into "conduct in principle constituting violation", "conduct suspected of being in violation" and "conduct in principle not constituting violation" under the Antimonopoly Act.

The FTC further provided active support for initiatives by the industries concerned, including the holding of educational sessions and the compilation of Antimonopoly Act compliance manuals.

Establishment of co-operative arrangements with commissioning government entities

To develop a system of liaison with commissioning government entities, in September 1994, the FTC convened a second meeting of liaison officers with the Commission to discuss public bidding. At the regional block level as well, the FTC convened meetings of liaison officers and held educational sessions for procurement officers of commissioning government entities regarding the Antimonopoly Act and related subjects (educational sessions for procurement officers). The Commission also provided active support for educational sessions on the Antimonopoly Act organised by these commissioning government entities, including making arrangements for lecturers and preparing textbooks.

Addressing issues pertaining to price differentials between domestic and overseas markets and the distribution of the benefits of the strong yen to consumers

The FTC will increase its efforts to collect information on violations of the Act concerning import-related goods, including cartels, resale price maintenance and unreasonable obstruction of parallel imports, and seek to eliminate such violations, because such conduct unreasonably obstructs the rectification of price differentials between domestic and overseas markets and the distribution of the benefits of the strong yen to consumers.

The FTC analysed, from the viewpoint of market structure, the impact of the appreciation of the yen on domestic prices and import volumes, and published its findings in April 1994. In the same month, the Commission also surveyed and published its findings on the actual state of the market structure, price trends and trade practices of the steel and petrochemical industries, which are likely to be more strongly influenced by the strong yen because of their high dependence on overseas sources for the supply of raw materials. The FTC further conducted surveys on the actual state of such consumer goods as foodstuffs, cosmetics and sporting goods from a similar point of view, and published its findings in June 1994.

To further strengthen its activities concerning conduct restricting imports that violates the Antimonopoly Act, and other violations of the Act which would invite price differentials between domestic and overseas markets, in March 1995, the FTC decided to establish a task force to focus on such issues as import restrictions and price differentials between domestic and overseas markets. The Commission will actively utilise this task force to eliminate conduct that violates the Antimonopoly Act in these fields.

II. Enforcement of competition laws and policies

Measures taken against violations

Investigations

In 1994, the FTC investigated a total of 243 cases of alleged violation of the Antimonopoly Act. Of these, 81 were brought forward from the preceding year, while 162 were initiated during this period. The FTC concluded its investigations in 161 of these cases, and the remaining 82 cases were carried over to 1995.

Content of formal actions

Among the 161 cases completed, the FTC issued orders to cease and desist illegal practices in 30 cases by recommendation decision, and gave warnings in 21 cases of suspected violations.

Recommendation decisions

The 30 cases in which recommendation decisions were handed down in 1994 included 21 cases of bid-rigging, seven cases of price-fixing cartels and one other case. In 12 of the recommendation decision cases, the violations were committed by trade associations.

Surcharge payment orders

According to the Antimonopoly Act, the FTC should order the payment of surcharges by enterprises or members of trade associations that have formed a cartel which pertains to the prices of goods or services or affects prices by substantially restricting the supply of goods or services. The amount of the surcharge is determined by multiplying the sales turnover during the operative period of the cartel by a certain percentage. In 1994, the FTC ordered 482 enterprises involved in 23 cartel cases to pay a total of approximately 7.8 billion yen in surcharges.

Criminal accusations

In June 1990, the FTC announced its adoption of a policy to bring accusations and to seek criminal penalties in the following cases:

-- vicious and serious cases of violation that are likely to have widespread influence on people's lives, particularly those violations that substantially restrict competition in certain areas of trade, such as price-fixing cartels, supply-restraint cartels, market allocations, bid-rigging, group boycotts and other violations; and

-- among those cases of violation involving firms or industries that are repeat offenders, or that do not abide by the measures to eliminate the violation, those in which the administrative measures of the FTC are not considered to fulfill the purpose of the Antimonopoly Act.

In accordance with the above policy, on 6 March 1995, the FTC filed criminal accusations with the Prosecutor General against nine electrical equipment manufacturers who engaged in bid-rigging in the installation of electrical equipment commissioned by the Japan Sewage Works Agency. The FTC judged that the cases constituted a crime violating Section 3 of the Antimonopoly Act (prohibition of unreasonable restraint of trade). In this case, the parties concerned had decided who would be the successful bidders for the installation of electrical equipment commissioned by the Japan Sewage Works Agency in 1993, and agreed that the bidders would present their bids at pre-determined prices so that the pre-selected bidders would be awarded the commission.

Hearing procedures

In 1994, the FTC initiated hearing procedures under the Antimonopoly Act in a total of six cases. These included: the restraints imposed by a trade association on the method of selling gasoline by its members; the trade association's action to raise retail prices of gasoline; collusion to raise the sales prices of certain types of corned beef; a surcharge payment order pertaining to a conspiracy to set the minimum sales price of microcomputer-controlled gas metres for household use; and two cases of bid-rigging in certain electrical work projects ordered by Shiga local government and others.

In 1994, the FTC also handed down a decision to impose a surcharge payment order in a case which had been going through a hearing procedure (a case of violation of Section 3 of the Antimonopoly Act regarding a surcharge payment order for bid-rigging involved in maintenance work on telecommunications equipment ordered by the Tokyo Area Contracting Centre of the U.S. Air Force). In yet another case undergoing hearing procedures (concerning collusion to set standard charges for elevator maintenance), the Commission handed down a decision that there had been no violation. As of the end of December 1994, a total of eleven of the suspected violations of the Antimonopoly Act were going through hearing procedures.

Major cases

Manufacturers of and dealers in marine paints

Chugoku Marine Paints, Ltd. and nine other firms (whose combined sales volume of marine paint thinner and marine paints accounts for a majority of the total sales volume of these products in Japan) were found to have colluded to raise the prices of marine paint thinner and marine paints, and a recommendation decision was handed down on 28 February 1994 for violation of Section 3 of the Antimonopoly Act (prohibition of unreasonable restraint of trade).

Manufacturers of and dealers in canned corned beef

Meidi-Ya, Co., Ltd., two other firms and Nozaki & Co., Ltd. (whose combined sales volume of canned corned beef accounts for a major portion of the total sales volume of the product in Japan) were found to have colluded to raise the prices of canned corned beef, and a recommendation decision was handed down to Meidi-Ya and two others on 23 February 1994 for violation of Section 3 of the Antimonopoly Act (prohibition of unreasonable restraint of trade). (A decision to initiate hearing procedures against Nozaki & Co. was made on 15 March 1994 as this firm did not accept the recommendation; hearing procedures are still under way.)

Surveyors and geological surveyors located in Kagawa Prefecture

Regarding surveys and other undertakings order by the Civil Engineering Department of the Kagawa local government through designated bidding, 25 surveyors were found to have pre-determined the bid-winner, and a recommendation decision was handed down on 14 March 1994 for violation of Section 3 of the Antimonopoly Act (prohibition of unreasonable restraint of trade).

In a similar case of violation, regarding geological survey projects ordered by the Kagawa local government and municipalities in Kagawa prefecture through designated bidding, 12 geological surveyors

were found to have pre-determined the bid-winner, and accordingly a recommendation decision was handed down on 14 March 1994 for violation of Section 3 of the Antimonopoly Act (prohibition of unreasonable restraint of trade).

Designated painters located in Tokushima Prefecture

Regarding painting projects ordered by the Tokushima local government through designated bidding, the Tokushima Prefectural Association of Construction Painters was found to have pre-determined the bid-winner, and a recommendation decision was handed down on 28 April 1994 for violation of Section 8 of the Antimonopoly Act (prohibited acts by trade associations).

In a similar case of violation, regarding painting projects orders by the Tokushima Project Office of the Shikoku Regional Construction Bureau of the Ministry of Construction through designated bidding, 23 painters were found to have pre-determined the bid-winner, and accordingly, a recommendation decision was handed down on 28 April 1994 for violation of Section 3 of the Antimonopoly Act (prohibition of unreasonable restraint of trade).

Furthermore, regarding painting projects ordered by Tokushima City through designated bidding, 24 painters were found to have pre-determined the bid-winner, and accordingly a recommendation decision was handed down on 28 April 1994 for violation of Section 3 of the Antimonopoly Act (prohibition of unreasonable restraint of trade).

Trade associations of builders in the Yamanashi Prefecture

Regarding a civil engineering project ordered by the Yamanashi local government through designated bidding, eight chapters of the Yamanashi Prefectural Association of Builders were found to have induced their members to pre-determine the bid-winner, and a recommendation decision was handed down to the eight chapters on 16 May 1994 for violation of Section 8 of the Antimonopoly Act (prohibited acts by trade associations).

National Co-operative of Mosaic Tile Manufacturers

The total supply volume of mosaic tiles for exterior decoration manufactured by the members of the National Co-operative of Mosaic Tile Manufacturers accounts for a major portion of the product's total supply volume for the domestic market, and the total volume of mosaic tiles for exterior decoration exported to Southeast Asia by the members of the association accounts for a major portion of the total volume exported to Southeast Asia. The co-operative was found to have agreed to maintain and raise both the shipping fees for mosaic tiles for exterior decoration supplied by members of the co-operative to the domestic market and those of exporters for Southeast Asia, and a recommendation decision was handed down on 30 May 1994 for violation of Section 8 of the Antimonopoly Act (prohibited acts by trade associations).

Kinki Chapter of the Japan Hospital Bedding Association

The Kinki Chapter of the Japan Hospital Bedding Association was found to have been restricting the business activities of its members by having them decide on the suppliers of rental bedding to newly-

opened hospitals, and a recommendation decision was handed down on 6 June 1994 for violation of Section 8 of the Antimonopoly Act (prohibited acts by trade associations).

Manufacturer-dealers and dealers in fire engines in Hokkaido

Hokkaido Morita Pump, Ltd. and three other firms were found to have colluded to decide on the successful bidders in advance so that they would receive the orders from municipalities in Hokkaido for fire engines, and a recommendation decision was handed down on 29 July 1994 for violation of Section 3 (prohibition of unreasonable restraint of trade).

Painting work ordered by offices in the Tohoku Regional Construction Office of the Ministry of Construction

Regarding painting work ordered by offices in the Tohoku Regional Construction Bureau of the Ministry of Construction, 70 painters were found to have pre-determined the bid-winner, and accordingly a recommendation decision was handed down on 6 September 1994 for violation of Section 3 of the Antimonopoly Act (prohibition of unreasonable restraint of trade).

Follow-up surveillance

Through checking up on the parties concerned after decisions are rendered, the FTC verifies their compliance with the decisions and endeavours to prevent the recurrence of illegal activities. These were no cases in 1994 in which follow-up surveillance was completed.

Recommendations and warnings under the Subcontract Act

The Subcontract Act is intended to ensure the fairness of transactions of parent companies with their subcontractors by preventing delays in payment of subcontract proceeds. The Act, in protecting the interests of subcontractors, thereby contributes to the sound development of the national economy. It is unlikely, due to the nature of subcontracting transactions, that subcontractors will lodge complaints. Therefore, the Act provides the FTC and the Small and Medium Enterprise Agency with the authority to conduct regular annual written surveys on parent companies and their transacting subcontractors to check for possible violations.

In 1994, the FTC conducted written surveys on 20 470 parent companies and the 73 440 subcontractors with whom they had transactions. Meanwhile, during the same period, the Small and Medium Enterprise Agency also conducted the same surveys on 40 083 offices of parent companies and 42 028 offices of the subcontractors with whom they had transactions.

As a result of the surveys, parent firms found to have been violating the provisions of the Subcontract Act were instructed to cease their illegal conduct and take corrective measures, including compensation for losses their subcontractors had suffered.

Cease-and-desist orders under the Premiums and Representations Act

The Act Against Unjustifiable Premiums and Misleading Presentations, by establishing special provisions for the Antimonopoly Act, aims to prevent the inducement of customers by means of unjustifiable premiums and misleading representations in connection with transactions regarding goods or services, and thereby to maintain fair competition as well as protect the interests of consumers in general. The FTC investigated 1 509 cases under the Premiums and Representations Act in 1994. Among these cases, cease-and-desist orders issued under Section 6 of the Premiums and Representations Act were all for misleading representations, and totalled 13 cases. Warnings were also issued in 821 cases, although the FTC did not take legal action in them.

Furthermore, on the basis of the conclusion of discussions by a study group of academic and other experts on the review and clarification of regulations regarding premium offers, which is expected to be reached by the end of March 1995, the FTC will review the contents of the Commission's notification concerning sales campaigns with premium offers by department stores and the upper limits of premiums in various types of premium offers during fiscal 1995.

Legal actions

Case of petition seeking the overturning of an FTC decision

The Tokyo High Court issued a ruling on 25 February 1994 regarding the pending case of a petition by Toshiba Chemical Co., Ltd. to overturn the FTC's decision against the company. On 6 June 1989, the Commission had given a recommendation to Toshiba Chemical Co., Ltd. and seven other companies in the same industry concerning a case of price-fixing (in violation of Section 3 of the Antimonopoly Act, which prohibits unreasonable restraint of trade) in which those companies colluded to raise the delivery prices of domestic users of copper-plated phenolic paper laminate. Toshiba Chemical alone refused to follow the recommendation. Accordingly, the FTC initiated hearing procedures, and on 16 September 1992 handed down a decision of a cease-and-desist order against Toshiba Chemical. The dissatisfied defendant filed a suit with the Tokyo High Court on 16 October 1992 demanding that the decision be referred back to the Commission or overturned.

In its ruling, after pointing out the significantly quasi-judicial nature of hearing procedures prescribed by the Antimonopoly Act and the consequent necessity of assuring the impartiality of hearing examiners, the Tokyo High Court concluded that the decision regarding this case, in which Commissioner A (who was not a party to the suit) was involved, was illegal because it violated a basic legal principle of quasi-judicial procedures, namely, that the impartiality of hearing examiners should be assured. For this reason, the court overturned the decision and referred the case back to the FTC.

In compliance with the above ruling, the FTC on 26 May 1994 once again decided against Toshiba Chemical Co., Ltd. On 24 June 1994, Toshiba Chemical filed a suit with the Tokyo High Court demanding that the decision be referred back to the Commission or overturned and the case was still pending at the court as of the end of December 1994.

Case of a new petition seeking the overturning of an FTC decision

In 1994, there was one case of a new petition for the overturning of an FTC decision under the Antimonopoly Act, and this case involved a surcharge payment order.

Pending damages suit under Section 25 of the Antimonopoly Act

In 1994, there was one pending damages suit under Section 25 of the Antimonopoly Act, but no new suit was filed under this section.

Major court decisions related to the Antimonopoly Act

In 1994, major court decisions related to the Antimonopoly Act, included the following two cases concerning the termination of an agency contract for cosmetics.

i) Ruling against Kao Cosmetics Sales Co., Ltd. in a case of request for confirmation of status

In this case, Egawa Kikaku, Ltd., which had been engaged in over-the-counter and clerk-assisted sales, sued Kao Cosmetics Sales Co., Ltd., which had terminated its agency contract with Egawa, and requested the confirmation of its status under the contract.

Regarding this suit, on 18 July 1994, the Tokyo District Court ruled that the termination at issue constituted an abuse of rights and was thus invalid, reasoning that various relevant circumstances inevitably led to the conclusion that the defendant had terminated the said contract for the purpose of resale price maintenance. On 29 July 1994, the dissatisfied defendant filed an appeal, and the case was still pending at the Tokyo High Court as of the end of December 1994.

ii) High Court ruling against Shiseido Tokyo Sales Co., Ltd. in a case of request for confirmation of status

In this case, Fujiki Honten Ltd. had sued Shiseido Tokyo Sales Co., Ltd., which had terminated its agency contract with Fujiki, and requested the confirmation of its status under the contract. On 27 September 1993, the Tokyo District Court, the court of first instance, reasoned that the provisions of this agency contract concerning over-the-counter sales and compilation of a client account book were highly likely to violate the purpose of the Antimonopoly Act, in the sense that the defendant placed restrictions on the plaintiff's sales methods for no rational reason and with the intention of maintaining prices, and thus recognised the validity of some of the claims by the plaintiff. The defendant appealed.

On 14 September 1994, the Tokyo High Court, the court of second instance, handed down a ruling overturning the decision of the court of first instance, reasoning that there were rational reasons for a manufacturer's prescribing sales methods to a retailer (including the requirement of over-the-counter sales and mandatory compilation of a client account book), such as ensuring product safety and the preservation of trust in the trademark. It further reasoned that if similar conditions were imposed on other retailers as well, this was also obviously acceptable unless it went against compulsory legal provisions, and for all these reasons, therefore, this case did not necessarily pose any problem under the Antimonopoly Act. On 19 September 1994, the dissatisfied plaintiff brought the case to the court of appeals, and the case was still pending at the Supreme Court as of the end of December 1994.

Mergers and economic concentration

Statistics on mergers

In Japan, under Sections 15 and 16 of the Antimonopoly Act, prior notification of all mergers and transfers of business must be filed with the FTC. The FTC examines such notifications and either bans the proposed merger or acquisition, or takes some other action if it considers that the proposed merger or acquisition may substantially restrict competition. In 1994, the FTC received 1 983 merger notifications under Section 15 and 1 224 acquisition notifications under Section 16 of the Antimonopoly Act. During that period, there were no cases of mergers or acquisitions of business, etc. in which the FTC took formal measures.

In Japan, when a proposed merger may raise concerns under the Antimonopoly Act, it is usual for the parties concerned to consult with the FTC before filing the merger notification, and the FTC examines it vigorously to see whether it is likely to violate the Antimonopoly Act. If the FTC points out any problem at the prior consultation stage, the parties to the intended merger either abandon their merger plan or modify its planned content so that it presents no problems under the Antimonopoly Act.

Table 1

Number of notifications filed on mergers and transfers of business

	1992	1993	1994
Mergers	1 991	1 947	1 983
Acquisitions of business	1 72	1 140	1 224
Total	**3 063**	**3 087**	**3 207**

Major merger cases

Merger of Onoda Cement Co., Ltd. and Chichibu Cement Co., Ltd.

In this case, Onoda Cement Co., Ltd., ranked second among Japanese cement manufacturers, and Chichibu Cement Co., Ltd., ranked sixth, intended to merge. This merger posed problems. In addition to the fact that the merged company would gain the largest share in the national market, the merger would place the company in the top position in the Tohoku, Kanto and Tokai regions with an increased share in each, and the combined market share of the top three manufacturers would be over 50 per cent.

Regarding this case, in addition to the existence of major competing firms in the market, the parties to the proposed merger offered to take such actions as reducing the number of their customer service centres, warehouses and silos for use at construction sites.

The FTC, taking overall consideration of the actions to be taken by the parties to the merger, considered that the proposed merger would not necessarily restrain competition substantially in a particularly field of trade.

Merger of Sumitomo Cement Co., Ltd. and Osaka Cement Co., Ltd.

In this case, Sumitomo Cement Co., Ltd., ranked fourth among Japanese cement manufacturers, and Osaka Cement Co., Ltd., ranked seventh, intended to merge. In addition to the fact that the merged company would have the second largest share in the national market, this merger would create two problems. It would become the leader in the Tokai and Kinki regions with an increased share in each, and the combined share of the top three manufacturers would exceed 50 per cent.

Regarding this case, in addition to the existence of major competing firms in the market, the parties to the proposed merger offered to reduce the number of their customer service centres, consolidate their remaining service stations and reduce the number of their silos for use at construction sites.

The FTC, taking overall consideration of the offers made by the parties to the merger, considered that the proposed merger would not necessarily restrain competition substantially in a particular field of trade.

Merger of Mitsubishi Chemical Industries Ltd. and Mitsubishi Petrochemical Co., Ltd.

Mitsubishi Chemical Industries Ltd., holder of the top position among Japanese general chemical manufacturers, and Mitsubishi Petrochemical Co., Ltd., the top petrochemical company in Japan, intended to merge. As a result of this merger, the new company would become a large-scale enterprise with equity capital of ¥ 140.4 billion, total assets of ¥ 1.5 billion and a sales turnover of approximately ¥ 1.1 billion, including ¥ 617.4 billion in sales of petrochemical products, and would be in the top position with a large market share in ten petrochemical products.

Regarding this case, the FTC, taking into account, among other factors, the existence of major competing firms in the market, pressure from imports and availability of alternative products, with respect to overall business capabilities and each individual product, considered that the proposed merger would not necessarily restrict competition substantially in a particular field of trade.

Merger of Taiyo Sanso Co., Ltd. and Toyo Sanso K.K.

In this case, Taiyo Sanso Co., Ltd. and Toyo Sanso K.K., mainly engaged in the manufacture and marketing of various high-pressure gases, intended to merge. With this merger, the new company would have the second largest market share of the combined trade in liquefied oxygen, liquefied nitrogen and liquefied argon in the Kanto region, and moreover, the combined market share of the top three companies, including parties to the proposed merger, in the national markets for rare gases and gases for semiconductor materials, would reach 90 per cent and 66.6 per cent, respectively.

Regarding this case, the FTC considered that the proposed merger would not necessarily restrain competition substantially in a particular field of trade for the following reasons: the top manufacturer of liquefied oxygen, liquefied nitrogen and liquefied argon holds a large market share, and the share of second-ranked Toyo Sanso, a party to the proposed merger, would increase only a few percentage points; the share of the two partners in the rare gas and gases for semiconductor materials are third and second largest, respectively; and there are major competing firms in the market.

Other major cases of corporate alliances

A joint venture between Mitsubishi Steel Mfg. Co., Ltd. and Nippon Steel Corporation

In this case, Mitsubishi Steel Mfg. Co., Ltd. and Nippon Steel Corporation would set up a joint company, to which Mitsubishi's special steel division would be transferred. Further, Nippon Steel intends to carry out the mutual commissioning of part of the special steel rolling process with the joint company. As a result of the proposed joint venture, the combined share of the two companies in output would be 22.1 per cent in crude steel for special steel and 58 per cent in carbon steel shaped for machine structural use, among various types of special steel.

Regarding this case, since carbon steel for machine structural use and alloy steel for structural use are partially substitutable for each other and, in terms of production, can be manufactured with the same equipment, this suggests that the barrier to new entry is not high. Further, among different shapes of special steel, as opportunities for new entry seem to exist to a certain degree on a long-term basis, in addition to the existence of major competing firms in the market in carbon steel for machine structural use as a whole, the partners to the proposed merger offered to weaken the impact of Nippon Steel's proposed 20 per cent ownership in the joint venture and to have Mitsubishi Steel and Nippon Steel continue to carry out and develop their respective business activities in conformity with the fundamental principle of maintaining between them the relationship of mutually independent competitors.

The FTC, taking overall consideration of the proposed joint venture partners' actions and other factors, considered that the joint venture plan would not necessarily restrain competition substantially in a particular field of trade.

III. The role of competition authorities in the formulation and implementation of other policies

Recent moves to review government regulations and the exemption system of the Antimonopoly Act

In order to achieve specific objectives, the government regulates, in accordance with its laws and regulations, the free economic activities of firms in regard to market entry or pricing (government regulations). Further, in specific fields and under specific conditions, certain conduct by firms is exempted from the application of the Antimonopoly Act (the system of exemption from the Antimonopoly Act). However, some of these objectives have lost their raison d'être or government regulations and the system of exemption from the Antimonopoly Act sometimes obstructs economic vitality and efficiency as a result of major changes in economic and other circumstances occurring since they were introduced.

One of the major policy tasks the Japanese Government is addressing is the encouragement of deregulation from the viewpoint of giving priority to consumer interests. The government is actively reviewing government regulations, and, based on the "Outline of External Economic Reform Measures" decided upon in March 1994, the Cabinet made a formal decision to relax relevant regulations, as referred to in its announcement "Regarding the Policy for Promoting Deregulation Hereafter" (July 1994).

Regarding the system of exemption from the Antimonopoly Act, in the aforementioned announcement, "Regarding the Policy for Promoting Deregulation Hereafter", the government announced that the systems permitting the exemptions of the Antimonopoly Act to cartels and others through individual laws will be reviewed from the viewpoint of conducting their abolition within five years, in principle, and concrete conclusions shall be reached by the end of 1995. Further, as to the resale price

maintenance system, efforts shall be made to cancel designation of all designated resale items and to circumscribe and identify the scope of literary works by the end of 1998.

FTC approaches

Review of government regulations

The FTC has been reviewing government regulations on competition policy from a medium- to long-term perspective for quite some time, and has requested the ministries and agencies concerned to review their respective systems in addition to announcing the Commission's own views on the basis of a factual survey conducted in 1982, in accordance with the recommendation of the OECD Council in 1979.

The Study Group on Government Regulations and Competition Policy, consisting primarily of third-party experts, has been studying the current status of and problems posed by government regulations and the direction of their review from the standpoint of competition policy. Recently, in August 1994, the group published its findings on the current status of and problems posed by government regulations in the field of physical distribution.

Review of the system of exemption from the Antimonopoly Act

In principle, the Antimonopoly Act prohibits cartels by firms and trade associations, yet certain cartels are exempted from the Act if these cartels meet specified conditions provided by law. Special provisions permitting such exemptions are set forth not only in the Antimonopoly Act itself, but also separately in individual laws such as the Small and Medium Sized Enterprises Organisation Act and the Export and Import Trading Act. As a rule, the formation of exempted cartels requires notification to, or authorisation by, the FTC or the relevant authorities.

Cartels currently exempted from the Antimonopoly Act are being reviewed by the relevant ministries and agencies for the purpose of reducing their number. In 1994, 12 exempted cartels were eliminated. At the end of 1994, there were 59 exempted cartels whose authorisation procedures required intervention by the FTC. The FTC intends to continue to promote actively the review of the exemption system from the Antimonopoly Act by persuading the respective relevant ministries and agencies to review such exemptions through liaison meetings among the ministries and agencies concerned.

Review of the system of exemption pertaining to resale price maintenance

Since the Japanese system of exemption pertaining to resale price maintenance covers good designated by the FTC and literary works, the Commission intends to revoke resale price maintenance for all designated items and to circumscribe and identify the scope of literary works by the end of 1998.

Review of exemption for resale price maintenance on designated goods

Regarding the system of exemption pertaining to resale price maintenance over which the FTC has authority, the Commission revoked, between April 1993 and December 1994, the resale price maintenance of approximately half of the designated cosmetics and the designated over-the-counter medicines which had qualified for such exemptions. By the end of 1998, it is intended to revoke resale

price maintenance for all such goods whose designations as exempted items were not withdrawn during that period.

Study on the Antimonopoly exemption for resale price maintenance on literary works

Regarding the extent to which literary works (newspapers, books, periodicals, recordings, music tapes and compact discs) are authorised to be eligible for exemption from the ban of the maintenance of resale prices under Section 24-2 of the Antimonopoly Act, the FTC set up a subcommittee for the study on the resale price maintenance issues, mainly consisting of third-party experts, within the Study Group on Government Regulations and Competition Policy. The subcommittee is currently studying the issue from a broad perspective.

IV. Studies related to competition policy

Studies on the actual state of transactions between firms

In recent years, there has been great concern, both in Japan and abroad, over business practices among firms in Japan, especially long-term business relationships between customers and suppliers. With an eye to examining the transactions between firms in individual industries from the perspective of competition policy, since 1990 the FTC has been conducting surveys on Japan's major industries concerning such aspects as the factors and background of long-term business relationships, the relations between stockholding and trade, and the presence or absence of exclusivity in the market.

As part of this study, the FTC conducted a survey on the actual state of transactions in two industries, agricultural chemicals and synthetic rubber manufacturing, and published its findings in July 1994. The findings are summarised below.

In the agricultural chemicals business, it was observed that once transactions are initiated, transactions between the same buyer and seller are usually continued unless specific circumstances arise, such as the introduction of a new agricultural chemical or the discontinuation of the production of an established product, and there are very few instances of new transacting relationships. This seems largely due to the market environment and the characteristics of the products, and there has been no indication of the affiliation of distribution channels, or the prescription of exclusive dealing contracts by a stockholding relationship or by the manufacturer. While the National Federation of Agricultural Co-operatives (*Zenno*) plays a major role in the trading of agricultural chemicals, Zenno does business with almost every manufacturer irrespective of whether it has a capital link with the manufacturer or not, and economic federations (*Keizairen*) and agricultural co-operatives also buy on their own from manufacturers or wholesalers. These circumstances would indicate that there were no exclusive trade relations in the affiliated channels. Additionally, foreign manufacturers have entered the Japanese market by selling crude materials to domestic manufacturers, and are very active in marketing activities.

A practice of continuous transactions has been observed in transactions involving synthetic rubber. At the same time, however, newly initiated transactions are by no means scarce, many agents and users deal in imported goods, there are new market entries by both domestic and foreign firms and the prices of domestic products are coming down as imports increase and import prices drop. All this suggests the existence of active competition involving both domestic and imported products.

Although the aforementioned surveys revealed no violations of the Antimonopoly Act, the FTC, to further promote fair and free competition, pointed out several matters which should be taken into consideration from the viewpoint of competition policy and expected the firms concerned to make voluntary efforts to improve.

In addition, the Commission carried out follow-up surveys in the four sectors for which survey findings had been published in June 1993, i.e. paper, flat glass, the passenger car and the auto parts industries, and studied how the parties concerned were addressing the problems pointed out from the viewpoint of competition policy. In August 1994, the FTC released its findings that those parties had improved or were making serious efforts to improve their trade practices.

Regarding the status of corporate groups

As there are many so-called corporate groups in Japan, the FTC conducted its fifth survey, from the viewpoint of competition policy, in an attempt to clarify the actual status of and trends in the relationships among member firms and intra-group transactions, among other matters, in regard to the six major groups (Mitsui, Mitsubishi, Sumitomo, Fuyo, Sanwa and Daiichi Kangin), as they are representative of Japan's corporate groups, and released its findings in July 1994. The findings are summarised below.

In the six major corporate groups, though the circumstances more or less differ from group to group, the relationships among their members, through stockholding and the intra-group dispatching of executives, are not excessively close, and have been, in fact, loosening. The ratio of intra-group transactions to all the transactions of member companies in the same group is 6.85 per cent in sales and 7.75 per cent in purchases, indicating that over 90 per cent of business is being done with companies not belonging to the same group. Moreover, this ratio has been consistently declining since 1981 (when it was 10.8 per cent in sales and 11.7 per cent in purchases). Although it is pointed out regarding the six major corporate groups that there is a general tendency to give priority and preference to transactions with fellow member firms, reflecting relationships among member firms, there remains a certain amount of cross-stockholding, dispatching of executives and intra-group transactions, these relationships are not very close and are generally weakening. Furthermore, on the whole, since their member firms are trading extensively with companies outside the same group, it is observed that the ratio of intra-group transactions is declining, so it can hardly be assumed that the six major corporate groups are engaged in exclusive and closed trade practices.

However, the positions held by these six major corporate groups in the Japanese economy remain substantial, and as the groups have influential member companies in their respective sectors, their impact on the Japanese economy would become too great to ignore if their intra-group transactions became exclusive and closed and a concentration of power occurred due to tightened social and capital ties within each group. Therefore, the FTC, from the viewpoint of competition policy, intends to continue to monitor the status of the six major corporate groups on a regular basis to keep track of their relationship as groups and the status of their activities.

Survey on the actual state of distribution in the toy industry

In view of the major changes taking place in the distribution and trade practices in the toy industry in recent years under the impact of market entry by discount stores, the FTC conducted a survey on the actual state of the industry, focusing on the impact of the market entry of these discount stores on

trade practices in the industry, evaluated it from the viewpoint of competition policy, studied anticipated problems and published its findings in March 1994. The findings are summarised below.

In the toy industry, while manufacturers (manufacturer-wholesalers) have led the industry by planning and developing new products and shouldering the risk of sales activities by the liberal acceptance of unsold goods (*henpinsei*), retailers are beginning to take the initiative in distribution as discount stores have entered the market (including Toys "R" Us - Japan Ltd.), are increasing the number of new outlets and are enlarging specialty toy stores. Moreover, while the toy industry used to sell goods primarily at the manufacturers' suggested retail prices, the goods are also beginning to be sold at a discount, reflecting the market entry made by discount stores.

The FTC considers it important to carefully monitor any changes in distribution structure which may accompany these developments in the toy industry, as well as to continue to support an environment in which active competition can take place through the proper implementation of the Antimonopoly Act.

Appendix

List of surveys related to competition policy

1994:

January Questionnaire survey concerning the Antimonopoly Act compliance program.

March Survey on the actual state of distribution in the toy industry.

April Analysis of the impact of the strong yen in terms of market structure.

April Survey on the actual state of the steel market.

April Survey on the actual state of the impact of the strong yen on the petrochemical industry (as reflected in domestic prices).

June Administrative Procedure Standards for Authorisation of Stockholding by Financial Companies.

June Surveys on the actual state of the impact of the strong yen on the prices of consumer goods.

June Antimonopoly Act Guidelines Concerning Administrative Guidance.

July Antimonopoly Act Guidelines Concerning the Activities of Firms and Trade Associations in Relation to Public Bids.

July Major examples of consultation regarding the activities of trade associations (fiscal 1993).

July Survey on the actual state of the agricultural chemicals industry.

July Outline of the report on the actual conditions of the six major corporate groups.

July Trends in and major cases of mergers and acquisitions of business in fiscal 1993.

July Survey on the actual state of transactions between firms in relation to the distribution of synthetic rubber.

August "On the review of government regulations in the field of physical distribution" (a report by the Working Group on Government Regulations and Competition Policy).

August Review of Administrative Procedure Standards for Examining Mergers by Companies and of Administrative Procedure Standards for Examining Stockholding by Companies.

August Follow-up to the surveys on the actual state of transactions between firms in four industries: flat glass, passenger car, auto parts and paper.

August Interpretations of the Application of the Provisions of Section 9 of the Antimonopoly Act with Respect to Venture Capital Firms.

October Growth of Discount Stores and Changes in Manufacturers' Policies on Sales Channels (a report by the working group on distribution issues).

1995:

February Survey on the actual state of transactions between large-scale retailers and suppliers

Index of FTC/Japan Views No. 18, October 1994

1. Problems in Government Regulations and the Direction of their Review from the Competition Policy Viewpoint.

2. Recent Development of Competition Policy in Japan.

3. The Antimonopoly Act Guidelines Concerning the Activities of Firms and Trade Associations in Relation to Public Bids.

Index of FTC/Japan Views No. 19, February 1995

1. Second Seminar on European Union/Japan Competition Policy, Brussels, 16 September 1994, Masami Kogayu.

2. Administrative Procedure Standards for Examining Mergers by Companies.

3. Administrative Procedure Standards for Examining Stockholding by Companies.

4. Interpretations of the Application of the Provisions of Section 9 of the Antimonopoly Act with respect to Venture Capital Firms.

5. Administrative Procedure Standards for Authorisation of Stockholding by Financial Companies.

MEXICO*

(1994-1995)

I. Changes to competition laws and policies adopted or envisaged

Mexico's competition legislation consists of the Federal Economic Competition Law (23 June 1992) and the Internal Regulations of the Federal Competition Commission (12 October 1992). Their application over the last two years has demonstrated their effectiveness in preventing and eliminating monopolistic practices and other restrictions on the efficient functioning of the markets for goods and services. The drafting of the regulations of the Federal Economic Competition Law has the highest priority, and significant progress is being made.

Recent months have seen the enactment of several ordinances and regulations that allow the opening up of railroads, basic telephone services and natural gas distribution to competition and the strengthening of competition in air transportation and other areas of telecommunications. These regulations are the following: the Railroad Service Regulatory Law, the Federal Telecommunications Law, the amendments to the Regulatory Law of Article 27 of the Constitution and the Civil Aviation Law.

II. Enforcement of competition laws and policies

The procedure for investigating anti-competitive practices and illegal mergers and concentrations begins with the submission of a complaint or *ex officio*. During 1994-1995, *ex officio* investigations played a major role in fighting those practices and in investigating mergers and concentrations for which the obligatory notification was omitted. This situation is partly explained by the fact that economic agents need time to assimilate the applicable legislation.

Actions against anti-competitive practices

Summary of statistics

During 1994-1995, a total of 45 cases were investigated, comprising 21 *ex officio* investigations and 24 complaints. Of the total, 14 cases were decided.

Description of significant cases

Naviera Turística de Quintana Roo, S.A. de C.V. vs. Transportes Marítimos de Yucatán y del Caribe, S.A. de C.V. and Cruceros Marítimos del Caribe, S.A. de C.V.

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* The original language of this report is English.

Naviera Turística de Quintana Roo, S.A. de C.V. (NTQR) filed a complaint against Transportes Marítimos de Yucatán y del Caribe, S.A. de C.V. and Cruceros Marítimos del Caribe, S.A. de C.V. for an alleged anti-competitive practice. NTQR based its complaint on the following facts:

-- the improvement of equipment and the expansion of service timetables by the two other companies, after NTQR began operations; and

-- violations of the agreement establishing prices, timetables and ticket-sale conditions signed by the Ministry of Communications and Transport (SCT) and the companies involved.

Making improvements to and expanding services are normal commercial practices, congruent with competition. Also, the pricing strategies of the companies against which the complaint was filed did not reflect the characteristics of either absolute or relative monopolistic practices, since there was no evidence of collusion between the competitors or of undue exclusion of the complainant. Consequently, the Commission decided that Transportes Marítimos de Yucatán y del Caribe, S.A. de C.V. and Cruceros Marítimos del Caribe, S.A. de C.V. were not involved in any monopolistic practice.

Aeropuertos y Servicios Auxiliares

The Commission conducted *ex officio* investigations into the provision of airport services and the functioning of duty-free shops at the nation's airports. Both cases involved Aeropuertos y Servicios Auxiliares (ASA) in its capacity as provider of airport services and administrator and operator of the airports of its property. In this context, ASA enters into such transactions as the following:

-- contracts with third parties for the provision of airport services, including ramp, dispatching and maintenance facilities; and

-- allocating space for the provision of different services, including manoeuvring, traffic, maintenance and repair and retail sales.

On 22 April 1992, ASA entered into a partnership with Aerovías de México, S.A. de C.V. and Compañía Mexicana de Aviación, S.A. de C.V. for the supply of ground assistance services through the company Servicios de Apoyo en Tierra (SEAT). The Commission found that this partnership could lead to discrimination against Seat's competitors in areas such as charges, space allocation, the terms of service-provision contracts and the leasing of operational areas.

Similarly, ASA has established exclusive contracts for setting up and operating duty-free shops in the country's international air terminals, thereby placing barriers to entry and limiting consumers' options. It is important to point out that the Commission found no reasons of security or efficiency to explain such treatment. As a result, the Commission made the following recommendations to the state company:

-- it should offer options for investors interested in operating ramp, loading, unloading, maintenance, and passenger reception and dispatching services, subject to technical, safety and physical restrictions, without losing sight of the economies in operating integrated services;

-- it should sell its equity participation in SEAT and play no part in future schemes designed to open the aforementioned services to competition;

-- it should grant all airport services without discrimination to any existing airline; and

-- it should cancel its exclusivity agreements with the operators of duty-free shops, using the available space to allow free entry into this business, provided that passenger safety, traffic standards and customs regulations are met.

The Commission determined that observation of these recommendations would solve the problems affecting competition in airport services, while schemes to allow privatisation of airports under conditions of competition are explored and implemented.

Purified water producers from Campeche and Puebla States

The Federal Competition Commission carried out *ex officio* investigations into alleged absolute monopolistic practices by purified water producers in the states of Campeche and Puebla. In both instances, the Federal Economic Competition Law was breached by the establishment of agreements among competitors to fix prices in their corresponding markets, under which purified water producers and distributors in the state of Puebla fixed a price for 19-litre bottles, and purified water bottlers in the state of Campeche fixed a price for 20-litre bottles. The Commission ordered the termination of the practice and applied the corresponding fines to the economic agents involved.

Aerovías de México, S.A. de C.V.

The Federal Competition Commission carried out an *ex officio* investigation into alleged relative monopolistic practices by Aerovías de México, S.A. de C.V. (Aerovías). The alleged practices involved the vertical division of markets and the company's refusal to deal with travel agencies that sold other airlines' tickets.

During the investigation,. The Commission found that Aerovías was refusing to use the services of the travel agency Baúl, S.A. de C.V. (Baúl), located in the city of Chihuahua, even though the agency met the requirements established by the airline for transactions of that kind. As a result, Baúl was forced to resell tickets allocated by Aerovías to other travel agencies. This restriction placed Baúl at a disadvantage vis-à-vis other agencies.

The Commission found that the airline's practice was causing the undue exclusion of several economic agents and substantially hindering their access to the relevant market. To correct this practice, the Commission ordered Aerovías:

-- to suspend its unilateral action through which it was refusing to provide Baúl, and any other agent who met the applicable requirements, with the tickets they requested;

-- to prepare, to the Commission's satisfaction, a memorandum indicating that the practices of refusing to deal with and/or discriminating against travel agents were prohibited, and also stipulating the requirements to be met for tickets to be supplied; and

-- to distribute the memorandum to its district departments and offices dealing with travel agents, and to submit proof of their receipt thereof to the Commission.

Cámara Nacional de Autotransportes de Carga

The Federal Competition Commission carried out an *ex officio* investigation into an alleged absolute monopolistic practice by Cámara Nacional de Autotransportes de Carga (the National Trucking Chamber or Canacar). This involved an agreement among Canacar's members to fix the prices applicable to their cargo services. The practice arose from a reference price guide for negotiations between users and truckers operating under concessions; Canacar had made the guide and distributed it among its members. The purpose of document was to set minimum prices for trucking services. As a result, the Commission decided to fine Canacar for participating in the aforementioned absolute monopolistic practice on its members' behalf. Likewise, it ordered Canacar:

-- to cease from publishing and distributing the aforementioned price guide and to withdraw the copies in circulation among its members; and

-- to refrain from issuing or distributing any kind of guide, pamphlet or bulletin with the aim of fixing prices or minimum costs for the services provided by its members.

Pemex-Petroquímica

The Commission conducted an *ex officio* investigation into an alleged relative monopolistic practice by Pemex-Petroquímica (Pemex), which involved the state company setting discriminatory prices for ethylene oxide. Prices charged by Pemex are set by means of formulas approved by a committee involving, *inter alia*, representatives of the Ministry of Treasury and Public Credit and the Ministry of Trade and Industrial Development. The formulas vary with each kind of user, thereby giving rise to significant differences. Thus, the price paid by ethoxilators was 56 per cent higher than that paid by producers of ethylene glycol. These disparities were not based on differences in quality, since the products supplied to each user are markedly similar.

The investigation revealed that the selling conditions of ethylene oxide led to market segmentation and price discrimination, since Pemex is practically the only supplier on the domestic market; the dangerous nature of the product and its high transport costs represent a barrier to imports; international trade in ethylene oxide is practically non-existent; as a result of this, Pemex enjoys substantial market power; and the supply contracts included a statement by the purchaser by which it promised not to resell the product in the state in which it was acquired without Pemex's prior authorisation. To correct these practices, the Commission recommended to Pemex that it should make every effort necessary to modify its price policy in order to eliminate the discriminatory treatment given to ethylene oxide users, and provide evidence of the elimination of the price discrimination by presenting the Commission with certified copies of the modified contracts.

Mergers and concentrations

Summary of statistics

A total of 122 cases were analysed, following 109 notifications and 13 *ex officio* investigations. The legal acts that gave rise to the notifications were 23 mergers, 55 acquisitions of assets, six joint investments, one notification made in compliance with a previous Commission resolution, one trust, two administrative restructurings and 21 participations in public biddings. Of all the notified cases, 81 were brought to a conclusion. Of these, conditions were placed on four and an objection was made to one. The rest were approved as filed. It should be stated that the notifications were solved in periods much shorter than those provided by law.

Description of significant cases

Femsa Cerveza, S.A. de C.V. and John Labatt, Ltd.

Femsa Cerveza, S.A. de C.V. (Femsa) gave notification of its intention to enter into a partnership with the Canadian company John Labatt, Ltd. Both firms produce and distribute beer. Femsa would reform its corporate by-laws to carry out the partnership. Thus, a new stock structure would be established under which Labatt would subscribe to up to 22 per cent of the (restricted circulation) Series-D shares, with an option to acquire an additional eight per cent over a period of three years. Likewise, an eight-member Board of Directors would be set up, with Labatt entitled to appoint five of those directors and appoint or remove the vice-president. Femsa and Labatt then signed a letter of intent, including agreements on technical co-operation and corporate services between Femsa and Labatt, and obligations by Labatt:

-- to take no direct or indirect part in representing or being connected to the production, marketing, sale or distribution of any other Mexican brand of beer other than those produced by Femsa, either in Canada or in other countries, without Femsa's prior authorisation; and

-- to take no direct or indirect part in representing or being connected to the production, marketing, sale or distribution of any brand of beer in Mexico except through Femsa.

After considering Femsa's size and the viability of distributing the product throughout the nation, the Commission determined that the relevant market corresponding to the concentration was that of Mexican and imported beer sold at the national level. In accordance with 1993 estimates, Femsa and Grupo Modelo had shares of the Mexican beer market of 48 per cent and 52 per cent, respectively.

The Commission found that the partnership between Femsa and Labatt reflected an international marketing strategy. The Mexican brewery's action can be explained in the light of economic liberalisation, the new conditions of competition prevailing in domestic markets and domestic producers' interest in expanding their operations to foreign markets. On the one hand, this transaction is a response to the partnership set up in March 1993 between Grupo Modelo and Anheuser-Busch, under which the latter company acquired an 18 per cent share of Modelo; on the other, the Femsa-Labatt operation facilitates Femsa's expansion into the Canadian market. Finally, it should be pointed out that Femsa's distribution of Labatt Blue, Labatt Ice and Labatt Genuine Draft imported beers, in addition to the imported beers it already sells (Heineken and Amstel Light), does not increase its market power, since it is competing against Grupo Modelo which distributes Budweiser and Bud Light.

The Commission decided that, considering the structure of the relevant market, economic liberalisation and the internationalisation of Mexican companies, the partnership between Femsa and Labatt did not threaten competition. Consequently, no objections or conditions were set on the transaction.

Carlos Abedrop D. and Conductores Latincasa, S.A. de C.V.

On 4 August 1994, Mr. Carlos Abedrop informed the Commission of his intent to purchase 52 per cent of the shares representing the capital stock of Conductores Latincasa, S.A. de C.V. (Latincasa), belonging to Ericsson Holding International, B.V. (Ericsson). Latincasa manufactures, processes and installs metallurgical products, produces cables and wires for electricity, telephony and telegraphy, and manufactures other electrical articles.

Previously (on 25 February 1994), Grupo Condumex, S.A. de C.V. (Condumex) had notified the Commission of its interest in purchasing the aforementioned shares. On that occasion, the Commission took the following elements into consideration:

-- Condumex is a part of Grupo Carso, S.A. de C.V., which in turn has an important holding in and maintains control over Teléfonos de México, S.A. de C.V. (Telmex);

-- Telmex is the leading purchaser of telephone cable;

-- the operation would lead to the concentration of almost 70 per cent of all telephone cable sales; and

-- with the purchase of Latincasa, Condumex would acquire control over the country's main producers of refined copper and wire rod.

After considering the possible negative effects of the Condumex-Latincasa concentration, the Commission decided to subject it to the condition that Grupo Carso must refrain from using its holding in Telmex to make the company discriminate against other producers in its purchases of telephone cables. Since the operation approved under these conditions was not closed, Ericsson once again offered the shares for sale, and Mr. Abedrop's proposal was made.

The aim of Mr. Abedrop's operation is to strengthen Latincasa against the effects of commercial liberalisation. To this end, the company requires investments in cable manufacture that Ericsson was not planning to make, together with technical assistance for this product line. Responsibility for the former element fell to the new majority stockholder, while the latter was resolved through a contract with Ericsson Cables, A.B. This commitment required the payment of a commission on all exports involving either directly or indirectly one of the companies in Grupo Ericsson.

Mr. Abedrop's main activities are in the financial sector. When he gave notice of the operation, he was the president of Latincasa and a minority shareholder in both that company and in Telmex. Given his minority holding in the latter firm, the Commission ruled that the concentration of which Mr. Abedrop was giving notice would not influence Telmex's commercial relations with Latincasa. The Commission therefore did not object to or impose conditions on the transaction, since the concentration did not threaten competition.

Ingenio Nueva Esperanza de Pujiltic, S.A. de C.V. and Ingenio Pujiltic, S.A. de C.V.

Ingenio Nueva Esperanza de Pujiltic, S.A. de C.V., a subsidiary of Consorcio Industrial Escorpión, S.A. de C.V. (CIE), gave notice of its intent to acquire the assets of a bankrupt state-owned company known as Ingenio Pujiltic, S.A. de C.V. (Pujiltic). Prior to this operation, 93.6 per cent of the shares in Grupo Xafra were purchased by Consorcio Integral de Empresas, S.A. de C.V. (Consorcio Integral), which is related to CIE. Through that transaction, the purchaser controlled more than nine sugar mills, the supply from which equals around 20 per cent of the domestic sugar market and more than 40 per cent of the refined sugar market. The Commission determined that the relevant market corresponding to the concentration between Consorcio Integral and Xafra would be that of the refined sugar produced and sold in the country. It also decided that Consorcio Integral's market power could be offset by various factors, such as the transformation of standard sugar into a refined product and the possible substitution of corn syrup for the latter product at the industrial level. Nevertheless, because of the time and costs implicit in such adjustments, the Commission deemed it would be prudent not to ignore the possibility that the aforementioned factors might not effectively offset the market power of the concentration. The Commission therefore placed a condition on the operation involving Grupo Xafra and Consorcio Integral. In the resolution, the latter company was required to give notice of all future plans to purchase companies or assets related to sugar production and/or distribution, both directly and indirectly, involving subsidiary companies, dependent companies or its shareholders, even when the amount of such operations was below the thresholds indicated in the Federal Economic Competition Law.

The purchase of Pujiltic by Ingenio Nueva Esperanza de Pujiltic, S.A. de C.V. did not exceed the minimums set down in Article 20 of the law. However, notification was obligatory by virtue of the condition established in the prior resolution on the operation involving Consorcio Industrial and Grupo Xafra. The Commission considered the increased concentration in the relevant market resulting from the purchase of Pujiltic and reviewed, within the context of the new scenario, both the barriers to imports and the timescale and costs involved in adjusting to replacement products and in transforming standard sugar into refined sugar. Similarly, pursuant to Section V of Article 13 of the law, it took CIE's recent behaviour into account. On these bases, the Commission found that the market power that would arise from the purchase of Pujiltic by CIE would endanger competition. The Federal Competition Commission therefore resolved to object to the operation.

Grupo Radio Centro, S.A. de C.V. and Radiodifusión Red, S.A. de C.V.

On 12 December 1994, Corporación Medcom, S.A. de C.V. (Medcom) and Grupo Radio Centro, S.A. de C.V. (Radio Centro), as seller and purchaser respectively, informed the Commission of their intention to carry out an operation with the following characteristics:

-- purchase and sale of shares representing the capital stock of Radiodifusión Red, S.A. de C.V. (Red) for a fixed price plus a maximum contingent price to be estimated depending on the audience for Red's news services;

-- transfer of titles to commercially exploit three radio stations in Mexico City, one in Guadalajara (Jalisco) and another in Santa Catarina (Nuevo León);

-- transfer of intellectual and industrial property rights covering various radio programmes;

-- granting of a licence for Red to use various brands and authorship rights, including Monitor; and

-- conclusion of a contract to provide Red with services including news production, news programmes and special events from Infored, S.A. de C.V. (a Medcom subsidiary), allowing the use of those services by Radio Centro. Infored remained under an obligation to provide its radio, audio and other related services to Red on an exclusive basis.

After analysing the advertising market, and particularly that covered by Red and Radio Centro, the following conclusions were drawn:

-- the geographical area covered by these companies corresponds to the Federal District Metropolitan Area (ZMDF);

-- in that area, radio advertising competes with an open television station with services aimed at the ZMDF and with several national-coverage television stations, although the services of the latter are of less interest to advertisers whose business is limited to that area;

-- advertising services provided by paid television in the ZMDF represent increasing competition for radio stations operating in the same area;

-- the advertising carried by print media competes partially with the services that radio provides, due to the more limited coverage of print media; and

-- in deciding how to spend their advertising budget, advertisers usually consider all the above media outlets.

While not losing sight of how the different media complement each other, the Commission determined that the relevant market corresponding to the operation was that of radio broadcast advertising services aimed at the ZMDF. In such a context, as a result of the concentration Radio Centro would increase the number of radio stations under its control from ten to 13, giving it a 24 per cent share of the total; Radio Centro would concentrate 39.2 per cent of all advertising sales, followed by Grupo Radiópolis, whose market share would remain at 27.7 per cent; and Radio Centro's audience would increase from 30.3 per cent to 45.6 per cent. On the basis of audience distribution, the Herfindahl Hirschman concentration index would rise from 1 556 to 2 479. It should be noted that, in the absence of reliable sales information, audience figures are the best data available for estimating market concentration. Furthermore, the saturation of the frequency bands available to radio stations and the high audience and competitiveness of the Monitor newscasts would seem to indicate that the proposed operation would grant Radio Centro significant market power. At the same time, the evolution of the advertising market, the growing share held by television and the deregulation of the telecommunications sector could offset the market power that may arise from this transaction. Therefore, the Commission found that the unconditioned approval of the concentration could reduce or harm competition in the relevant market. As a result, the Commission decided not to object to this transaction provided that the parties observe the following conditions:

-- they shall submit documents to the Commission, in order to give record of the terms and conditions of the notified transaction as renegotiated and of all other related operations;

-- they shall eliminate the exclusivity on news services, news programmes and special events included in the contractual relationship with Infored, S.A. de C.V., and any other similar or equivalent conditions. The parties shall satisfactorily inform the Commission of the way in

which said services would be offered to third-party competitors, in the understanding that such offers must include non- discriminatory terms and conditions;

-- they shall refrain from making tied sales, by abstaining from linking the sale of advertising time from the companies acquired to the sale of advertising time from the companies that currently comprise Radio Centro.

On 21 April 1995, Medcom and Radio Centro put forward a new proposal that took the above conditions into consideration and changed the terms of the purchase operation. The transaction was divided into two parts: the first would be limited to the purchase by Radio Centro of 33 per cent of the total capital stock of Red; and the second would involve an option to purchase the remaining 67 per cent of the stock. The Commission ruled that this modification of the payment method did not substantially alter the concentration as previously approved. Nevertheless, it warned the parties that until the transaction was completed in full, they would be considered competing economic agents. Thus, they were warned that they could not exchange information or exercise the right to appoint members to the Board of Directors. The parties were informed that if the second part of the transaction was not concluded within a period of 36 months, they would be under an obligation to restore the situation that prevailed prior to the Commission's resolution.

The Commission informed the parties that they should provide prior notification of any joint operating or marketing agreement entered into by and between them, be it formal or informal, and of any later concentration made with other economic agents, regardless of whether or not the amount involved exceeded the limits set down in the law for the notification of such undertakings.

Empresas Cablevisión, S.A. de C.V. and Sercotel, S.A. de C.V.

On 10 February 1995, the Commission was notified of the intent of Sercotel, S.A. de C.V. (Sercotel) to purchase 49 per cent of the stock of Empresas Cablevisión, S.A. de C.V. (Empresas). Empresas is a subsidiary of Grupo Televisa, S.A. de C.V. (Televisa), and Sercotel is a subsidiary of Teléfonos de México, S.A. de C.V. (Telmex). Sercotel has a majority holding in several companies involved in such areas as real estate, construction, equipment rentals, operation of networks and plants, and technological research. They all provide Telmex with services. At the same time, Empresas holds a majority of the capital stock of Milar, S.A. de C.V., which in turn holds the stock of Cablevisión, S.A. de C.V. (Cablevisión) and other companies dedicated to the transmission of restricted television at the regional level and the construction and installation of networks and studios related to that service. It should be pointed out that Cablevisión operates solely in the Federal District Metropolitan Area (ZMDF) and that the other regional companies as yet do not have the concessions necessary for transmitting cable television.

The television market comprises open services and paid services. The former are transmitted on the UHF and VHF bands and can be freely received with conventional antennas and television sets. The companies active in this market segment obtain their income from advertising sales and therefore compete for audiences and advertisers. The services offered by restricted television companies, on the other hand, are intended exclusively for subscribers. The fees charged account for these companies' main source of income. In contrast, revenues from advertising are substantially lower, since services of this kind are subject to greater restrictions in terms of audiences and times. Thus, while advertising on open television is freely received by broad sectors of the population, on restricted television advertisers' messages are aimed at specific audience types. On the basis of these elements, and bearing in mind the share of the television market enjoyed by Empresas, the Commission found restricted television to be one of the

products covered by the concentration. It also considered the fact that Empresas is only involved in the ZMDF's restricted television market through Cablevisión. In the remaining regions of the country, its subsidiaries do not provide such services because they lack the necessary concessions. As a result, it was determined that with regard to television, the relevant market corresponding to the concentration was that of paid television services offered in the ZMDF. In such a context, the concentration does not grant a level of market power that could reduce, harm or impede competition. The reasons for this are the following:

-- cablevisión's share of the relevant market has fallen from 98 per cent in 1989 to 36 per cent in 1994. The remaining 64 per cent is now covered by MVS Multivisión, which has proven to be a very effective competitor;

-- technological progress in this field has allowed the development of systems that facilitate the entrance of new competitors. Thus, cable systems are currently facing competition from microwave television and satellite television. Microwave television has already proved its effectiveness in the ZMDF market. With regard to the option of satellite television, it must be pointed out that the most advanced system is competitive in terms of price, quality and programming choices. In Mexico, there are companies making preparations for providing services that use this system, including Medcom and MVS Multivisión;

-- the new Telecommunications Law substantially frees the granting of concessions and eliminates the discretionality that characterised this process in the past. This limits the market power of the two companies that operate in the ZMDF by truly opening the sector up to new competitors;

-- the new Telecommunications Law obliges Telmex to establish contracts for using its network on non-discriminatory bases that reflect costs. Under these terms, the opening up of Telmex's network to a specific television company forces it to allow equal conditions of access to other television companies.

In turn, the telephone market at present comprises basic telephony and mobile radiotelephone services (using cellular and conventional technology). Mobile radiotelephony is not a perfect substitute for basic telephone services, given their differences in mobility, price and market penetration. It was therefore determined that basic telephony was the only product to be included in the relevant market of the concentration. Under these conditions, the Commission considered the following factors in determining the market power that the transaction implies:

-- Telmex's share of the basic telephony market is 100 per cent;

-- long-distance services are to be opened up to competition as of August 1996, as stipulated in Telmex's concession;

-- the Telecommunications Law facilitates entry by new companies by establishing measures such as the obligation to interconnect competitors' networks under non-discriminatory conditions and by freeing the granting of concessions and eliminating the element of discretionality in their allocation. In this fashion, new companies will be able to connect to Telmex's infrastructure to offer services on a competitive basis;

-- the technological development of the sector makes access by competitors economically feasible. With regard to basic telephony, there are several companies interested in entering

this segment with wireless technology, given the progress made with such systems and their shorter installation times. As for the possibility of using the cable television network for basic telephone services, it must be made clear that major investments and longer installation periods would be necessary.

After considering the above factors and the possibility of Cablevisión providing basic telephone services, the Commission decided that, given the new legal and technological conditions, the concentration notified by Telmex and Televisa would not threaten competition or freedom of access provided the following conditions were met:

-- the economic agents involved must notify the Commission of all later concentrations and/or mergers they plan to carry out, regardless of whether or not the amounts involved are below those stipulated in Article 20 of the Federal Economic Competition Law;

-- should Cablevisión provide telephone services over its network, after the appropriate modification to its concession, it must allow access by other companies wanting to use its cable infrastructure to provide local telephone services. This condition is essential so that the concentration does not lead to the exclusion of competitors.

Finally, it should be pointed out that the Commission gave notice of the need for the Ministry of Communications and Transport (SCT) to authorise the sale of stock in Empresas Cablevisión, S.A. de C.V., belonging to Grupo Televisa.

III. Consultations

On the basis of the experience of its first year's work, the Commission restated its consultation policy for economic agents. Firstly, the incipient and heterogeneous awareness of the law among the interested parties was recognised. Secondly, the effectiveness of consultations in filing claims and preventing anti-competitive practices was taken into account. On this basis, the following steps have been adopted in order to provide better attention to individuals' consultations:

-- identifying those aspects of the law that pose the greatest problems of assimilation or interpretation, in order to strengthen the Commission's ability to give advice;

-- supporting interested parties in identifying anti-competitive practices and institutional restrictions to competition; and

-- providing support and orientation in formalities and procedures to face problems affecting competition, particularly to the most disadvantaged economic agents.

IV. The role of competition authorities in the formulation and implementation of other policies

Federal Telecommunications Law

The new Federal Telecommunications Law provides the regulatory framework necessary for establishing competition. Thus, market behaviour was placed under the supervision of a regulatory authority and the Federal Competition Commission. The powers of the former include the authority to enforce the technical and legal conditions necessary to establish unrestricted competition and to apply the

appropriate regulations when competition does not exist or when, in the Commission's opinion, this process is subject to undue interference. The Commission retains its powers of protecting competition and freedom of access.

The new rules regulating access to the sector, relations between participants, service supply and pricing will be determining factors in the functioning and structure of telecommunications markets. In this regard, the following measures are worthy of particular note:

-- the allocation of concessions for the commercial use of the radio spectrum and satellite communications through public biddings with transparent and exact bases;

-- the granting of concessions for public networks and permits for telecommunications service providers and ground transmission stations on non-discretionary and non-discriminatory bases;

-- broad access to the provision of value-added services, with the sole requirement of registering with the Ministry of Communications and Transport;

-- the prevention of anti-competitive practices by subjecting participation in public biddings and the granting of concessions and permits to the prior opinion of the Federal Competition Commission. With the same aim, participation by public network concession-holders in companies providing telecommunications services is subject to the Ministry's authorisation;

-- the elimination of barriers to entry by establishing technical plans that will allow the broad development of new concession-holders, non-discriminatory treatment and increased telecommunications services; adopting open-architecture network designs that will allow interconnections and interoperability between concession-holders' networks in accordance with the aforementioned plans; establishing interconnection agreements among concession-holders; prohibiting exclusive contracts for the use or exploitation of public telecommunications networks; and governmental arbitration of interconnection pricing, when concession-holders encounter difficulties in agreeing thereon;

-- the freedom to establish pricing schedules;

-- the placement of specific obligations regarding pricing and service quality on concession-holders with substantial power within the corresponding market, in accordance with the Federal Economic Competition Law.

Railroad Service Regulatory Law

Progress in transport, increased competition between different means of transportation and the integration of the global economy, particularly in the North American Region, forced a reassessment of the State's role in the railroad sector and a search for adequate mechanisms for private participation. In this context, the Commission, working closely with the Ministry of Communications and Transport, studied the situation of the national railway system and analysed the implications of its privatisation on competition and freedom of access.

Global experience indicates that the development of competition in this sector requires the railway service to be fragmented into companies, with facilities for interconnections and the shared use of

the railroad network by competitors. In general two kinds of scheme are used. One is based on the fragmentation of the service by function, in which infrastructure, traffic control and transportation are assigned to different companies, while the second implies regional divisions that preserve the vertical integration of the concessioned areas. The Railroad Service Regulatory Law allows for two forms of disincorporation and takes into account conditions to guarantee competition between different modes of transport. In this context, reference should be made to the following provisions:

-- the allocation of concessions for constructing and operating railroads and providing public rail transport services through competitive biddings with transparent and exact bases;

-- the granting of permits, on non-discretionary and non- discriminatory bases, for both the provision of auxiliary services and for construction work and associated installations on railroads or on the rights of way belonging thereto;

-- the prevention of anti-competitive practices by subjecting participation in competitive biddings and the granting of concessions and permits to the opinion of the Federal Competition Commission;

-- the removal of barriers to entry by obliging concession-holders to mutually provide interconnection and terminal services and to share rail tracks along the sections determined by the Ministry of Communications and Transport, by means of payments agreed upon by the parties;

-- arbitration by the Ministry in the event of disagreements regarding the payments referred to in the previous paragraph;

-- the freedom to determine pricing schedules; and

-- the establishment of a consultation mechanism between the regulatory authority and the Federal Competition Commission to establish temporary pricing schedules when conditions of competition do not exist.

Civil Aviation Law

The Civil Aviation Law, in force since May 1995, is a step forward in the deregulation of air transportation services. Among the provisions allowing competition, the following are worthy of special note:

-- the granting of concessions and permits on the basis of transparent and non-discriminatory criteria;

-- the granting of concessions and permits through the observance of minimal regulations;

-- legal certainty for concession- and permit-holders;

-- the allocation of timetables for aircraft landings and take-offs, on equal and non-discriminatory bases, by scheduling committees composed of the interested parties; and

-- co-ordination between the regulatory authority and the Commission when there is no competition in the markets so that, subject to the Commission's opinion, temporary pricing regulations can be established.

The Federal Competition Commission is working closely with the Ministry of Communications and Transport on studies aimed at strengthening competition within the plans for modernising airport services.

Port privatisation

The port administrations (Administraciones Integrales de Puertos) of Lázaro Cárdenas, Manzanillo Veracruz and Altamira issued an invitation for bids for the right to use and exploit several port facilities and terminals along the Pacific coast and the Gulf of Mexico. The Commission participated in assessing the competition aspects of these transactions. In this regard, the Commission declared itself in favour of not allowing successful bidders to obtain more than one terminal of each kind on each coast. In this way, concentrations that could give considerable market power to the winning companies will be avoided.

Credit Information Bureaus

The efficient development of the credit information market facilitates the incorporation of economic agents into the financial sector. It also encourages more efficient channelling of finance. After analysing the draft regulations put forward by the Ministry of the Treasury and Public Credit (SHCP), the Commission declared itself in favour of the following points:

-- the usefulness of allowing the establishment of credit information agencies in addition to that, or those, established by the banks;

-- the need to prevent exclusive dealings between suppliers of credit information and any of the aforementioned agencies;

-- the usefulness of establishing regulations in accordance with the predicted structure of the market for such services and the degree of vertical integration between information suppliers and credit information agencies; and

-- the importance of establishing an efficient and reliable system that will allow the flow of positive and negative information.

Unfair foreign trade practices

The Commission established an administrative collaboration agreement with the Ministry of Commerce and Industrial Development (SECOFI), to enable the Ministry's International Commercial Practices Unit to ask for the Commission's opinion on the possible effects of dumping investigations on competition.

V. International affairs

During the course of the year, the Federal Competition Commission has worked to establish closer contact with foreign competition agencies. Extensive work with the NAFTA signatories under the Chapter 15(1504) led to the establishment of a working group two years ago. To date, four meetings have been held in which delegations have worked together on comparative studies of the competition legislations.

In other areas, the Commission has worked with the competition agencies of its Latin American trade partners such as in the free trade agreement (G-3) consisting of Venezuela, Colombia and Mexico. Mexico has also received technical assistance through consultations and granted assistance to several competition agencies throughout the year.

THE NETHERLANDS*

(1993-1994)

Some preceding passages from the 1995 Budget of the Ministry of Economic Affairs

Competition and deregulation

The task facing both the Dutch business community and the government in the coming years is to create more scope for enterprise. The business and government must therefore pay constant attention to effective competitive relationships and critically examine any effects of regulation and self-regulation that restrict competition. Both the OECD and the CPB (`The Netherlands in Triplicate') have pointed out that the functioning of the Dutch markets for goods and services is less than optimal. Effective competition is restricted either at the instigation of the market parties themselves (cartels) or as a planned or unplanned effect of government regulation of the market. Restriction of competition carries substantial costs in terms of prices, the quality of products and services and stimuli for innovation in products and production processes. Furthermore, increased labour market flexibility will not materialise to the extent thought necessary if businesses continue to face restrictions on access, expansion and innovation in markets for goods and services. Competition policy is being tightened up considerably and legislation on business licensing is being brought up to date. Progress has also been made with individual dossiers, such as telecommunications, transport, health care and professional practitioners. Thus the first steps towards improving market operations in the Dutch economy have been taken. However, a substantial improvement in the dynamism of the market sector requires a further reduction of public and private regulation restricting competition in the Dutch economy, across the board. The method followed here is that in specific sectors, interdepartmental working groups:

-- Examine all regulations, both public and privat;

-- Carefully assess where unnecessary market constraints arise;

-- Consider how these can be eliminated.

Good experience has been gained with this method in the medicines sector.

... Healthy competition between companies trains an economy, as it were, in adaptive capacities and challenges companies to realise innovation and modernisation. This is why properly functioning markets are essential in order to strengthen our competitiveness. The functioning of the market in the Netherlands, however, is over-constrained by government regulation and self-regulation (cartels), which frustrates healthy competition. Sooner of later, a lack of competition leads to cost inefficiencies and loss of quality, and holds back modernisation of the product package. An accumulation and frequent amendment of legislation can also severely hamper market access and innovation. New businesses, in particular, face restrictions on

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* The original language of this report is English.

opportunities for growth and, therefore, for creating new jobs, partly because the need for cost control appears less urgent. Legislation and regulation also increase costs directly. Rules and regulations cost Dutch industry some NLG 13 billion a year in administrative expenses: some 2 percent of the gross national product. In many cases, this is more than the usual profit margin. In publicly-regulated sectors, too, the failure of market function can lead to loss of quality and cost inefficiencies. Regulations in these sectors often have relatively high execution costs. Inefficiencies lead to extensive application of regulations, as the executors or suppliers have no incentive for volume or cost control. In the last government's term of office, some initial steps were taken to reduce constraints on the functioning of the market. In the coming term of office, the reassessment of the relationship between common regulations and individual responsibility will also take shape in this area of policy, and action will continue along the lines already introduced. For the market sector, legislation on business licensing will be substantially simplified and competition legislation has already been tightened up considerably. Plans to sharply reduce restrictions in the Shop Hours Act will not only promote the dynamism of the economy, but also respond to changing working and living patterns and will increase consumer choice. Under the influence of technological development and European Community (EC) liberalisation guidelines, parts of the public sector will also (need to) experience the effects of market forces. The media market, rail transport and telecommunications can be cited as examples. Building on this, a progressive approach is needed by the government or the sector itself to rules that hamper flexible adaptation to new economic conditions. The primary aim here is not to alter the envisaged policy targets of the existing legislation and regulations. The emphasis must lie on reducing policy costs by testing existing regulation in terms of policy effectiveness and cost efficiency. The need for the means and ends of regulations, and the question of whether these are in proportion, will require continual assessment. A substantial part of this approach involves reducing the administrative cost burden for businesses to the minimum level necessary. The possibilities for restoring market functioning in quasi-public sectors need study. More competition on the supply side of the markets, together with government legislation to secure minimum standards for the services to be provided and access for consumers, afford the necessary prospects here. In close cooperation with the Minister of Justice, proposals will be drawn up for a plan of approach in order to reduce or simplify regulations that restrict competition and create a cost burden, with a view to - improving market function and thus increasing the dynamism of the economy. This project will be supervised by a ministerial commission, in which the ministries most directly involved will be represented ...

Competition

Tightening competition policy is of major importance to the economy: dynamic relations in the Dutch markets are needed if the business community is to function well. Such a market environment will strengthen Dutch businesses in their battle for national and international market shares. In addition, growing numbers of administrative and legal considerations call for a tighter policy. A growing proportion of Dutch industry is directly affected by European cartel law, which bans all agreements that restrict competition unless an explicit exemption is made, or dispensation has been granted. To increase transparency for industry, Dutch competition policy has therefore been brought more closely into line with that of the European Commission in recent years. Moreover, the European Commission is then more likely to leave the settlement of competition issues of a largely national scale to the Dutch government (subsidiarity).

A prohibition system now applies in the Netherlands, de facto, for the main types of cartels. The Economic Competition Act (WEM) will also be amended on some points. This will extend the scope of the WEM to all professional practitioners and to agreements between businesses that are not binding in law. The possibilities for enforcement and control will also be improved. Requests for advice to the Economic Competition Commission, and the Commission's advisory reports, will be made public. The Amendment Bill is currently before the First Chamber of Parliament.

The introduction of a new Competition Act, on a European footing, will be the final step in the intensification of competition policy. On 16 February 1994, the State Secretary of Economic Affairs asked the Economic Competition Commission and the Social and Economic Council for advice on the main points of the new Act. The Second Chamber of Parliament received a copy of this request for advice by letter of 28 February 1994. The new Act is expected to come into force in 1997.

Deregulation

Both public and private regulation often serve legitimate social ends. However, social conditions are subject to change. This calls for continual reassessment of the relationship between collective regulations and individual responsibility, that corresponds with the increased independence of the public. This increased independence is compatible with the economic consideration that more competition and more stimuli can lead to better performance and greater efficiency. Regulation and self-regulation that restrict competition are critically (re-)examined in this light. Work is in progress in the following areas, among others. These could conform well to the new deregulation operation mentioned in Part 1, to strengthen the dynamism of the Dutch economy:

-- Shop Hours Act: in order to realise a sharp reduction in the restrictions imposed by the 1976 Shop Hours Act, the Ministry is preparing an amendment of the existing Act. The duration of the experimental stipulations for the 1976 Shop Hours Act has now been extended until the proposed amendment of the statutory requirements takes effect;

-- public law business organisation (PBO): at the request of the Second Chamber of Parliament (Wiebenga et al. motion, Second Chamber Documents II 1992/93, 21 427, No. 45), an in-depth study will be carried out into the functioning of the PBO. This study will not only include an administrative analysis, but will also cover the economic effects of the PBO activities;

-- health care: the activation of competition policy has also brought more attention to regulation of the health care sector. On the supply side, we often find a mix of public and private regulation. The inter-departmental examination of regulations in the medicines sector can serve as an example for future studies in other sectors;

-- liberal professions: outside the health care sector, too, there is regulation that restricts the commercial capacities of professional practitioners. A large proportion of these professional groups are not (yet) under pressure from foreign competition, which could lead to erosion of regulations. Because the service provision of these professional groups determines the performance of other sectors of Dutch industry to a considerable degree, there is every reason to subject the relevant regulations to a critical examination;

-- traffic and transport: on the basis of external advisory reports (Wijffels and Brokx), the government decided on a different course for public transport. An important point here is the introduction of competition from parties other than the now well-known transporters. The introduction of competition is expected to improve quality and reduce the intensity of subsidisation;

-- the environment: self-regulation in the environmental field, which is growing in importance, is also a priority area in competition policy. The need for, and proportionality of agreements

restricting competition for the benefit of the environment is specifically considered from the competition point of view.

I. Main developments

Competition policy forms part of the broader policy field for improvement of market functioning. Market function policy is one of the key tasks of the Ministry of Economic Affairs. This policy takes shape along three lines:

-- strengthening competition policy;

-- attention to deregulation; and

-- commercial realisation of the government's role as a party in the market.

Strengthening competition policy

Competition policy is being strengthened on the basis of two tracks. The first is a general prohibition of horizontal pricing agreements, market sharing agreements and tendering agreements, and an amendment to the WEM (the Dutch Competition Act), to increase its effectiveness. The amendment bill is currently before the First Chamber of Parliament. The general prohibitions have now all come into force, so that a *de facto* prohibition system exists in the Netherlands for the main types of cartel. A restrictive dispensation policy is being pursued. During the year under review, 19 applications for dispensation for existing price cartels were rejected. Tightening of competition policy along this track has therefore already produced results. The second track for the intensification of policy must be the introduction of a completely reformed Competition Act, based on the prohibition principle. The Social and Economic Council and the Economic Competition Commission were asked for advice on this on 16 February 1994. The new Competition Act must replace the abuse system of the WEM by a prohibition system in line with the competition regime of the EC Treaty.

This approach through a two-track policy has proved to be productive for the following reasons:

-- without the general measures, there would not have been any intensification of competition policy. The prohibition act will certainly take several more years to complete;

-- work on the prohibition act took place at the same time as the preparation of the general measures;

-- the knowledge and experience gained with the effect of the general measures and the processing of the dispensation applications were used for the preparation of the prohibition legislation;

-- the general measures, and the extensive publicity they received, contributed to the creation of a base of support for an intensified competition policy.

The adaptation of the Dutch competition regime to the tighter European standard is of major importance to the pursuit of a fully-fledged competition policy. Many agreements that restrict competition, and many types of conduct that take place entirely or mainly within EU Member states, are covered both

by the scope of national competition law and the competition rules of the EC Treaty. Partly as a result of this, many cases presented to the European Commission could also be handled by a national institution. Awareness is growing in both the Commission and the Member states that decisions should not be taken at a higher level than is strictly necessary, and that the competition policies pursued by national authorities must increase in importance. This is in line with the subsidiarity principle laid down in the Maastricht Treaty. However, the Member states must possess an adequate set of legal instruments in order to play this larger role. The adjustment and tightening of the Dutch competition regime therefore proved necessary.

Deregulation

The freedom of businesses can be restricted by both public regulation and private cartels. Private and public regulation are even interchangeable to a large extent. Public rules often create restrictions on access, expansion and innovation for businesses. Legislation and regulation also directly increase costs: rules and regulations cost the Dutch private sector an estimated NLG 13 billion per year in administrative expenses. Examples of restrictive regulation in the sphere of the Ministry of Economic Affairs include the Business Licensing Act and the Shop Hours Act. Partly as a result of changing opinion in relation to the functioning of the market, licensing requirements were relaxed considerably during the last government's term of office, and shop opening hours were extended.

More in general, it is important to aim for a structural reduction in the burden of regulation and for more free market forces in heavily regulated sectors, such as transport, health care, public housing and the construction sector. Responsibility for much of the regulation referred to above rests primarily with other departments. Further consideration of the need for regulation appears to be advisable. In the coming government term, there are plans to realise a general deregulation operation. Proposals will be made for a sharp reduction in the costs of existing and new legislation and regulation for businesses, and for the liberalisation of heavily regulated sectors, in tranches.

The government's role as a market participant

The Ministry of Economic Affairs receives many complaints about government or semi-government organisations that act as parties in the market. They are said to avail themselves of a preferential starting position, for example in terms of taxation and overhead costs. This issue is all the more important because the government's profitable activities are increasingly being transferred from the public to the private domain. An effort to realise profitability through the market and a smaller government apparatus (return to core tasks) is a sound principle. However, care should be taken to ensure that this does not lead unnecessarily to negative effects for the functioning of the market. In this respect, the first requirement was to reconsider the definition of public and private responsibilities. Any privatisation should take place on commercial terms as far as possible, so that free market forces -- and not the government -- determine the success or failure of a privatised enterprise. The organisation or business responsible for implementing government tasks should then be provided with clear guidelines in this respect (i.e. clear definition of tasks and instructions for commercial implementation of those tasks). In the coming government term of office, the conditions under which government authorities, privatised government services or companies with exclusive rights operate in the market require further consideration.

II. Intensification of competition policy: general measures and amendment of parts of the WEM

Horizontal pricing agreements

As announced in the last annual report, the Horizontal Price Maintenance Decree (Statute Book 80) took effect as of 1 July 1993. The Decree provides for the possibility of granting dispensation for pricing agreements if the existence of the agreement is required in the general interest. In principle, this criterion will be interpreted on the basis of the dispensation criteria of Article 85(3) of the EC Treaty. If an application for dispensation for an existing pricing agreement was submitted before the Decree came into force, the pricing agreement in question is not subject to the prohibition until a final decision on the application has been taken. Dispensation applications of this kind therefore have a suspensive effect.

As at 30 June 1993, dispensation applications had been submitted for 50 existing pricing agreements (State Gazette 128, 155). In one case, the application was inadmissible because the pricing agreement in question was subject to other legislation. In another case, the applicant could not convincingly show that the pricing agreement in question did indeed exist as at the date on which the application was submitted, as a result of which this application, too, was declared inadmissible. The applicant has filed an appeal.

During the year under review, 26 dispensation applications were submitted to the Economic Competition Commission, with a request to advise the State Secretary of Economic Affairs regarding plans to reject the applications in question (see Appendix). The Commission published 23 advisory reports, recommending in 21 cases that the dispensation application should be rejected. In two cases, the Commission took the view that a pricing agreement should not be prohibited, for reasons of efficiency (the agreements were due to expire anyway as of 1 January 1994). However, these recommendations could not be adopted, since the Decree does not provide such grounds for dispensation. In the course of processing, seven dispensation applications were withdrawn, one after the submission of a request for advice and one in the month that the Commission presented its recommendations. Therefore, no decision was taken on these applications. Partly on the basis of the Commission's recommendations, 19 decisions were taken on dispensation applications in the period under review; these applications were rejected in every case (State Gazette 19, 49 101). Six applicants filed objections to the rejection of their applications. In three cases for which advisory reports were presented, decisions are still pending. Advisory reports are still in preparation for 17 dispensation applications.

During the period under review, the State Secretary of Economic Affairs, together with the Minister of Welfare, Public Health and Culture, granted dispensation from the prohibition of the Decree in one case, for an agreement submitted in draft form in the application (Order of 31 May 1994, State Gazette 100). This relates to an agreement on a reduction of the price of medicines for a two-year period, for which Nefarma filed a dispensation application on behalf of the Dutch producers and importers of pharmaceutical products. Dispensation was granted because the pricing agreement can contribute towards the government's objective of reducing the costs of health care as far as possible. The pricing agreement does not affect competitive relationships, except in that a ceiling is set on the prices of the pharmaceutical products in question. The term set gives the government scope to proceed with the development of its policy aimed at generating results acceptable to the general public, without external intervention, party through a structural improvement in the functioning of the market for pharmaceutical products.

Market sharing agreements

After a positive recommendation from the Council of State dated 10 December 1993, the Decree of 19 January 1994 (Statute Book 56), invalidating stipulations on market sharing in competition agreements (Market Sharing Agreements Decree) was enacted by Royal Decree. In principle, the Decree invalidates all market sharing agreements, i.e. agreements defining the market position of two or more businesses in respect of each other. This covers agreements such as quota agreements, capacity control agreements and agreements on the share-out of territory, customers, suppliers or orders.

There are a number of exemptions from the measure, relating mainly to other national or European legal provisions, particularly the European Commission's group exemption orders; an exemption for "bagatelle" agreements is also included. The Decree provides for the possibility of granting dispensation for a market-sharing agreement if its existence is required in the general interest. The interpretation of the dispensation criterion and the dispensation procedure is regulated as in the Horizontal Price Maintenance Decree (see above). The Decree took effect as of 1 June 1994. Before it came into force, applications for dispensation (State Gazette 124) were submitted for 24 agreements, from various sectors. These applications are under consideration.

Tendering agreements

After a positive recommendation from the Council of State, dated 10 January 1993, the Decree of 19 January 1994 (Statute Book 55), invalidating stipulations relating to tendering in competition agreements (Tendering Agreements Decree) was enacted by Royal Decree. In principle, the Decree invalidates all agreements between both businesses and professional practitioners that restrict the freedom of one or more of the parties to determine tender prices or to submit tenders in response to an invitation to do so, regardless of the sector in which such agreements are applied. The prohibition also explicitly covers the exchange of information between the parties concerned regarding tender prices or responses to an invitation for tenders. The measure provides for a number of exemptions, primarily relating to other national or European legal provisions. The Decree also affords scope for agreements relating to control of hawking practices, as deemed to be acceptable by the European Court of Justice in a ruling handed down on 16 July 1992 in a case involving the Dutch construction industry cartel. Further, the Decree provides for an exemption for agreements relating to the execution of contracts for which joint tenders are submitted. An exemption for "bagatelle" agreements is also included. The Decree provides for the possibility of dispensation for tendering agreements if the existence of an agreement is required in the general interest. The interpretation of the dispensation criterion and the dispensation procedure is regulated as in the Horizontal Price Maintenance Decree (see above). The Decree took effect as of 1 June 1994. Before it came into force, applications for dispensation (State Gazette 124) were filed for 13 agreements. These applications are under consideration.

Amendment of the WEM

The WEM Amendment Bill announced in the preceding report, designed to increase the effectiveness of the Act, was presented to the Second Chamber of Parliament on 2 September 1993 (Second Chamber, Documents II, 1992/93, 23 306), after the Council of State had published its recommendations. The Bill first introduces the term "entrepreneur", extending the scope of the Act to all professional practitioners. It also introduces the possibility of measures relating to agreements or decisions that are non-binding in law and the term "mutually agreed actual conduct" in relation to the individual and general measures provided for in the Act. This improves the possibilities for action against forms of

restriction of competition that are not legally binding. The suspensive effect of appeals against certain decisions, currently still provided for in the Act, will be abolished. This will help to increase the effectiveness of the general measures decreed on the basis of the Act. Finally, the Bill provides for freedom of information in respect of requests for advice to the Economic Competition Commission and the advisory reports of the Commission, it affords supervisory powers for the ECD and, through an amendment of the Economic Offences Act, extends the limitation term for violations of the Act from two to six years. After a speedy passage through the Second Chamber of Parliament, the Bill was presented to the First Chamber on 21 April 1994. The First Chamber approved a report on the Bill on 13 June 1994.

Amendment of the Horizontal Price Maintenance Decree, the Tendering Agreements Decree and the Market Sharing Agreements Decree

One of the proposed amendments contained in the WEM Amendment Bill is the replacement of the terms "business owner" and "professional practitioner" by a single term, "entrepreneur". In connection with this, the Economic Competition Commission was asked on 24 June 1994 to advise on plans to also replace the terms "business owner" and "professional practitioner" by "entrepreneur" in the Horizontal Price Maintenance Decree, the Tendering Agreements Decree and the Market Sharing Agreements Decree. However, pending the preparation of the new Competition Act, the exemptions in the Horizontal Price Maintenance Decree for sales price agreements on joint advertising, covering no more than one month, and for pricing agreements in forms of purchasing and sales alliances, will apply only in the case of entrepreneurs who practice a profession, within the meaning of the existing Article 1a of the WEM (State Gazette 1994, 119).

Amendment of exemption from reporting requirements

In connection with the introduction of the Tendering Agreements Decree and the Market Sharing Agreements Decree as of 1 June 1994, the provision for exemption from reporting requirements in the Economic Competition Act was amended by Regulation of 27 May 1994 (State Gazette 99). Competition agreements containing no stipulations regulating competition, other than those exempted pursuant to one of these Decrees, are also exempt from the reporting requirement of Article 2(1) of the WEM. This is in line with the earlier amendment, exempting competition agreements from the reporting requirement if they contain no stipulations regulating competition, other than those exempted pursuant to the Horizontal Price Maintenance Decree.

III. Intensification of competition policy in the longer term: introduction of prohibitive legislation

On 16 February 1994, the Social and Economic Council and the Economic Competition Commission were asked to advise on a new Competition Act. The proposal included in the request for advice contained the following elements. The new Competition Act will replace the abuse system of the WEM by a prohibition system, in line with the competition regime of the European Union. Competition agreements and mutually agreed actual conduct will be banned, as will abuse of positions of economic power. The EC exemptions will be incorporated in the Act, which will also provide for the possibility of exemption on the basis of criteria such as those of Article 85(3) of the EC Treaty, and for a bagatelle stipulation. Dispensation will be possible on the basis of criteria such as those of Article 85(3) of the EC Treaty. There will also be a special dispensation possibility on the basis of criteria such as those of Article 90(2) of the EC Treaty, for cases in which businesses have been entrusted with a particular task in the

general economic interest. The regulation of powers to generally invalidate competition agreements for which dispensation has been granted on the basis of the special dispensation possibility could also be considered. The decision on the desirability of provisions for the application by the Dutch competition authorities of Article 85(1) and Article 86 of the EC Treaty will depend partly on the outcome of the debate on these problems in an EC context. At present, there are felt to be insufficient arguments for the introduction of any form of concentration control. It is intended that the new Competition Act will be enforced by means of administrative law. The Competition Act will be implemented independently as far as possible, by assigning responsibility for this to an official service, to be installed by law. This service will be granted powers to supervise compliance with the Competition Act, to institute investigations into violations of the Act, to impose sanctions and to decide on applications for dispensation.

IV. Other WEM issues

Collective vertical pricing agreements

Dispensation applications for collective vertical pricing agreements

On 10 December 1993, the Economic Competition Commission presented its advisory report on the plans of the Economic Affairs State Secretary and the Minister of Welfare, Public Health and Culture to grant dispensation from the general invalidation of collective vertical pricing agreements in respect of the Regulations for Book Trading in the Netherlands and the Regulations for Trading in Music Publications of the Netherlands Association of Music Traders and Publishers. Talks are currently underway with the Ministry of Education, Culture and Sciences on further processing.

Decisions in individual cases (and appeal proceedings)

Branch protection: "Het Trefcenter" shopping centre in Venlo

The objection filed by interested parties against the Order of 10 July 1992 (State Gazette 135), described in the last annual report, was rejected by Order of 10 February 1994 (State Gazette 35). The tenants in question have appealed against the rejection.

Provisional supply requirement for pharmaceutical wholesalers

By Order of 10 May 1994 (State Gazette 89), a provisional measure was taken in relation to four pharmaceutical wholesalers involved in a (collective) position of economic power. The provisional instruction, pursuant to Articles 24 and 27 of the WEM, contained a requirement to supply a pharmacist who co-operated in "mail-order pharmacy" together with a company specialising in this field. The four pharmaceutical wholesalers have objections to the phenomenon of mail order pharmacy, on the grounds of the quality of supply of pharmaceutical products, the interests of the (other) client pharmacists and the consequences for the present distribution structure. The four pharmaceutical wholesalers filed objections to the provisional measure and simultaneously appealed to the Companies Division of the Courts of Appeal for suspension of the measure. The Companies Division of the Courts of Appeal has now suspended the provisional measure (31 May 1994). In its ruling, the Court appeared to introduce weightier, more substantive considerations regarding the provisional measure than had previously been the case. This could affect future applications of this instrument. In accordance with the requirements of the WEM, the Economic Competition Commission was asked to advise on the application of Article 24 of the

WEM in relation to the wholesalers in question when the provisional measure was effected. The Commission has yet to present its advisory report.

Cases settled through intervention

Wadden Island ferry charge differentials

On 16 May 1994 (Second Chamber Documents II, 1993/1994, 23 400 / XIII / 034), the State Secretary of Economic Affairs sent a letter on this issue to the Second Chamber, explaining that she had reached agreement with both the ferry operators and the Wadden Islands Consultative Platform, in which the Mayors of the Wadden Islands are represented, on a substantial reduction of the differentials in freight charges for ferry services to and from the islands, insofar as these differentials result in a distortion of competition between islanders and non-islanders.

Refusal to supply filter systems

A complaint from an installer of hydraulic units, regarding the refusal by a sole importer of filter systems to supply these systems, did not lead to action pursuant to the WEM, as supplies were resumed in the course of the investigation.

Agreements on shop opening hours

Despite the amendment of the Shop Hours Act, providing for longer shop opening hours, the Winkelhof shopping centre in Leiderdorp decided to maintain the opening hours in effect in 1992. As a result of this decision, outlets in the shopping centre could not remain open after 6:00 p.m. However, one of the businesses located in the centre wanted to remain open until 6:30 p.m. and filed a complaint with the Ministry of Economic Affairs. The businesses concerned have now agreed to extend the opening hours until 6:15 p.m. In this case, there appears to be no reason at the moment for further application of the WEM.

Professional practitioners: Zaanstad auction monopoly (exclusive trading agreement between notaries and estate agents)

The last report announced a ban on auction agreements between associations of notaries and estate agents in Amsterdam. Following a complaint, the association of estate agents and notaries in Zaanstad, where agreements similar to those in Amsterdam were contracted, was asked to adjust the auction terms and conditions in order to eliminate the objections in respect of competition policy. The parties concerned have promised to make such adjustments.

Gaming machines sector

An operator of gaming machines filed a complaint regarding a refusal to supply. This refusal proved to be based on the regulations of the branch association, of which the supplier concerned was a member. This branch association has promised to suspend the relevant stipulations of the regulations.

Under investigation

Azivo/KNMP

On 15 April 1994, the Economic Competition Commission presented an advisory report on the plans of the State Secretary of Economic Affairs to invalidate the contract between Azivo and KNMP, dated 29 September 1971. This contract subjected the position of Azivo's own pharmacy in The Hague region to more restrictive competition agreements than those of privately established pharmacies. Partly in view of the reform of the health insurance system now underway in the Netherlands, which is hampered by the Azivo-KNMP contract, the Commission concluded that this contract should be invalidated and therefore issued a positive recommendation. An Order will follow shortly.

Medicines (Imigran)

The European Commission is conducting an investigation, in relation to the competition rules of the EC Treaty, into the (high) prices charged for the anti-migraine drug Imigran. Depending on the outcome, any further need for a national investigation, as announced in the Medical Letter of 22 April 1993 (Second Chamber, Documents II 1992/1993, 22 393, No. 4), will be considered.

Establishment of postal agencies

A complaint against Postkantoren BV's policy of contracting the establishment of new postal agencies or the extension of existing agencies only with a certain commercial partnership is still under consideration.

Increased first risk for storm damage

A complaint has been submitted on the standard increase in the uninsured risk for storm damage introduced by a large number of insurers as of 1 January 1994. The complaint is under consideration.

Estate agency

The largest association of estate agents in the Netherlands is trying to restrict the affiliation of its members to an alliance involving only commercial activities that are complementary to estate agency, namely in the marketing field. An investigation of the rules of conduct of this association of estate agents is in progress. Enquiries also focus on whether and, to what extent, an association of which the majority of businesses in a particular market are members can impose restrictions on its members in the field of commercial partnerships.

Conference organisation

An institution that organises conferences filed a complaint about potential distortion of competition in this field by educational institutes. The complaint focuses on the possibility that a number of overhead costs are not (fully) charged in offer prices. The complainant has promised to provide further details in this respect. This information has not yet been received.

Opticians

Two opticians' organisations filed complaints regarding bilateral contracts between a regional health care insurer and a number of opticians established in that region. The insurer requires a certain discount on spectacle lenses for its insureds in these contracts. The complaints relate mainly to the exclusive nature of the agreements: only some of the opticians established in the region qualify for such contracts. The complaint is under investigation.

Unfair competition in leasing of fairground sites

An association of funfair operators complained about the fact that municipal authorities increasingly contract out leasing of fairground sites to organising agencies or funfair operators. This is said to lead to unfair competition, as such agencies operate fairground attractions themselves, or lease the sites privately. The complaint is still under consideration.

Unfair competition from privatised government service

A commercial organisation agency active in the field of market gardening consultancy and research filed a complaint over alleged unfair competition from a privatised government service that performs similar commercial activities. The latter holds a preferential position in this market, due to government financial aid and long-range agreements with public law business organisations. The complaint is under consideration.

Interbank settlements

Complaints relating to interbank settlements, mentioned in the last annual report, are still under consideration by both the European Commission and the Ministry of Economic Affairs. The principle of interbank settlement has an important Community dimension. Similar stipulations can be found in the case of Eurocheque and in international credit card agreements. For this reason, processing of reports in the Netherlands concerning the Joint Collection Procedure (GIP), the Joint Giro Deposit Slip Procedure (GSA), the Joint Credit Slip Action Procedure (GAA) and the Cash Dispenser Partnership Agreement (SOGA) has been deferred in respect of this element, pending the ruling of the European Commission. The Commission opened proceedings on the GSA on 11 June 1993 and approved the announcement of the Points of Objection. A hearing took place on 28 October 1993. After the Advisory Committee has met, the Commission will issue a ruling on the case. In view of the importance that must be attached to a uniform approach to cases with both a national and a Community dimension, and also in view of the fact that provisional dispensation, subject to conditions, cannot reasonably be ruled out, the Netherlands will decide on the applications for dispensation filed as soon as there is certainty on the European line of policy.

Funerals/cemeteries

The ECD completed its investigation, announced in the last annual report, into the relationships (interplay) between the different parties involved in the disposal of the dead (cemetery managers, funeral parlours or undertakers associations and stonemasons) in early 1994. In consultation with the Home Affairs Ministry, the question of whether the results of the investigation provide grounds for action is now under consideration.

Glass sector

During the period under review, a complaint from a glass wholesaler, concerning the fact that glass factories allegedly refused to supply it direct, was processed. The question of whether this involved a defendable commercial policy or reprehensible conduct by businesses in a position of economic power is under investigation.

Artificial insemination

Detailed enquiries have been opened into a complaint over the market behaviour of (members of) the Netherlands Cattle Syndicate. This issue is whether the regional cattle improvement organisations restrict the market operations of private, as opposed to co-operative businesses, by banning member cattle farmers from providing artificial insemination services outside the cattle improvement organisation. A decision on this complaint is in preparation.

Buma/Radio Noordzee

During the period under review, a complaint was filed against the involvement of the Buma organisation in the commercial radio station Radio Noordzee. This complaint was deferred, pending the outcome of further enquiries into any financial inter-relationships between Buma and Radio Noordzee by the supervisory authority.

The CD market

Following a complaint from Konsumenten Kontakt, an investigation was opened into the operation of the CD market. This investigation showed that pricing for certain categories of CDs shows remarkable similarities. The complaint is under further investigation.

Beer market

In response to a complaint from a catering business in Amsterdam, an investigation was opened into pricing of tap beer. The investigation showed that the gross barrel prices of the different suppliers of tap beer in the Netherlands show a high degree of uniformity. However, this appears to carry a formal rather than any material significance. The discounts offered on the gross barrel price for each catering business are so varied that there is no material question of uniform net barrel prices for retailers. Moreover, no evidence has been found so far of any co-ordination between beer suppliers with regard to discounts. A decision on the complaint is in preparation.

WEM not applied

Breeding rights for freesias

The complaint from a plant breeders' association, mentioned in the last annual report, regarding the position of the holder of the breeding rights, did not lead to action. The complaint concerned the increase in licence royalties, the trading terms for breeding material and the export policy. It was concluded that the position of power of the holder of the breeding rights for various freesia breeds in the market for freesia breeding materials carries no consequences that are counter to the general interest. In view of price movements in the period concerned, there was no question of any excessive increase in the royalties. The trading terms imposed were not found to be improper in relation to the exercise of breeding rights.

Preferential package of incontinence materials

In response to a complaint, the ECD opened an investigation into the existence of a competition agreement relating to incontinence absorption materials in the operating region of a national health insurer. Pharmacists were allegedly required to supply incontinence materials of one brand only. The national health insurer in question proved to have no involvement in a competition agreement within the meaning of the WEM.

Placement of lighting mast advertising

The complaint from a business in Oosterhout (North Brabant), regarding the fact that the Oosterhout municipal authority had afforded exclusive rights for lighting mast advertising, led to no action pursuant to the WEM. The agreement between the municipal authority and the beneficiary must be seen as a leasing agreement, not a competition agreement. Furthermore, there was no position of economic power with consequences counter to the general interest.

Dental materials and equipment

A complaint was filed over the refusal of the Netherlands' largest importer and wholesaler of dental materials and equipment to supply a new wholesaler in this market. It was found that the complainant had increasingly gained a firm foothold in this market through parallel imports and through other suppliers. No evidence was therefore found for a position of economic power with consequences counter to the general interest.

Enforcement of Article 39 of the WEM

Dispensation from the prohibition contained in Article 39 of the WEM was granted to two business established in the Netherlands, in the foodstuffs sector on 7 January 1994, and in the petrochemicals sector on 21 March 1994. Article 39 of the WEM prohibits compliance with the competition policy measures/decision of other States, unless exemption or dispensation is granted. Both Orders related to requests to the businesses concerned to supply information, in the form of documents originating from the Federal Trade Commission in Washington, D.C., as part of enquiries being conducted by that Commission, under the Clayton Act, into concentrations in which these businesses were involved

and which had effects within the United States. Dispensation was granted subject to restrictions in both cases: no documents in the Netherlands relating to the activities of applicants or other businesses in the Netherlands, or to activities outside the Netherlands with effects within the Netherlands, could be supplied. After an objection was filed in the second case, by a joint venture in the petrochemical industry, against the original Order of 21 March 1994, the Order was reconsidered. On 29 June 1994, it was agreed that in this case, dispensation could be granted without restrictions.

V. Themes

Environment

As a result of the government's waste policy, self-regulation by industry in relation to the environment has become an important theme. Producer responsibility for products in the waste phase has led to collaboration between businesses in the same branch in setting up waste disposal systems. A feature of these systems is that they lead to a virtually new market, with new market participants, such as collectors and recyclers. From the point of view of competition policy, optimal market functioning is important in these developing markets, within the framework that the government imposes through market regulation. Generally speaking, good environmental performance will be realised earlier in a competitive environment. For example, a branch association of plastics producers that, in relation to the producer responsibility for agricultural foil in the waste stage, collects used foil from the end users, can:

-- contract several collectors and allow them to compete, rather than work with just one;

-- leave the processing method to recyclers in the market rather than stipulate or contract a single tried and tested foil recycling method, thus giving new technological developments a chance; or

-- reduce disposal contributions for producers of foils that are easier to process, instead of charging every producer the same amount.

This example illustrates that introduction of market forces can form a stimulus for better environmental performance (i.e. development of better recycling methods for foil, production of foils that are easier to process) and can also lead to lower costs (i.e. price competition for collection charges, cost savings on disposal contributions).

The fact that the waste processing market is often not (yet) profitable means that businesses co-operate in order to realise economies of scale, which curtail the costs. However, alliances can lead to restrictions of competition between the companies taking part. The agreements between businesses are considered in terms of whether they are essential and in proportion to the realisation of environmental objectives.

Health care: distribution of medicines

The findings and recommendations of the Interdepartmental Working Group on Distribution of Medicines (IWG) were announced in a letter to the Second Chamber of Parliament dated 18 February 1994 (Second Chamber Documents II 1993/94, 22 393, No. 70). The investigation of public and private regulations and the conduct of parties produced a list of more than 50 constraints to improved market functioning. The working group proposed removal of many of these constraints, partly on condition that the interests of insurers and patients in cost control are increased. The report was submitted to the Second Chamber with a letter of 24 February 1994, in which the Ministers of Welfare, Public Health and Sport and of Economic Affairs reported their approval of the main conclusions and adoption of the recommendations. In the summer of 1994, the market participants were given an opportunity to respond to the working group's findings and recommendations. The IWG will advise the ministers in September 1994 on the outcome of the market research and the action programme for the implementation of its proposals. Preparations for the implementation of a number of IWG proposals is now underway. These include:

-- assessment of the rules of conduct of the pharmacists' organisation (KNMP);

-- preparation of a request for advice to the Economic Competition Commission on plans to invalidate individual vertical pricing agreements for medicines; and

-- request for advice to the Economic Competition Commission on control of the boycott of mail-order pharmacies (see above).

A study into the operation of the pharmaceutical wholesale trade is in its final stages.

Professional practitioners: notaries

Research conducted by KPMG, on commission from the Ministry of Economic Affairs and the Justice Ministry, conclusively showed that free pricing in the notarial profession is desirable. A proposal for a new Notaries Act presented to the Second Chamber of Parliament on 2 May 1994 is therefore based on free pricing. By way of a transitional arrangement, there are plans to adapt the current private law regulation of charges of the Royal Fraternity of Public Notaries in such a way as to increasingly realise the operation of the market step by step. Talks with the Royal Fraternity of Public Notaries are being conducted on this issue. At or around the time that the new Notaries Act comes into force, notaries must be free to set their own charges.

Business Licensing Act -- recognition regulations

The brochure "Quality Recognised", announced in the last annual report, was published on 12 October 1993. Among other things, this explains the test criteria of the Ministry of Economic Affairs for recognition regulations, with a view to effective functioning of markets. For example, there may be a negative impact on market function if recognition regulations contain pricing or market sharing agreements, compulsory use of intermediaries or bans on advertising, or if the regulations are abused in order to strengthen the position of established businesses by applying need criteria or collective exclusive trading. During the period under review, some 20 recognition regulations from various branches were subjected to a competition test. In most cases, there were stipulations which could restrict access to the

market in question. These stipulations were removed from the regulations. Talks over the regulations for the public utilities/installation branch are still in progress.

Subsidiary activities of utility companies

Complaints from installers over the subsidiary activities of energy distribution companies were mentioned in the last annual report. A structural solution is being sought for this problem.

The Energy Distribution Bill includes a provision for this. The distributors' organisation should draw up a code of conduct with representative installers' organisations to prevent distortion of competition. This code could forbid defined transactions from being conducted by legal persons to which a distributor is affiliated. This refers to transactions or activities which can be performed satisfactorily by the private sector. A distributor should refrain from these, or transfer such activities to a separate legal person, such as a subsidiary private limited liability company. The latter will foster transparency and will also mean that this subsidiary will have to pay corporate taxes on its profits. This will create an equal starting position in the relevant market. The code of conduct could also contain stipulations on the distributor's conduct in respect of its subsidiary, in order to avoid internal subsidisation or preferential treatment by other means. The code of conduct must be declared binding by the Minister of Economic Affairs. The Minister will not declare a code of conduct binding if it does not satisfactorily control undesirable competition. If the parties cannot reach agreement among themselves, the Minister can ultimately introduce a code of conduct himself. The Bill is currently awaiting the recommendations of the Council of State.

North-South Rotation System

At present, a rotation system is used for some of the North-South shipping on inland waterways. In principle, freight is divided among shippers in order of registration, through a private law exchange. A system of charges is also applied here. High tensions in this market led to a boycott of the shipping exchange and blockades of certain North-South routes. In order to find a solution to the conflict, talks were conducted between all the market participants concerned, the Transport Ministry and the Ministry of Economic Affairs, under the chairmanship of Prof. W. Albeda. These talks focused on drawing up the main points of a statutory regulation. The main outcome of the talks was therefore a model outlining the contours of a market regulation system for North-South inland shipping. The key issue was that the system should represent a transitional stage en route to a freer market. The model offers an operational mix of commitment of shippers to a rotation system, which affords security, and a sufficient increase in commercial flexibility in charges and shipping terms for loaders. The greater flexibility is aimed specifically at certain types of shipping contracts, including periodic shipping and secondary cargoes for which, in principle, pricing and shipping conditions will be free. The greater flexibility affects an estimated four million tonnes of the overall six million tonnes of freight that will be required to pass through the exchange. This will allow the switch to free market forces to take place in stages, in the interests of market stability. In accordance with Prof. Albeda's recommendations, the Transport Minister has adopted this model as the basis for a temporary legal regulation. The draft of the temporary Freight Allocation on North-South Shipping Routes Act has been presented to the Council of State for advice. The key to the current rotation system is formed by a pricing- and market-sharing agreement. In view of this, the managers of the private law exchange, the North South Rotation Association, have submitted applications for dispensation from both the Horizontal Price Maintenance Decree and the Market Sharing Agreements Decree. These applications will be considered in relation to the proposal for the above temporary Act. The European Commission will also be consulted in relation to the processing.

Minimum milk price

The minimum milk price was abolished as of 1 October 1993 (Royal Decree of 21 September 1990, Statute Book 493).

VI. International competition (enforcement of EC Treaty)

Orders in individual proceedings

During the year under review, a number of orders were issued for application of the competition rules of the EC Treaty in respect of Dutch businesses: On 29 March 1994, it was decreed that the German, Belgian and Dutch rail companies had contravened Article 85(1) of the treaty through their involvement in a price agreement for rail transport of containers. Moreover, the German rail company was fined ECU eleven million for imposing discriminatory charges.

On 13 April 1994, the Commission decreed that the regulations of the Certification Foundation for Crane Leasing Companies and the Netherlands Federation of Crane Leasing Companies were incompatible with Article 85. Dispensation was refused because, in the Commission's view, the regulations excluded competition by keeping outsiders out of the market, which was then shared among the members.

By Order of 13 July 1994, it was decreed that 23 cardboard suppliers had formed an illegal cartel, relating to prices, market sharing and control of supply. The European Commission proved the existence of the cartel in the 1986-1991 period. In this case, too, heavy fines were imposed.

On 29 April 1994, the Commission granted dispensation, pursuant to Article 85(3), for an agreement restricting Dutch production capacity for bricks. This dispensation allows the implementation of a restructuring plan in which a return to a normal competitive situation can be realised on socially acceptable terms.

Group exemption for consortia

In December 1993, representatives of the European Commission and the EU member states discussed the first draft of a group exemption for maritime shipping consortia. This involves different forms of commercial partnership between companies providing scheduled services, relating partly to common operation of certain capital goods, participation in joint tonnage schemes and joint agreement of schedules. A second version of the group exemption was published on 1 March 1994 in the EC journal.

Group exemption for technology transfer

In early 1994, the European Commission initiated the amalgamation and simplification of the group exemptions for patent licences (Regulation 2349/84) and know-how licences (Regulation 556/89). After an initial discussion with the EU member states, a draft of the new Regulation was published on 30 June (Pb C 178). The most important of the proposed amendments are a reduction in the list of banned stipulations, withdrawal of the opposition procedures and the introduction of market share limits, above which the exemption no longer applies.

Concentration Regulation

In relation to the application of the European Concentration Regulation (4064/89) of 21 December 1989, concerning control of concentrations of businesses, the European Commission investigated the following six concentrations involving Dutch-registered businesses during the year under review:

-- McCormick/CPC/Rabobank/Ostmann, 29 October 1993; compatible with the Common Market;

-- Philips/Grundig, 3 December 1993; compatible with the Common Market;

-- Akzo/Nobel, 10 January 1994; compatible with the Common Market;

-- Philips/Hoechst, 11 March 1994; compatible with the Common Market;

-- Unilever France/Ortiz Miko, 15 March 1994; compatible with the Common Market;

-- Shell/Montecatini, 8 June 1994; compatible with the Common Market, after the parties had altered their report. To avoid the creation of a position of power in the market for polypropylene production technology, Montecatini's R&D department was kept out of the merger. Montecatini's subsidiary Montedison undertook to withdraw from a joint venture with Petrofina, to avoid creating a position of power in the polypropylene product market in the EU.

Appendix

Position of main assessments of competition agreements and positions of economic power

Applications for dispensation from the Horizontal Price Maintenance Decree (Article 12, Clause 2 of the WEM)

Requests for advice to, and advisory reports of the Economic Competition Commission, negative Orders, objections filed:

-- Netherlands Prosthodontics Organisation, for the Regulations on Prosthodontics Charges and the General Terms of Delivery and Payment for Prosthodontics (request for advice dated 8.3.1994, advisory report 10.6.1994);

-- Nederlandse Steenslag Centrale BV, for the NSC agreement (request for advice dated 30.9.1993, advisory report 10.12.1993, Order 24.1.1994 (State Gazette 19));

-- Van Heeringen and Van Vliet, for the regulations of the CV Industriezand Centrale (request for advice dated 30.9.1993, advisory report 10.12.1993, Order 24.1.1994 (State Gazette 19));

-- Van Roosmalen Transport en Handel Maatschappij, for the `Maaszand' agreement (request for advice dated 27.1.1994, advisory report 15.4.1994);

-- Van Roosmalen Transport en Handel Maatschappij, for the `Maasgrind Combinatie' agreement (request for advice dated 27.1.1994, advisory report 15.4.1994);

-- SAVAM, for the SAVAM Recognition Regulations (request for advice dated 17.8.1993, advisory report 10.12.1993, Order of 24.1.1994 (State Gazette 19));

-- Netherlands Bible Society for the agreement on minimum prices for Bible publications (request for advice dated 30.9.1993, application for dispensation withdrawn);

-- American Express International Inc., for the non-discrimination stipulations in contracts with credit card acceptors (request for advice dated 17.8.1993, advisory report 25.2.1994, Order of 9.3.1994 (State Gazette 49), objection filed);

-- Eurocard Nederland BV, for the non-discrimination stipulations in contracts with credit card acceptors (request for advice dated 17.8.1993, advisory report 25.2.1994, Order of 9.3.1994 (State Gazette 49), objection filed);

-- VSB International BV, for the non-discrimination stipulations in contracts with credit card acceptors (request for advice dated 10.9.1993, advisory report 25.2.1994, Order of 9.3.1994 (State Gazette 49), objection filed);

-- Diners Club Benelux BV, for the non-discrimination stipulations in contracts with credit card acceptors (request for advice dated 10.9.1993, advisory report 25.2.1994, Order of 9.3.1994 (State Gazette 49), objection filed);

-- Association of Rotterdam Ship Brokers, for the Port Goods Charge, the Regulations on Minimum Charges for Ship Brokerage Services and the Scales of Minimum Agency Charges (request for advice dated 18.5.1994).- North Shipping Association (General Stevedoring Businesses Branch) and the Association of Rotterdam Stevedoring Businesses, for the Stevedoring Tariff for the Discharge of Sea-going Vessels in the Ports of Rotterdam and Amsterdam, the Stevedoring Tariff for the Loading of Sea-going Vessels in the Ports of Rotterdam and Amsterdam and the Tariff for Delivery of Goods from the Depot (request for advice dated 18.5.1994);

-- Limburg Milk Trading Association, for the Agreement on Pricing of Bottled Milk and Milk Products (request for advice dated 17.8.1993, advisory report of 10.12.1993, Order of 24.1.1994 (State Gazette 19)). - Provincial Union of Milk Traders (South Holland), for the Agreement on Pricing of Bottled Milk and Milk Products (request for advice dated 17.8.1993, advisory report of 10.12.1993, Order of 24.1.1994 (State Gazette 19));

-- North Holland Milk Traders Organisation, for the Agreement on Pricing of Bottled Milk and Milk Products (request for advice dated 17.8.1993, advisory report of 10.12.1993, Order of 24.1.1994 (State Gazette 19));

-- Eastern Union of Milk and Food Traders, for the Agreement on Pricing of Bottled Milk and Milk Products (request for advice dated 17.8.1993, advisory report of 10.12.1993, Order of 24.1.1994 (State Gazette 19));

-- Zeeland-North Brabant Milk Trading Association, for the Agreement on Pricing of Bottled Milk and Milk Products (request for advice dated 17.8.1993, advisory report of 10.12.1993, Order of 24.1.1994 (State Gazette 19));

-- Northern Union of Independent Milk Traders, for the Agreement on Pricing of Bottled Milk and Milk Products (request for advice dated 17.8.1993, advisory report of 10.12.1993, Order of 24.1.1994 (State Gazette 19));

-- Netherlands Estate Agents Association (NVM), for the 1985 NVM Terms and Charges and 1985 Regulations on Application of Terms and Charges (request for advice dated 17.8.1993, advisory report 10.12.1993, application for dispensation withdrawn);

-- Netherlands Church Candles Convention, for the Binding Minimum Prices Decision (request for advice dated 17.8.1993, advisory report 10.12.1993, Order of 24.1.1994 (State Gazette 19), objection filed);

-- Netherlands Order of Accountants-Accounting Consultants, for the NOvAA New Businesses Tariffs and the NOvAA Business Investigation Method (request for advice dated 30.9.1993, advisory report 25.2.1994, Order of 9.3.1994 (State Gazette 49));

-- Association of Sectoral Employers Training Courses, for the agreement on sales prices for course materials (request for advice dated 17.8.1993, advisory report 10.12.1993, Order of 24.1.1994 (State Gazette 19));

-- Royal Netherlands Aviation Association, for the agreement on prices for foundation courses for parachuting sports (request for advice dated 30.9.1993, advisory report of 10.12.1993, Order of 24.1.1994 (State Gazette 19));
-- Pharmacon Foundation, for the Pharmacon Regulations (request for advice dated 7.12.1993, advisory report 25.2.1994, Order of 30.5.1994 (State Gazette 101), objection filed);

-- Netherlands Tour Guides Organisation `Guidor', for agreements on minimum prices in its Framework Agreement (request for advice dated 7.12.1993, advisory report of 25.2.1994, Order of 9.3.1994 (State Gazette 49)).

Inadmissible:

-- Nationale-Nederlanden Zorgverzekering NV, Meander Zorg NV and the national health insurers participating in Meander Zorg NV, for an agreement on price-fixing for the Garant Policy and Garant Plus Policy;

-- Stock Exchange Association, for the Commission Regulations.

Applications for dispensation withdrawn:

-- Netherlands Lift Industry Association, for its Regulations and List of Decisions and Recommendations (State Gazette 1993, 235);

-- Netherlands Bible Society for the agreement on minimum prices for Bible publications (State Gazette 1993, 235, see also above);

-- NV Luchthaven Schiphol, for price stipulations in concession agreements (State Gazette 1993, 246);

-- Netherlands Estate Agents Association (State Gazette 1994, 22, see also above);

-- Insurers Association, for the Bonus Scheme for Group Life Insurance Policies (State Gazette 1994, 22);

-- Insurers Association, for the Bonus Scheme for Individual Life Insurance Policies (State Gazette 1994, 22);

-- Apollo Plant Breeders Association (State Gazette 1994, 83).

Dispensation applications in processing pending a request for advice:

-- North-South Rotation Association, for the North-South Rotation Regulations;

-- Netherlands Inland Waterways Towage Foundation, for the Rotation Scheme;

-- Sand and Gravel Shippers Association, for the agreement on charges for transport of sand and gravel;

-- Fleurop/Interflora, for the agreement on fixed charges for the costs of delivering flowers, plants etc. to be passed on to clients, and for order prices;

-- Teleflora Nederland, for the agreement on fixed charges for the costs of delivering flowers, plants etc. to be passed on to clients, and for order prices ;

-- Royal Association of Court Bailiffs, for the Non-Official Legal Practice Regulations and the Circulaire Legel ;

-- Royal Fraternity of Notaries, for the notarial charges agreement;

-- NV Nederlandse Inkoopcentrum, for the NIC master agreement;

-- Beanet BV, for the Joint Protocol for Electronic Payments and the Cooperative Agreements on Electronic Payments;

-- Bankgirocentrale BV, for the agreement on the GAA;

-- Bankgirocentrale BV, for the agreement on the GSA;

-- Bankgirocentrale BV, for the agreement on the GIP;

-- Bankgirocentrale BV, for the agreement on the SOGA;

-- Netherlands Daily Newspaper Association, for the agreement on collective increases in subscription and advertising charges, the agreement on free and reduced-rate subscriptions and the agreement on free gift systems;

-- Netherlands Daily Newspaper Association and Netherlands Organisation of Magazine Publishers, for the Advertising Rules;

-- The Commission for Private Law Consultation, for the provisional agreement on payment of non-life insurance agents;

-- Invaliditeitsverzekeringscentrale BV, for the pooling agreement for disability insurance.

Applications for dispensation from the Horizontal Price Maintenance Decree (Article 12, Clause 1 of the WEM and Article 6 of the Horizontal Price Maintenance Decree):

-- Nefarma, for a collective price reduction for drugs supplied under the Exceptional Medical Expenses (Compensation) Act (AWBZ) (request for advice dated 5.4.1994, advisory report 27.5.1994, Order of 31.5.1994, (State Gazette 100)).

Other WEM matters:

Formal measure:

-- Provisional order to supply pharmaceutical wholesaler (Order of 10.5.1994, State Gazette 89, suspended by the Court of Appeal on 31.5.1994, request for advice to the Economic Competition Commission dated 10.5.1994).

Completed: agreements revised or withdrawn after intervention:

-- Tariff differentials for Wadden island ferry services;

-- Refusal to supply filter systems;

-- Agreements on shop opening hours;

-- Professional practitioners: Zaanstad auction monopoly;

-- Gaming machines sector.

Completed: investigation showed no grounds for action:

-- Breeding rights for freesias;

-- Policy terms for motor insurance;

-- Preferential package for incontinence materials;

-- Placement of lighting mast advertising;

-- Dental materials and equipment.

Consultation or testing in progress:

-- testing of 17 agreements following applications for dispensation from the Horizontal Price Maintenance Decree (see above);

-- testing of 24 agreements following applications for dispensation from the Market Sharing Agreements Decree (State Gazette 124);

-- testing of 13 agreements following applications for dispensation from the Tendering Agreements Decree (State Gazette 124);

- testing of 2 agreements following applications for dispensation from the compliance with policy prohibition (advisory report from the Economic Competition Commission of 10.12.1993);

-- Azivo-KNMP (request for advice of the Economic Competition Commission dated 18.1.1994, advisory report 15.4.1994);

-- tevised Regulations for Recognition of Electrical Engineers (REI 1976/83) of the Netherlands Association of Electricity Companies (VEEN);

-- subsidiary activities of utility companies / boiler inspections;

-- restrictions of assortment (including Rosmalen and Zwijndrecht shopping centres);

-- drugs (Imigran);

-- establishment of postal agencies;

-- increase in first risk for storm damage;

-- estate agents;

-- congress organisers;

-- opticians;

-- unfair competition in leasing of fairground sites;

-- unfair competition from privatised government service;

-- interbank settlements (national payment circuit);

-- funerals/cemeteries;

-- glass sector;

-- artificial insemination of cattle;

-- Buma/Radio Noordzee;

-- CD market;

-- destructors;

-- beer market.

NEW ZEALAND*

(1 September 1994 - 31 August 1995)

I. Changes to competition laws and policies adopted or envisaged

As noted in other recent New Zealand annual reports, the Government agreed, in 1991 and 1992, to make some changes to the Commerce Act. None of these changes have been implemented to date. However, some of these changes have been included in the Law Reform (Miscellaneous Provisions) No. 4 Bill. The proposed changes include:

a) to confirm that the Act applies to mergers between foreign bodies corporate with subsidiaries in New Zealand to the extent that the merger affects a market in New Zealand. This is designed ensure jurisdiction in relation to mergers and acquisitions of two foreign parent companies, that are legally distinct persons from their New Zealand subsidiaries, and that could have the effect of aggregating market power in a New Zealand market;

b) to add the prohibition of resale price maintenance to the list of matters for which lay members of the High Court may be appointed. Lay members are economic experts that can help the Court in assessing complex economic evidence. At present Lay Members sit on all other restrictive trade practice cases and there is no clear rationale to exempt Lay Members from resale price maintenance cases.

II. Enforcement of competition laws and policies

A. Measures taken against anticompetitive practices

Authorisations

Statistics on applications received by the Commerce Commission for the authorisation of restrictive trade practices in 1994/95 are as follows:

On hand 1 July 1994	1	Authorised	1
Registered during year	4	Withdrawn by applicant	2
		On hand 30 June 1995	2
Total	**5**	**Total**	**5**

* The original language of this report is English.

Enforcement

Commerce Commission v Port Nelson Limited

Port Nelson Limited (PNL) owns the wharves, berths, slipways and harbour land at the Port of Nelson. PNL has a monopoly on some services offered to vessels using the port and faced competition from an independent pilotage company for pilotage services. PNL refused to make its tugs available to vessels piloted by non-PNL pilots.

The High Court found that in refusing to hire tugs unless its own pilots were also hired, Port Nelson had used its dominant position to try to prevent competition. A penalty of 300 000 dollars was imposed and an injunction issued preventing Port Nelson continuing the practice.

Port Nelson also offered a five percentage discount on its services, including those over which it had a monopoly, to people who bought their full range of services. The Court found that any economies of scope achieved by use of PNL's services alone were insufficient to justify the five percentage discount. At the same time, PNL set a below-cost minimum price for hiring out its own pilots. This charge was substantially below an appropriate apportionment as advised by their own accountants. The High Court found that these practices had the potential to eliminate the independent pilots and that one purpose of these practices was to lessen competition. Penalties of 100 000 dollars were imposed for each matter and an injunction preventing Port Nelson offering a discount on bundled services was issued.

Port Nelson has appealed to the Court of Appeal against the High Court's decision.

Commerce Commission v Wrightson NMA and others

A group of real estate companies and agents, admitted working together to prevent a competitor advertising in the local newspaper's property guide. The agents in the area customarily charged a standard rate of commission. The competitor had reduced the commission it charged customers when it sold properties, and sought to advertise that rate in the property guide. Other real estate agents then withdrew their advertisements from that edition of the guide and thereby prevented its publication. The other agents then agreed with the newspaper to exclude the competitor from future editions of the guide. The Court found this exclusionary behaviour to be in breach of the Commerce Act and imposed penalties totalling 60 000 dollars.

Commerce Commission v Sealy New Zealand Ltd

A Sealy representative told a retailer that it would be excluded from a free linen promotion if it continued to offer a 10 percentage discount on Sealy beds. The High Court concluded that this contravened the resale price maintenance prohibition and imposed a penalty of 30 000 dollars on Sealy.

Other activities carried out by the Commission

The Commission initiated three further court actions, accepted four administrative settlements and issued 27 warnings. The court actions involved allegations of price fixing by moteliers, resale price maintenance by a car manufacturer and use of a dominant position for exclusionary purposes by an insulation manufacturer.

During the year the Commission continued its previous focus on newly deregulated sectors focusing particularly on electricity and health. Although, as in the previous year, the number of business acquisition notifications received by the Commission was down, a significant number involved electricity supply authorities and power companies, as the number of independent players in the sector continued to rationalise. In the trade practice area, the competitive behaviour of natural monopolies continued to be the subject of investigation and scrutiny, particularly with regard to the terms and conditions of access to these monopolies. The health sector has continued to be the subject of an ongoing education programme, mixed with investigations, as this area adapts to the new competitive environment.

Private Actions

Clear Communications Ltd v Telecom Corporation Ltd

The previous New Zealand annual report reported on the Court of Appeal decision in Clear and Telecom, relating to the terms and conditions for access by Clear to Telecom's public switched telephone network for local telephone access. Since then the Privy Council has considered the issues.

Telecom appealed and Clear cross-appealed from the Court of Appeal decision to the Privy Council. The Privy Council ruled that if Telecom used Baumol-Willig, it would not be in breach of s.36 of the Commerce Act. The Baumol-Willig rule states that Telecom may charge a sufficient connection fee to compensate it for the opportunity cost of losing business to Clear. The Privy Council found that the application of the rule would allow Clear to enter the market and over time, compete out monopoly profits obtained by Telecom.

The Privy Council held that Telecom was not acting anticompetitively in seeking to charge its opportunity cost, since that is what it would have charged in a fully competitive market. Clear had not established that Telecom's charges were so high that Clear would be prevented from entering the market at all.

The Privy Council also considered that while the Baumol-Willig rule may allow network owners to recover any loss of monopoly profits through their prices for access, the Government could introduce price control under Part IV of the Commerce Act if monopoly profits were not competed out.

B. Mergers and concentrations

New Zealand has a voluntary premerger notification system. Mergers notified to the Commission in the period from 1 July 1994 to 30 June 1995 were as follows:

Merger applications registered under section 66 (clearance)

On hand 1 July 1994	1	Cleared within 10 working days	11
Registered during year	18	Cleared after extension of time	8
Total	**19**	**Total**	**19**

Merger applications registered under section 67 (authorisation)

On hand 1 July 1994	0	Withdrawn	1
Registered during year	1		

The Commission monitors business mergers and can initiate investigations into mergers not notified to it by the parties involved.

Merger investigations initiated by the Commission:

On hand 1 July 1994	22	No dominance concerns	62
Investigations started during year	98	Transaction not proceeding	12
		Clearance sought/obtained	7
		Authorisation sought/obtained	1
		Warnings issued	1
		On hand 30 June 1995	37
Total	**120**	**Total**	**120**

Significant features of the Commerce Commission's decisions on business applications were:

-- airlines: considerable preparatory work was undertaken by the Commission in anticipation that Air New Zealand might acquire a significant shareholding in Ansett Australia Holdings Ltd, the owner of Ansett New Zealand. This possibility raised major concerns in respect of competition in the New Zealand because Air New Zealand and Ansett New Zealand are the two main competitors in New Zealand's domestic air transport market. The proposed purchase of shares also raised the issue of the impact on potential competition for trans-Tasman services because Ansett is one of the most likely new competitors in the Australia/New Zealand market, in which Air New Zealand already operates. Air New Zealand indicated that it would continue its efforts to acquire a shareholding in Ansett, but there was no firm proposal at the end of the year.

-- paper: the proposal of Carter Holt Harvey Ltd to acquire the Tissue and Timber Division of Bowater Corporation of Australia was investigated. It was concluded that, while the resulting market shares for several types of tissue products would be high, and while market entry by a new integrated tissue producer was unlikely, current and potential competition from imports would provide adequate constraints. Tissue products may be imported readily either as 'jumbo' rolls for local conversion or as finished products.

Enforcement

No action was initiated in the High Court by the Commission in respect of mergers.

Appeals

No appeals were filed or heard.

III. The role of competition policy in the formulation and implementation of other policies

Vertically-Integrated Natural Monopolies

In response to the Privy Council decision in *Telecom v Clear* (see above), the Government instructed officials to review the current regulatory regime in relation to vertically integrated natural monopolies. As part of this process, the Government released a discussion document that sets out the regulatory framework for vertically integrated natural monopolies and options for change. Officials have received submissions from the public and will be reporting back to the Government in late-1995. Subsequent to the release of the officials' discussion document, Clear and Telecom have agreed to a heads of agreement to enable Clear to enter the local loop telephone market in early 1996. Clear and Telecom are continuing negotiations to conclude a comprehensive agreement on Clear's interconnection into the local loop.

Airport Regulation

As a result of consultation with the public, the Government has agreed to introduce information disclosure regulations in accordance with the Government's light-handed regulatory policy for natural monopolies.

The objectives of airport regulation are to ensure that airports do not abuse their monopoly power, and that prices reflect those that would arise if the market were competitive. The regulations will focus on those airport services subject to monopoly power, while ensuring that compliance costs are not excessive.

The proposed changes to the Airport Authorities Act, as outlined in a discussion document released for public consultation, involve:

i) defining a list of natural monopoly services (airside operational facilities) and accommodation of access for services that require access to airside services, to which regulation would apply;

ii) the disclosure of information, revealing aggregate costs and revenues for the separate groups, and prices and units supplied for each of the services. The requirement to disclose this specified set of information would reduce the latitude for airports in determining the information they disclose, and ensure that airport users receive sufficient information on which to engage in effective consultation on price setting, and assist in the identification of anticompetitive behaviour or monopoly pricing;

iii) requiring charges to be set at regular intervals, even where airport charges do not change. This would enable airport customers to contest airport charges periodically or take actions under the Commerce Act where appropriate..

The Government has instructed officials to draft the necessary legislative ammendments and regulations, which are likely to be tabled in Parliament by the end of 1995.

IV. Publications

Commerce Commission publications

Booklets relevant to competition law include:

Acquisitions and the Failing Company Argument', the Commerce Commission & the Australian Trade Practices Commission, October 1993.

Guidelines to the Analysis of Public Benefits & Detriments in the Context of the Commerce Act 1986', Commerce Commission, Wellington, October 1994.

Leaflets include:

The Commerce Commission - A general guide

The Commerce Act 1986 - A general guide

Complying with the Commerce Act

Authorising AntiCompetitive Practices

Anti-competitive Behaviour - What the Commerce Act prohibits

Dictating Prices and the Commerce Act

Price Fixing and the Commerce Act - A guide for the business community

Refusal to Deal and the Commerce Act

Reducing Competition - A guide to section 27 of the Commerce Act

Excluding your Competitors - A guide to section 29 of the Commerce Act

Abusing a Dominant Position - A guide to section 36 of the Commerce Act

A Guide to the Revised Conference Procedures of the Commerce Commission

Business Acquisitions and the Commerce Act

Confidentiality Orders and the Commerce Act

Anticompetitive Behaviour - Exceptions to the Commerce Act Rules

Investigative Powers of the Commerce Commission.

Government publications

Government publications include:

Regulation of Access to Vertically-Integrated Natural Monopolies - A Discussion Paper', Ministry of Commerce & the Treasury, Wellington, August 1995.

Review of New Zealand Airport regulation - Proposals for Consultation', New Zealand Government, Wellington, April 1995.

NORWAY*

(1994)

Summary

On 1 January 1994 a new competition legislation was introduced in Norway. Simultaneously the Price Directorate and the Price Inspectorate united into one organisation, the Norwegian Competition Authority. Norwegian competition policy has not been substantially altered due to the introduction of new legislation. In 1994 the activities of the Norwegian Competition Authority continued mainly as before.

Part one of the annual report shows the enforcement of competition law in Norway during 1994. Two cases were decided in court in 1994. In one case the four largest producers of corrugated cardboard were fined a total of NOK 20 million. In four other cases enterprises and persons involved accepted fines for infringement of the prohibitions against horizontal price fixing agreements within the markets for storage batteries, roofing paper, wholesale of tubes and services rendered by contractors of heavy equipment. Two new infringements which concerned illegal price maintenance in the market for electrical machinery and apparatus and horizontal price fixing within a local craft guild were further reported to the police.

In 1994 intervention was made only in one merger case, the acquisition of shares in Frionor AS by Orkla AS. Three cases of intervention against restrictive arrangements or abuse of dominant market position in banking, the silver ware market and the flower market are described in the report. Two important cases concerning exemption in the aviation market and one rejected exemption in the power utility market are also described. Restraining effects of public measures in the pharmaceutical market is dealt with by the Authority during the period. The activities of the Competition Authority also comprise price surveillance, price regulation and price information.

Part two of the report describes the organisation of the new Norwegian Competition Authority. The third part of the report gives a short summary of the Norwegian Competition legislation and the relationship between the Norwegian Competition Authorities, the Consumer Ombudsman and other relevant authorities.

I. Changes to competition laws and policies adopted or envisaged

On 1 January 1994, new legislation in the field of competition was introduced in Norway. The Price Act of 1953 was replaced by the Competition Act (Act No. 65 of 11 June 1993; the Act relating to Competition in Commercial Activity) and the Price Policy Act (Act No. 66 of 11 June 1993; the Act relating to Price Policy). Parallel with the entry into force of the above mentioned Acts, the EEA

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* The original language of this report is English.

Agreement and the Agreement's competition rules became effective. These rules have been implemented into Norwegian legislation through special acts and regulations.

II. Enforcement of competition laws and policies

A. Infringements of the prohibitions

The Norwegian Competition Authority will ensure that enterprises comply with the provisions of the Competition Act. Control activities uncovered various unlawful practices during the previous year. These were reported for prosecution, and substantial fines were imposed in some cases. The infringements mostly concerned prohibition against price agreements.

Decisions made by the Supreme Court relating to competition legislation

During 1994, the Supreme Court decided in two cases relating to infringement of the Price Act. Both decisions were in favour of the view put forward by the Competition Authority. Since the provisions in question were transferred unchanged in the new Competition Act, the decisions are of considerable importance to the Competition Authority.

Statements obtained by the Norwegian Competition Authority

The Norwegian Competition Authority has the right to search archives and offices in order to seek evidence of illegal behaviour. The Competition Authority may also obtain statements from heads of companies and other employees. These statements, documents and other evidence are the basis for reports to the police. During the legal proceeding against the producers of corrugated cardboard (see below), the defenders maintained that the statements could not be used as evidence in court. The question was appealed to the Supreme Court, which decided that the statements taken by the Competition Authority could be read out in court in case of discrepancy between the statements and the evidence given by the accused or by witnesses.

Effect of price-fixing agreements on prices

A Magistrates' Court acquitted members of a local association of enterprises for illegal price-fixing practices since an effect on prices could not be proved. The case was appealed to the Supreme Court, which stated that the prohibition in the Act is a general prohibition against price-fixing agreements. Companies and persons involved can be found guilty even if no effect on prices in the relevant markets of the illegal co-operation can be proved.

Sentences and fines[**]

Producers of corrugated cardboard

The four largest Norwegian producers of corrugated cardboard were put on trial for price collusion. The producers, accounting for some 95 per cent of the Norwegian market, were charged in

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** Average rate per 1 July 1994: NOK 100=USD 14.28=ECU 11.96.

1991 with collusion with regard to price calculation. In 1992, the firms were fined a total of NKr 20 million. Each of the managing directors was fined NKr 75 000. The fines were not accepted, and the case was subsequently brought to court in April 1994. The Council for the Prosecution asked for a fine of NKr 19 million and a relinquishment of gain estimated at NKr nine million. The verdict given in July 1994 called for fines of NKr 2.65 million, the relinquishment of gain of NKr 7.932 and the payment of costs of NKr one million. Three managing directors were each fined NKr 75 000. The difference between the verdict and the amount of fines claimed is partly due to the fact that the statute of limitation was considered to apply to the unlawful activities prior to 1990. The ruling has been appealed to the Supreme Court, and the amount of relinquishment of gain and the fines will be reconsidered.

Cases reported to the police

Contractors of heavy equipment

Four contractors of heavy equipment as well as four persons associated with the firms were reported to the police for illegal collaboration with regard to tenders in connection with the Media Village of the Lillehammer Olympic games. The four firms agreed to pay a fine of NKr 75 000 each. The persons responsible for the illegal collaboration were also fined.

Producers of storage batteries

In December 1992, two major producers of batteries were reported to the police for infringement of the Competition Act due to illegal co-operation with regard to prices, discounts and freight charges during the period 1985-1992. In July 1994, the two companies, Varta AS and Tudor Sønnak AS, accepted fines of NKr 1.5 and NKr two million respectively. The companies, however, made their final acceptance of the fine subject to a forthcoming interpretation by the Supreme Court on how the provision regarding statute of limitation applies to companies.

Roofing paper

In 1987, the former Price Directorate reported Fjeldhammer Bruk AS and Isola Fabrikker AS, two producers of roofing paper, to the police for unlawful agreement regarding prices and discounts. Six persons responsible for reaching the agreement were also reported. In May 1989, the companies accepted fines of NKr 1.3 million and NKr 900 000 respectively. The fines were set at one per cent of total turnover in 1986 for the products in question. Due to differences regarding the legality of the procedure, the fines against the six persons were only decided in 1994. The fines, ranging from NKr 70 000 to NKr 100 000, were all accepted.

Tube wholesalers

In 1987, 31 persons, 15 companies and the Association of Norwegian Tube Wholesalers were reported to the police by the former Price Directorate for infringements of the Price Act. The infringements concerned a nation-wide co-operation on gross prices set by various committees within the Association as well as a local agreement covering maximum discounts, prices and tenders. An offer to accept fines and thus avoiding the case being taken to court was declined by 19 of the persons and 13 of the companies. The cases were subsequently referred to the court at the end of 1992. Before the case was

brought to court in January 1995, all the companies and persons involved accepted the fines ranging from NKr 35 000 to NKr 120 000 for the persons and from NKr 400 000 to NKr 4.6 million for the companies.

Motoring schools

In two cases, the Competition Authority reported local motoring schools to the police for price collaboration. In one case, the motoring schools agreed to stop offering special reduced prices and to revert to their normal price level. In the other case, the schools had tried to prevent price competition by setting minimum and maximum prices for all services in the training program. Shortly after the agreement took effect, all prices were changed to the level agreed upon. In both cases, the schools involved have been fined.

Recent infringements

Illegal price maintenance

Investigations in the market for electric household equipment, radio and television sets during 1992-1993 revealed that a number of suppliers applied pressure on retailers to cease selling below the minimum resale prices set by the suppliers. The Competition Authority refrained from reporting the firms to the police if in the future they abstained from attempting to influence the prices charged by retailers. The firms were requested to make it clear to their retailers that they were completely free to set their prices. The Competition Authority found however that one of the suppliers, Miele, continued to apply pressure by threatening to withdraw certain marketing support schemes if the retailers did not increase their prices to an acceptable level. Miele refused to deal with one of the largest chains in the particular market, Elkjøp, on account of its low prices. In August 1994, the Competition Authority reported Miele AS to the police for illegal price maintenance.

Illegally influencing prices in craft guilds

The Competition Authority reported a local craft guild and three members of the board to the police. The board members asked the members of the association to apply a minimum charge of NKr 250 per hour for craft services. This was part of a campaign to increase earnings in the trade and was referred to in a local newspaper. The campaign was supported in a newspaper article by the head of the national craft association. The Competition Authority also reported the person to the police for trying to influence the pricing.

B. Merger control

In 1994, 262 mergers or merger plans were registered by the Competition Authority. In August, the Authority intervened against the merger mentioned below.

Acquisition of shares in Frionor AS by Orkla AS

In the course of the last two years, Orkla AS, a dominating company in a variety of sectors in the consumer market, acquired a significant proportion of the shares in Frionor AS, the largest producer and exporter of frozen fish products in Norway. Frionor Produkter AS, a subsidiary of Frionor AS, operates

mainly in the domestic Norwegian market and in some product markets (frozen pizza products and frozen vegetables). Frionor Produkter AS is Orkla AS's main competitor. In consultation with Orkla AS, the Competition Authority endeavoured to find a solution to the problem by somehow severing the close connection between Frionor AS and Frionor Produkter AS. This would greatly eliminate the possible competitive consequences of Orkla having a dominating position in Frionor AS. This attempt did not succeed, and the Competition Authority ordered Orkla AS to sell, before 1 September 1995, all shares acquired in Frionor AS since 23 August 1993. The decision was appealed to the Ministry of Government Administration. The Ministry reversed the decision on the basis of an assessment of the positive effect of the international competitiveness of Frionor that might ensue from being owned by Orkla. The Ministry was of the opinion that the positive economic effects on this will offset the negative effects of reduced competition in Norway. A further argument in favour was that changes in the import regime as a consequence of the new GATT Agreement would gradually introduce competition from imported products.

C. Intervention against restraints on competition

In a number of cases during the past few years, the Competition Authority has intervened against loyalty discounts and bonus systems honouring loyalty. The Competition Authority has also intervened against restraints on competition implemented by nationwide organisations. Interventions were also carried out against trade terms implemented by dominant enterprises. The restraints concerned the "locking-in" of customers and the introduction of barriers to entry.

Affiliation to the payment systems of Norwegian banks

A recently established local bank lodged a complaint with the Competition Authority claiming that the price charged by the Norwegian bank associations made it impossible to join the giro settlement system for Norwegian banks. The Authority found that the entry fee demanded did not bear any reasonable relation to the real costs of admitting a new bank. The Authority also found that the charge would seriously impede all establishments of new banks, thus limiting consumers' choices. The lack of competition might, particularly in the regions, result in excessive service charges. The Competition Authority intervened against the entry cost and laid down that the cost of operating the giro system should be covered by charges based on transactions performed. A new bank should only have to bear the actual costs of connecting a new bank to the system. The decision was appealed by the two bank associations. They argued that the charges for connecting the complaining bank had been reduced to a reasonable amount and that they intended to issue a price list with reduced charges for connection. On receiving this information, the Competition Authority reconsidered the case and allowed the reduced charge to be increased.

Producers of silverware

The Competition Authority intervened against eight producers of silverware who declined to supply silverware to a jeweller. The jeweller had a low-price profile as part of his marketing policy. The Competition Authority found that the producers did not practise uniform sets of rules as to which retailers to supply. The refusal to deal in this case was considered more or less arbitrary. As the eight producers also represented some 95 per cent of Norwegian production of the articles in question, the concerted refusal to deal in the case might not only seriously affect the jeweller's ability to trade, but would also be

detrimental to competition in the trade and could establish a price structure at a higher level than necessary.

Interflora Norge AS

The Competition Authority decided to intervene against provisions in the bylaws of Interflora, the Norwegian branch of an international association of florists. The regulation prohibited, under threat of exclusion, all participating florists from associating with another floral delivery network. The Competition Authority found that this prohibition had detrimental effects on competition by excluding members of competing organisations from large parts of the market.

Wholesalers of consumer goods

During the last few years, there has been a growing trend of concentration in the wholesale market as well as in retail trade in the food-related market. This has led to increased vertical integration of wholesalers and retailers. In the opinion of the Competition Authority, this trend may well produce adverse effects on competition. The Competition Authority therefore instructed a major wholesaler and four wholesale/retail chains to report to the Authority all further acquisitions or agreements on vertical as well as horizontal co-operation.

D. Exemptions from the prohibitions

The Norwegian Competition Authority may grant exemptions from the prohibitions. Exemptions may be granted when for example the restrictive practices in question may lead to increased competition, promote efficiency or have little competitive significance. During 1994, the Competition Authority handled 118 cases which lead to decisions with regard to exemptions. One hundred six exemptions were granted, included several cases in which conditions were imposed. Nine were rejected, and three were withdrawn. A substantial number of the cases concerned collaboration on prices within small chains of retailers.

Agreements in aviation

The Competition Authority granted SAS Scandinavian Airlines System and Braathens SAFE, the two dominating airlines on the Norwegian market, exemption from the prohibitions in the Competition Act, allowing them to continue their agreement concerning inter-line tickets in Norway. The exemption was granted to allow the airlines to continue a collaboration with Widerøe's Flyveselskap, the airline which until 1 April 1996 has a monopoly on operating local lines from small regional airports. The present system with inter-line tickets is passenger-friendly as it allows passengers the use of any flight on all routes serviced by both airlines. In addition, one single travel document can cover flights with different airlines. The exemption only covers a narrow field and does not allow any general co-operation on air fares between the participants. The Competition Authority is generally not in favour of any price agreement between dominant participants in a market. A deciding factor in the present case was the fact that such agreements are allowed under the EEA Agreement in the aviation sector.

Sales integration of power utilities

Several regional power utilities had established common sales organisations. Under the Competition Act, agreements on prices between members of joint sales organisations are prohibited. The sales organisations operating at the introduction of the Act were granted exemption for a period of one year to reorganise or apply for permanent exemption. Two sales organisations applied to the Competition Authority for permission to co-operate with regard to prices, market sharing and management of water resources. After concluding an investigation into the effects on competition by the proposed areas of co-operation, the Authority declined to grant exemption from the prohibition laid down in the Competition Act. An increased concentration on the supply side would, in the opinion of the Competition Authority, greatly increase the danger of co-ordinated conduct between suppliers and might establish a price level higher than would otherwise prevail. The Authority is of the opinion that the proposed joint management of water resources will significantly reduce the supply of surplus energy to the detriment of the customers. One organisation appealed the decision in December 1994.

E. Restraining effects of public measures

According to the Competition Act, the Norwegian Competition Authority shall evaluate measures by the public sector with regard to possible restraining effects on competition. On several occasions during the previous period, such opinions were given. The following case illustrates this work:

Pharmaceutical products

The trade in pharmaceutical products is subject to a very detailed set of provisions by the government and is therefore well shielded from competition. As a consequence, prices tend to be high compared to the level in other countries.

The Competition Authority participated in an inter-ministerial working group which discussed the pricing and distribution of pharmaceutical products in view of obligations laid down in the EEA Agreement. In a recommendation to the Ministry of Health and Social Affairs, the Competition Authority expressed preference for more extensive and more rapid changes than those recommended by the working group. At present, pharmacies have a monopoly on the distribution of pharmaceutical products. The Competition Authority concurs with the recommendations of the working group to allow non-prescriptive medication to be sold through sales outlets other than pharmacies, such as supermarkets and groceries. This will give the pharmacies some competition and make the products more easily available for the consumer.

The Competition Authority is also of the opinion that the provisions covering the wholesale of drugs are unnecessarily restrictive. This has made Norsk Medisinaldepot AS the sole importer and wholesaler in Norway. The present provisions prohibit hospitals from putting their requirements out to tender. The Competition Authority is of the opinion that regulations requiring hospitals to buy pharmaceutical products through the same channels as any ordinary consumer should be abolished. The Authority also favours provisions which will allow other firms to import pharmaceutical products as wholesalers. This would encourage competition and limit the possibility of artificially high prices for pharmaceutical products in Norway.

F. Subjects related to prices

Price surveillance and price regulation

For certain commodities and services for which competition is negligible or non-existent, such as cement, fertilizers, milk and taxi services, the Competition Authority stipulated maximum prices. Certain firms have been instructed to notify the Competition Authority when prices are increased.

Price surveillance and price regulation in the Lillehammer Olympic area

Prior to the Olympic Games, particular attention was paid to monitoring prices charged for accommodations, food and beverages in the Lillehammer area. Excessive price increases were not observed, and most enterprises charged prices at normal Norwegian levels. Just before the Games started, the Ministry of Government Administration decided to freeze prices on accommodations, food and beverages in the Lillehammer area. During the two weeks of regulation, the Competition Authorities completed 460 controls. Only a small number of infringements was registered.

Price information

The general obligation to provide information on prices so that they can be easily seen by consumers applies also to sales of services. On 1 January 1994, new general provisions were introduced for enterprises serving food and beverages, medical services and public call-boxes. On 1 May 1994, provisions were introduced for funeral services.

Price consciousness

The Norwegian Competition Authority endeavours to promote price consciousness among consumers, trade and industry by publication of surveys of price differentials in various markets. The Authority also carries out price research for publication. The Authority has also issued provisions stipulating that enterprises in service sectors must provide information on their prices to the public.

Research

The Competition Authority worked out two sets of guidelines in 1994. The first set concerns procedures and evaluation with regard to loyalty discounts and rebate systems honouring loyalty. The second set concerns evaluation of refusals to deal. Both these guidelines have been published in order to give market players information on the Competition Authority's practises.

III. Organisation of the competition authorities

The authorities

The superior authority in the sphere of competition policy rests with Stortinget (the Norwegian Parliament). The Ministry of Government Administration (Administrasjons-departementet), which is the governing agency for the Norwegian Competition Authority (Konkurransetilsynet), has a specific section dedicated to competition policy, the Department of Competition Policy. The Ministry of Government Administration is the appellate body for complaints against all individual decisions made by the Competition Authority. The Ministry is also responsible for influencing other ministries in cases concerning government measures having a significant restraining effect on competition. The Ministry takes part in international activities in the competition field.

Organisation of the Norwegian Competition Authority

The Norwegian Competition Authority is responsible for Norwegian competition policy and day-to-day supervision in accordance with the acts. The Competition Authority, with a total staff of 145 persons, is organised in four departments:

Administrative Department

- -- Information Division;
- -- Administrative Division.

Regional Department

- -- Eight Regional Divisions and a Central Co-ordinating Unit.

Competition Department

- -- Division for Consumer Goods;
- -- Division for Crafts and Industry;
- -- Division for Communications and other Services;
- -- Research Division.

Legal Department

- -- Legal Division;
- -- Investigation Division;

-- Division for International Affairs.

The head office of the Competition Authority is situated in Oslo with regional offices in Oslo, Hamar, Kristiansand, Stavanger, Bergen, Trondheim, Bodø and Tromsø.

The relationship between the Competition Authority and other authorities

The relationship between the Competition Authority and national courts

The Competition Act empowers the Competition Authority to take steps to secure evidence in enterprises suspected of infringing prohibitions under the Competition Act or the Price Policy Act. Prior to taking such steps, the Authority must, however, apply for permission with the Court of Examining and Summary Jurisdiction. The Authority may then confiscate and remove documents for further scrutiny. The Authority is also empowered to take statements from employees in a company and, if so warranted, subsequently report infringements to the police. The prosecuting authority may then institute proceedings which will be treated as a criminal case at court. Infringement of the Act is punishable by fines or imprisonment. A claim for relinquishment of gain can be included as part of a criminal case. The penalty for infringements is, under aggravating circumstances, imprisonment for up to six years. In connection with infringement of the Competition Act, the Competition Authority may choose to issue a writ giving an option of relinquishment of the gain that has been obtained by infringement of the Act. The amount can be determined approximately. If the option is rejected by the company, the case can be submitted to the courts.

The Consumer Ombudsman

The activities of the Consumer Ombudsman are based on the Act relating to Control of Marketing and Contract Terms and Conditions. The main task of the Consumer Ombudsman is to supervise and implement the Act when this is called for in the interests of consumers. Marketing practices should not be unreasonable in relation to consumers. It is prohibited in the conduct of business to apply an incorrect or otherwise misleading representation. It is also prohibited to make use of any representation which does not provide adequate or sufficient guidance when the representation is likely to influence the demand for or supply of goods, services or other performances. The Regional Department of the Competition Authority assists the Consumer Ombudsman in the enforcement of the Act.

The Market Council functions as a court dealing with cases brought by the Consumer Ombudsman or a party involved or affected.

The Ombudsman for Public Administration

The Ombudsman for Public Administration looks into complaints lodged against Civil Services that fail to discharge their administrative duties or fail to apply appropriate rules in the processing. Cases dealt with by the Competition Authority may be referred to the Ombudsman for Public Administration.

IV. Norwegian competition legislation

The Competition Act

The Competition Act came into force on 1 January 1994 and replaced the Price Act of 1953. The most important prohibitions under the Price Act have largely been retained. The purpose of the new Competition Act is to achieve efficient utilisation of society's resources by providing the necessary conditions for effective competition.

Prohibitions

The Competition Act prohibits collaboration on prices, mark-ups and discounts in connection with the sale of services and goods. The prohibition does not concern purchase. Any collaboration in connection with tenders is prohibited. Suppliers are not allowed to prescribe or seek to influence resellers' prices on goods or services. Nevertheless, an individual supplier may stipulate recommended prices for resellers' sales of goods or services on the condition that the prices are explicitly defined as recommended. Market sharing in the form of area division, customer sharing, quota distribution, specialisation and limitation of quantity is prohibited. An individual supplier may however enter into an agreement on market sharing with dealers or determine market sharing for them, for example by exclusive agreements or selective distribution systems.

Exceptions

The following exceptions from the prohibitions are included in the Act:

-- collaboration on prices in connection with joint supplying of goods or services is permitted for individual projects;

-- price collaboration and market sharing are permitted between companies in the same group of companies and between companies with common owners;

-- certain restraints in patent and design licence agreements are also excepted. Restraints on competition which apply to prices and market sharing as part of agreements between licenser and licensee are permitted;

-- Firsthand sales of Norwegian agricultural, forestry and fisheries products are excepted from the prohibitions of collaboration on prices, market sharing and fixing or seeking to influence the prices of dealers;

Interventions

The Competition Authority may intervene against agreements, terms of business and other actions that may restrict competition. The Competition Authority may prohibit methods that maintain or strengthen a dominant position in the market, refusals to deal, limitation of customers' choices and restraints which unduly increase the costs of production, distribution or sales, or keep competitors away from the market.

Invalidity

Agreements that conflict with prohibitions under the Competition Act shall be invalid between the parties of the agreement.

Merger Control

The Competition Authority may intervene against acquisitions of enterprises. Normally any intervention against an acquisition will have to be decided within six months after a final agreement on acquisition has been concluded. An agreement on a merger or purchase of shares may, on voluntary basis, be reported to the Competition Authority in order to seek clarification on whether the Authority will wish to intervene. The Authority must then within three months decide whether to intervene.

Public sector measures

The Competition Authority shall call attention to possible restraining effects on competition due to public sector measures. The Authority may submit proposals aimed at strengthening competition or facilitating access for new competitors.

Price labelling

Undertakings selling goods retail to consumers shall, persuant to the Act, provide information on prices so that they can be easily seen by the customers. The same applies to sale of services to consumers.

The Price Policy Act

Parallel with the Competition Act, the Act of 11 June 1993 relating to Price Policy takes effect (the Price Policy Act). The Price Policy Act came into force on 1 January 1994 and provides authorisation for price regulation. Moreover, it carries on the prohibition on unreasonable prices.

New legislation in 1994

Exception from the prohibition against market sharing

The new prohibition against market sharing encompasses both sharing of area, customers and quota distribution, specialisation or quantity restrictions. On 1 July 1994 the Competition Authority decided, by means of regulation under the Competition Act, to except from the prohibition any market sharing agreements entered into in connection with the acquisition of enterprises. A buyer may wish to secure that the seller of an enterprise, for a certain period after the acquisition, refrains from acting as a competitor. This will especially be the case if the acquisition involves goodwill or know-how. Such clauses imply that the former owner is excluded from the market. As the former owner is an important potential competitor such agreements should not have longer duration than five years. Market sharing agreements are only allowed on condition that the new owner gains complete control over the company in question.

Price information and price labelling

Under the Competition Act regulations regarding price labelling and price information have been issued.

PORTUGAL*

(1994)

I. Changes to competition laws and policies adopted or envisaged

Summary of new legal provisions in competition law and related legislation

New antitrust legislation was adopted in Portugal in October 1993. The new legislation -- Decree-Law (DL) 371/93, of 29 October 1993, establishing the general regime on the "protection and promotion of competition" (the Competition Act) -- entered into force on 1 January 1994 and revoked the former antitrust statute (DL 422/83, of 3 December 1983), as well as the statute dealing with merger control (DL 428/88, of 19 November 1988).

The new statute also revoked some ancillary legislation, such as Decree ("Portaria") 585/84, of 9 August 1984, on temporary exclusion of the prohibition of individual trade practices (minimum selling prices), and Decree ("Portaria") 820/84, of 23 October 1984, on prior control of agreements between undertakings, decisions of associations of undertakings, concerted practices and abuses of dominant position.

The new statute is intended to bring within its scope all the relevant antitrust issues. Therefore, it covers agreements, decisions of associations of undertakings, concerted practices and abuses of dominant position, as well as merger control. DL 371/93 also addresses some issues which were not dealt with by the previous legislation, such as the abuse of economic dependence and state aid.

Contrary to DL 422/83, individual trade practices are no longer included in the Competition Act, as it was considered that the issues raised by those practices, both by their nature and by the market share of the undertakings generally involved, were not detrimental for competition and should be treated under a separate statute. This matter is now governed by DL 370/93, of 29 October 1993.

The new Competition Act enlarges the scope of application of antitrust law. Indeed, certain activities and sectors -- such as the production, transport and distribution of electricity, natural gas, water, post and telecommunications and public administration -- are no longer excluded from the antitrust regime. However, two important exemptions still remain. According to Article 41(2) of DL 371/93, "in case of public services, this Act does not apply to undertakings legally awarded concessions by the State, within the scope and terms of the relevant concession contract". Furthermore, credit institutions, as well as finance and insurance companies, are not subject to the Competition Act provisions on merger control.

Fines were substantially increased. Antitrust infringements are now subject to the imposition of fines ranging from Esc 100 000 to Esc 200 million. Violation of other provisions of the Competition Act -- such as opposition to investigations, provision of false declarations or information, non-compliance with decisions of the antitrust authorities or lack of notification of merger operations -- are subject to fines

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* The original language of this report is English

ranging from Esc 50 000 to Esc 100 million. However, when the defendants are individuals, the limits mentioned above are reduced by half.

Rules governing merger control were also improved and now closely follow those included in EC Regulation 4064/89, of 21 December 1989. Mergers and acquisitions must be previously notified to the Directorate-General for Competition and Prices (DGCP). The enquiry procedures are presently carried out by the DGCP, before the final decision is taken by the Minister of Trade, alone or together with the minister(s) responsible for the economic activities affected by the concentration.

The new Competition Act also introduces some important changes in procedural issues. One of the most significant concerns judicial review. After the entry into force of DL 371/93, appeals against decisions taken by the Competition Council (CC) have no suspensive effect, except for the imposition of fines and the mandatory publication of the decision.

Substantive coverage

Prohibitions

Agreements, concerted practices and decisions by associations of undertakings

Articles 2 and 3 of DL 371/93 are similar to Articles 85 and 86 of the EC Treaty. Article 2 prohibits "agreements and concerted practices between undertakings and decisions by associations of undertakings, in whatever form, which have as their object or effect the prevention, distortion or restriction of competition in the national market or a part thereof". Some of the prohibited practices are listed below. Agreements or decisions prohibited under Article 2 are void, unless they are considered justified by the CC under the provisions of Article 5 (economic balance, see below).

Abuse of dominant position

Under Article 3 of DL 371/93, "any abuse by one or more undertakings of a dominant position within the national market, or in a substantial part of it, which has as its object or effect the prevention, distortion or restriction of competition shall be prohibited".

Article 3 establishes the criteria under which the existence of a dominant position shall be assessed. According to Article 3(2), a dominant market position is constituted where an undertaking (or two or more undertakings operating jointly in a market) is (are) not exposed to significant competition or has (have) a dominant market share in relation to third parties. Article 3(3) defines certain market share presumptions (30 per cent or a combined share of 50 per cent in the case of two or three undertakings, or 65 per cent in the case of four or five undertakings), without prejudice to the weighing of other factors affecting the undertakings and the market in each particular case.

Under Article 3(4), an abuse is deemed to have occurred where the undertakings concerned engaged in any of the anti-competitive practices mentioned above in Article 2(1) of DL 371/93 (refusal to deal, discrimination, tying, abusive or predatory pricing, etc.).

Abuse of economic dependence

Although the CC has dealt with this concept in some past decisions, the prohibition of abuse of economic dependence was only established in the new statute. Under Article 4 of DL 371/93, a supplier or buyer shall not abuse a position of economic dependence with regard to a given undertaking when no equivalent alternative supplier or buyer exists. The DGCP is currently investigating some cases of alleged abuse of economic dependence, but no formal procedure has been opened yet. It must be emphasised that, although several cases of abuse were informally reported, no complaint was filed before the DGCP until now.

Economic balance

Notwithstanding the negative effect on competition resulting from the restrictive practices prohibited by DL 371/93, they may be considered as justified if they benefit from a "positive economic balance", i.e. if they contribute to improving the production or the distribution of goods or services or to promoting technical or economic development and meet all three conditions laid down in Article 5.

The wording of this article is similar to Article 85(3) of the EC Treaty, and results from the consideration that the rules of competition shall be interpreted not as a condition *per se*, but as an instrument to promote the proper functioning of competition in the market. Contrary to EC competition law, there is no need for prior notification of an agreement in order to benefit from a particular exemption. However, undertakings are free to notify their agreements to the CC under the procedure established by the Decree 1097/93, of 29 October 1993.

Merger control

Until 1994, the rules applicable to mergers and acquisitions were established in a specific statute: DL 428/88. The inclusion of merger control in DL 371/93 was justified not only by the advantage of having a single Competition Act, covering all relevant matters for competition, but also by the need of introducing some modifications as a result of the previous experience and of the approval of EC Regulation 4064/89, of 21 December 1989.

Concentrations, of whatever form, that lead to the creation or the strengthening of a market share exceeding 30 per cent of the national market, or a substantial part of it, or where the turnover of the participating undertakings in Portugal, in the preceding financial year, exceeded Esc 30 billion, after deduction of taxes directly related to the turnover, are subject to prior notification to the DGCP. Until tacit or express authorisation is given, any transaction establishing the concentration has no legal effect.

According to Article 10(1), concentrations subject to prior notification which create or reinforce a dominant position in the national relevant market, and which may restrict competition, are prohibited, unless they are authorised either because the criteria concerning economic balance established in Article 5 are satisfied or they significantly reinforce the international competitiveness of the participating undertakings.

The enquiry procedures are conducted by the DGCP within 40 days of the date of notification. After the investigation and hearing of the case, the DGCP shall deliver the file to the Minister of Trade. In case of a negative assessment of the effect on competition of the notified merger, the Minister shall request an opinion from the CC. This request must be made within 50 days of the date of notification and communicated to the parties concerned. The CC shall deliver its opinion within 30 days of the date of the

request. Within 15 days after the reception of the opinion of the CC, the Minister of Trade (jointly with the minister in charge of the economic sector concerned, except for "positive" decisions) may decide either not to oppose the concentration -- eventually subject to the imposition of conditions and obligations appropriate for the maintenance of effective competition -- or to prohibit the concentration, and, if it has already been put into effect, order appropriate measures to restore competition, such as the separation of undertakings or of the combined assets.

State aid

Contrary to the previous legislation, DL 371/93 also addresses state aid. The main reason for the introduction of specific rules on state aid in the new statute seems to be, as for merger control, the advantage of creating a single legal framework for competition matters.

However, it must be emphasised that provisions on state aid laid down in DL 371/93 do not establish a clear prohibition. Indeed, Article 11 only establishes the principle according to which aid to undertakings granted by the State or any other public body must not restrict or have a significant effect upon competition in the market or part thereof. The Minister of Trade may only propose to the minister responsible for the economic activities affected by the aid the adoption of measures which he considers necessary to maintain or re-establish competition. Besides, not all aid shall be considered as falling under the provisions of Article 11 of DL 371/93. Two specific categories of aid are expressly considered not to be aid for the purposes of Article 11(see below)

Interim measures

Subject to the condition that the investigations indicate, with a certain degree of probability, that the practices which are the subject of the procedure are seriously damaging to economic or social development or to the interest of economic operators and/or consumers, the CC may, on a proposal by the DGCP, order the immediate suspension or modification of the practices in question.

If the undertakings concerned are credit institutions or financial companies, insurance companies or pension fund management companies, the CC shall request, before the adoption of interim measures, an opinion from the Bank of Portugal and/or the Stock Exchange Commission, or from the Portuguese Insurance Institute, as the case may be.

Exemptions

-- Restrictions on competition which derive from specific laws are exempt from the application of the Competition Act (see Article 1(3) of DL 371/93).

-- Compensation, in whatever form, provided by the State in payment for a public service and benefits provided under the terms of incentive programmes or other specific schemes approved by the government or the Assembly of the Republic are not considered aid for the purposes of the Competition Act [see DL 371/93, Article 11(3)].

-- In the case of public services, the provisions of DL 371/93 are not applicable to undertakings awarded concessions by specific law, within the scope and under the terms of the relevant concession contract [see DL 371/93, Article 41(2)].

-- DL 369/93, published on the same date as DL 371/93, allows publishers to fix the prices of their own books (except school books), newspapers, magazines and other publications.

Partial exemptions

-- Credit institutions, as well as financial and insurance companies, are not subject to the rules governing merger control laid down in DL 371/93.

-- Certain agreements and/or concerted practices between credit institutions and financial companies, as defined in DL 289/92, of 31 December 1992, are not considered as restrictive of competition.

Procedures

Chapter III of DL 371/93 contains specific procedural rules (Section I for procedures in respect of agreements, concerted practices, decisions by associations and abuse of economic power, and Section II for merger control). However, some procedural matters are specifically regulated in other articles [see Articles 5(2), 7 and 11(2)].

DL 433/82, of 27 October 1982 (as amended by DL 356/89, of 17 October 1989, and by DL 244/95, of 14 September 1995) is subsidiarily applicable to the procedure in respect of restrictive practices (namely to appeals against decisions adopted by the CC or the DGCP).

DL 442/91, of 15 November 1991 (the Code of Administrative Procedure), is also applicable in respect of relations between citizens and the public administration and is the subsidiary legislation for merger control procedures.

II. Enforcement of Competition Laws and Policies

Prohibited Conduct

Table 1

Summary of statistics of antitrust cases

	1994	**First half 1995**	**Observations**
Cases under investigation	66(a)	60(b)	(a) 15 complaints
Investigations concluded	39	10	(b) 17 complaints
Opening of formal infringement procedures	10(c)	2(d)	(c) 6 were referred to the CC for final decision (d) 4 were referred to the CC for final decision
Prior evaluation of restrictive practices	3	1	

Comments

Preliminary proceedings

The DGCP investigated 126 cases in the last 18 months (1 January 1994 - 31 July 1995), but only a relatively small percentage was initiated by complaints (25 per cent). In 1994, 39 preliminary investigations were finished, ten of which gave rise to formal procedures for infringement of competition law. The other 29 cases were filed due to several reasons, such as informal settlements, compliance with the competition rules or withdrawal of the complaint. In the first half of 1995, although only ten preliminary investigations were completed, the number of infringement procedures opened was substantially greater (21). The reason for this is the important number of cases opened for violation of procedural rules (lack of notification of mergers and failure to comply with decisions requesting information).

Formal procedures

In 1994, only six cases were referred to the CC for final decision, under Article 26(1) of DL 371/93. This relatively small number may be explained by two factors: the entry into force of the new antitrust statute and the reorganisation of the internal procedures of the DGCP. The cases sent to the CC concerned, mainly, selective distribution in the markets for sportswear and soft drinks, abusive conduct in the markets for tachograph disks and television advertising, and restraints on access to the "bullfighting market" as a result of a decision taken by an association of undertakings.

In one of those procedures, the DGCP conducted an "on the spot" investigation on the premises of an undertaking, during which business records were examined and seized, after having obtained the necessary judicial authorisation, as established in the new Portuguese competition law.

Notifications received

Decree 1097/93 establishes the conditions under which the CC may, after the submission of an application by an undertaking or an association of undertakings, evaluate a specific agreement, decision of association of undertakings or concerted practice under the criteria laid down in Article 5 of DL 371/93. The DGCP is responsible for the organisation of such procedures and may request all the information necessary to assess the impact on competition of the practices concerned before submitting its final report to the CC.

In 1994, the DGCP analysed three notifications concerning two distribution agreements (current consumption goods and retail distribution) and one sales agreement (flat glass). The last case was referred to the CC only in 1995. In the first semester of 1995, only one notification was submitted to the DGCP (distribution agreement in the ice cream market).

Table 2

Decisions of the Competition Council

Year	Total	Violations	Exemptions	Others
1993	10	7	-	3
1994	7	5	-	2
1995 (First half)	3	3	-	-

Comments

There is still little experience in the application of the new legislation by the CC, as almost all the decisions adopted in 1994, as well as those adopted in early 1995, were still based on the former competition legislation. However, as the main core of the repealed legislation was not substantially affected by the new statute, it is not expected to have significant changes in the interpretation of the most important competition rules.

Relevant cases in 1994

IMPORBEL

IMPORBEL is an importer and wholesaler of cosmetics and perfumery products. Complaints were introduced against IMPORBEL by two retailers that wanted to purchase CLARINS products. They accused IMPORBEL of subjecting supply to the condition of the additional purchase of two other brands of perfumes, and refusing to satisfy orders since 1992. The first complaint concerning CLARINS products was since settled through direct intervention of the French undertaking CLARINS, SA.

Since there were no written contracts between IMPORBEL and their distributors, the CC considered it impossible to make a reasonable assessment of the economic balance.

Resale was allowed either to resellers of CLARINS trademark or to other resellers. There was also no imposition of selling other brands. Minimum purchases were not imposed, but the CC did not exclude the possibility of accepting such a clause if it was proved to be a condition for the company's profitability.

The CC considered that the agreements concluded for the sale of Clarins products might limit the access of retailers to the market and thus interfere with the determination of sale prices, and therefore that the practices restricted competition as prohibited by Article 2(1) of DL 371/93.

The CC also ordered IMPORBEL to provide an exhaustive list of conditions included in contracts concluded with the specialised retailers of CLARINS products or, alternatively, to provide the terms of a model contract that it intended to negotiate with those retailers in order to implement a system of selective distribution for such products. Taking into account IMPORBEL's size, its turnover, the small relevance of the CLARINS trademark and IMPORBEL's intention to introduce a transparent and coherent system of selective distribution, the CC did not impose any fine.

ANF and others

ANF (National Association of Pharmacies) and three pharmaceutical co-operatives (CODIFAR, FARBEIRA and FECOFAR) ordered their associates to boycott the products of NESTLÉ, MILUPA and NUTRICIA, because children's food (milk, in particular) of these brands was sold in some supermarkets at lower prices, instead of being distributed exclusively through pharmacies.

The CC considered the restriction on competition significant because the boycott included dietetic milks for specific purposes, which are considered pharmaceutical products and are sold exclusively in pharmacies. The restrictive practices were punished with the heaviest fines ever imposed by the CC. The case is being at present challenged before the Lisbon Court of First Instance.

SIBS

SIBS is an inter-banking service undertaking that co-ordinates the activity of the banks participating in an automatic debit card system (the "Multibanco" card), which allows access to automatic teller machines(ATM). SIBS decided that purchases paid for with automatic payment cards should be subjected to a flat rate, and the CC was asked to order interim measures to suspend the practice in question.

The Parliament (Assembly of the Republic) decided to enact a law suspending the above-mentioned flat rate until the adoption of specific legislation regulating the use of automatic debt cards or until 31 December 1994. Consequently, the CC filed the procedure.

MOTOMAR

MOTOMAR-Náutica, Turismo e Indústria, Lda. is an undertaking whose activity is the wholesale and retail of maritime motors and the accessories thereof, including after-sales service, maintenance and repair. It has the exclusive representation in Portugal of Yamaha maritime motors and spare parts. MOTOMAR refused to contract the representation of Yamaha maritime motors and spare parts to a plaintiff as its agent because the would-be contractor did not want to sell those products in exclusivity and wanted to continue to sell Mariner products.

Notwithstanding the allegation and evidence provided by the plaintiff that Motomar had negotiated contracts with other firms under the same clauses as the plaintiff wished, the CC decided that, given the nature of the products, the justification of the exclusive distribution system could be accepted and that the producer (or the exclusive importer) should have the freedom to decide in accordance with the local market conditions whether or not to impose the exclusivity clause. Since the competitive conditions were not affected by the absence of the agency contract because of the existence of alternative brands and alternative distribution channels in the market, the CC filed the procedure without the application of any sanction.

Bakeries

A group of ten bakeries in the Lisbon region, channelling their production through more than 300 of their own shops, decided in a meeting held on 31 January 1992 to increase the retail price of bread by 20 per cent beginning on 3 February 1992. Although the prices for all types of bread were not increased by the same amount, the price increase affected the most common type of bread (the so-called

"carcaça"). The justifications provided were either the increase of costs of production -- estimated by some at about 14.5 per cent -- or the prospect of their increase.

The CC decided that competition rules had been violated, without any justification with regard to economic balance, and imposed fines of different amounts in accordance with the size of the undertakings involved, and ordered the undertakings to refrain from similar practices in the future.

Sociedade Luso-Helvética

SOCIEDADE LUSO-HELVÉTICA, Lda. imports and distributes perfumery, cosmetics and body hygiene products of many trademarks, including Chanel, Boucheron, Stendhal, Arden, R. & Gallet, Balmain and Molyneux. A plaintiff accused Luso-Helvética of imposing, since 1990, a minimum ceiling of purchases of Chanel products and of subjecting the supply of Stendhal products to the condition of a visit from its delegates that allegedly never occurred.

Concerning Chanel products, Luso-Helvética provided copies of the general conditions of sale and the authorised distribution contract. From those documents the CC concluded that:

-- the selection procedure did not foresee the possibility for the distributor to be informed of the aspects to be modified if it did not meet the objective criteria to be a member of the distribution network;

-- the selection procedure did not provide for any deadline for the inspection of premises before the decision of acceptance or refusal;

-- the minimum stock requirement restricted retailer's freedom of procurement, and the associated financial costs limited its capacity to represent other brands;

-- minimum annual turnover, under conditions not specified in the contract, was a restriction to the freedom of procurement by other suppliers and to the distribution of their products;

-- sales restrictions imposed on the authorised retailer hindered its freedom of supply and the competition at the supply level; and

-- supply restrictions imposed on the authorised retailer hindered its freedom of demand and competition at the demand level.

According to the CC's case law, the selection of retailers based upon objective and transparent criteria is justified in order to give a sufficient guarantee to interested retailers, without prejudice to the management of the system by the producer and to the human and material restrictions to their ability to respond to demand. The selection operations should be limited in time, and the decision rejecting the agreement should specify the modifications to be introduced and a deadline to meet the conditions.

These conditions satisfied, the CC shall examine whether the economic balance is positive as regards the distribution contract and shall accept as benefiting consumers certain restrictions upon competition, such as: *a)* the requirement of a minimum inventory level and rules regarding the shelving and stocking of products; *b)* the requirement of a minimum annual turnover insofar as it does not stifle the retailer's activity when authorised to sell other products; *c)* sales restrictions that, within the limits of a selective distribution system, give consumers the guarantee that the products are sold only in authorised shops; and *d)* restrictions on retailer supply, especially those regarding the minimum ceiling of purchases

compatible both with the need to keep a closed selective distribution system and with the aim of making the activity profitable as a whole.

According to the CC's decision, the restrictive clauses regarding Chanel products could result in a positive evaluation, under the conditions specified in the decision, provided that Luso-Helvética complies with the injunction to communicate to the CC a list of retailers with whom agreements will be concluded in accordance with the "new General Conditions of Sale" and the new model of the "Authorised Distribution Contract".

As regards Stendhal products, the CC imposed an alternative injunction either to send a list of the distributors to whom Luso-Helvética has sent a letter cancelling the obligation of a minimum volume of purchases or to submit for consideration the General Conditions of Sale and the model of the "Authorised Distribution Contract".

SAME Tractores

SAME Tractores (Portugal) is a subsidiary of the Italian company SH. SAME represents in Portugal the production of SAME agricultural tractors built in Italy by SH. SAME appointed as its distributor for a specific region an undertaking that accused SAME of limiting its scope of activity and then terminating the distribution agreement. SAME channels its production through a network of 39 agents, each of which is assigned a limited area. Although it concluded written contracts with some of the agents, the terms of the relationships do not cover all of the agents. The contract clauses are the classic ones for the implementation of an exclusive distribution system.

The CC has already decided that exclusive or selective distribution contracts may improve the distribution of goods and services allowing consumers a fair share of the resulting benefits. In any case, the contracts shall not impose on the relevant undertakings restrictions which are not absolutely necessary and which do not give the undertakings the possibility of eliminating competition in a substantial part of the market. This conclusion is considered adequate when contracts regard products such as motor vehicles and tractors, i.e. products which are technologically complex, and require a satisfactory warrantee and after-sales service. In this context, the CC considered the contract clauses valid, with the sole exception of the clause requiring the agent to purchase SAME tools and equipment which are not essential for the quality of technical assistance. Moreover, the CC ordered SAME to communicate to their agents that this clause was null and void.

Relevant cases in 1995

Associação Portuguesa de Criadores de Touros de Lide

The Portuguese Association of Breeders of Bulls for Bullfights, in accordance with its statute, had the power to prevent bulls belonging to non-member breeders from participating in bullfights and to prohibit access to arenas for bulls, whose owners had concluded contracts with non-member breeders. Since the Association applied this clause of its statute, the CC decided that this practice was a violation of competition rules and imposed a fine on the Association and ordered it to amend its statute accordingly.

Multifrota

MULTIFROTA has distributed Kienzle tachographs (speed recorders) since the 1950s. Even if other undertakings also sell Kienzle products, only MULTIFROTA sells Kienzle discs for tachographs.

According to the CC's decision, MULTIFROTA limited the warrantee concerning Kienzle tachographs to the use of discs of the same brand and imposed the obligation of presenting used discs and the purchase of a minimum of two discs when a repair is requested under the warrantee. Given that the tachograph discs are perfectly interchangeable, the CC considered that MULTIFROTA's behaviour was in breach of competition rules. The CC imposed a fine and ordered Multifrota to notify all Kienzle authorised agents that discs will only be sold upon request and that neither the use of Kienzle discs nor the obligation of presenting used Kienzle discs should be considered conditions for benefiting from the warrantee.

Cadbury Schweppes

CADBURY SCHWEPPES (PORTUGAL) produces, bottles and distributes beer and non-alcoholic beverages and is the representative of the trademarks for the soft drinks Trinaranjus and Schweppes. The organisation of the distribution system is based upon a network of exclusive distributors, but written contracts have only been concluded with some of them.

The CC considered that the contractual clauses regarding the obligation to apply fixed sales prices and granting absolute territorial protection did not justify a positive evaluation. CADBURY was ordered to provide the list of distributors with which distribution contracts had been concluded without those clauses.

Control of Structures

Table 3

Summary of statistics

	1994	**First half 1995**	**Observations**
Mergers notified	24	10	
Merger procedures examined	25(a)	8	(a) Including one case notified in 1993
Procedures pending	0	2	

Until 1 January 1994, merger notifications were submitted directly to the Minister of Trade, who was the member of government in charge of competition matters. However, most notifications were sent to the DGCP for analysis before the adoption of the decision. After the entry into force of the new competition statute, undertakings must notify merger proposals directly to the DGCP, which subsequently reports its conclusions to the Minister of Trade.

Notwithstanding the substantial increase of the turnover threshold for mandatory notification (from Esc 5 to 30 billion), the number of notifications is the same as in previous years.

During 1994, DGCP examined 25 merger operations, one of which had been notified under the former merger legal framework (DL 428/88). Five of these mergers were not subject to compulsory notification: three of them did not fulfil any of the requirements set out by the law (i.e. market share exceeding 30 per cent or turnover exceeding Esc 30 billion), and the other two were considered to be co-operative joint ventures, which do not satisfy the definition of merger given by Portuguese legislation. The remaining operations were given favourable opinions, and were approved by the Minister of Trade, even though one case involved the attachment of formal conditions.

In the first half of 1995, ten merger notifications were registered, eight of which have presently already been dealt with and authorised by a governmental decision.

The activity of the undertakings involved in the mergers notified during the two periods mentioned above were as follows:

Manufacturing.....24
Retail distribution..... 7
Port handling services/rail transportation/electricity.....1
Telecommunications..... 1
Software/hardware services..... 2

As far as the form or type of operation and the "nationality" of the undertakings that took part in these mergers are concerned, the next table shows the main features of the merger operations examined.

Table 4

Merger operations examined in 1994-1995

	1994	**First half of 1995**
Form of merger		
Takeovers	1	-
Acquisition of assets	2	-
Acquisition of shares	18	9
Joint ventures	-	-
Restructuring within the same group of undertakings	2	1
Co-operative joint ventures	2	-
Type of merger		
Vertical	2	1
Horizontal non-conglomerate	20	9
Horizontal conglomerate	3	-
"Nationality" of the undertakings involved		
Purely domestic	11	5
Indirect foreign participation	4	3
Direct foreign participation	6	-
Purely foreign	4	2

Significant merger cases notified in 1994 and 1995

TELEPAC/SEVATEL/MARCONI-SVA

This merger, which was notified on 27 December 1993, concerned the acquisition by Serviços de Telecomunicações, SA (TELEPAC) of the entire share capital of Serviços de Valor Acrescentado em Telecomunicações, Lda. (SEVATEL) as well as MARCONI-Serviços de Telecomunicações de Valor Acrescentado, Lda. (MARCONI-SVA).

The notification of the proposed merger took place before the entry into force of DL 371/93, when notification was compulsory for mergers involving companies whose aggregate turnover exceeded Esc five billion.

TELEPAC is owned in equal shares by Telecom Portugal and Telefones de Lisboa e Porto (TLP), which are also the only owners of SEVATEL. MARCONI-SVA is entirely owned by MARCONI-SGPS Comunicações, SA. The acquisition of SEVATEL and MARCONI-SVA was the counterpart of the cession of credits in favour of Telecom, TLP and Marconi-SGPS, which will later be transformed into TELEPAC share capital. This company will, thereafter, include MARCONI-SGPS as a shareholder, in addition to Telecom and TLP.

The operation will basically affect the market for value-added telecommunications services.

The DGCP did not oppose the proposed merger, since the operation's goal was to concentrate all value-added telecommunications services in a single company in order to achieve greater efficiency and increase productivity, which may result in a benefit to consumers. According to the DGCP's conclusions, access to this market -- which represents only two per cent of the aggregate turnover by the three telecommunications services: basic, complementary and value-added -- would still be open.

DUCROS/DUCROS MARGÃO

This merger operation, which was notified on 18 January 1994, consisted of the acquisition of 50 per cent of the capital of DUCROS MARGÃO-Produtos Alimentares, Lda. (MARGÃO) by DUCROS, SA. This operation fell within the scope of Portuguese competition law, since MARGÃO had a market share exceeding 30 per cent in the spice market.

MARGÃO was owned in equal shares by a shareholder and by DUCROS INTERNATIONAL, BV, based in Amsterdam, which is also owned by MARGÃO (63.5 per cent) and private investors. After the merger is completed, MARGÃO will be owned in equal shares by DUCROS, SA and DUCROS INTERNATIONAL, BV. Consequently, the control of MARGÃO will be transferred to the DUCROS group.

The relevant product market is the market for the resale of spices for domestic consumption. Margão had a market share of approximately 70 per cent in 1991, in the Portuguese market. Only around four per cent of the products sold by Margão were imported by Ducros, SA, the remaining 96 per cent resulting from the sales of Margão spices.

Notwithstanding the important market share of MARGÃO in the Portuguese market, the DGCP did not raise any objections to this operation, since the examination of the case led to the conclusion that

there were no obstacles to the access of similar products to the national market and that the demand had a strong bargaining power (distribution networks). Therefore, it was considered that the acquisition of MARGÃO did not negatively affect competition on the domestic market for spice consumption .

NUTRINVESTE/SORGAL

This operation, which was notified on 7 June 1994, consisted of the acquisition of some assets of Sociedade Gestora de Participações Sociais, SA (SORGAL) by NUTRINVESTE, through its subsidiary Sociedade Vendedora de Glicerinas, SA (SOVENA). The operation was considered a merger for the purposes of DL 371/93, since the turnover involved exceeded Esc 30 billion and because the market share of the acquiring company on the relevant market exceeded 30 per cent.

NUTRINVESTE is an important holding company in the sector of foodstuffs of an agricultural origin, which holds majority shares in undertakings producing edible oils for general consumption. Mello, SGPS, SA owns 49 per cent of the equity of NUTRINVESTE, TABAQUEIRA-Empresa Industrial de Tabacos, SA owns 49 per cent and SINTRATURA-Sociedade de Estudos, Representações e Participações, Lda. owns 1.1 per cent. It operates in the sectors of juices, preserves and similar products, cereal derivatives and animal or vegetable fats. NUTRINVESTE's share in its subsidiary SOVENA, a company whose primary activity is the production of edible oils, is 98.8 per cent. Sorgal is 100 per cent owned by SOJA de Portugal, SGPS, SA (SOJA), and it produces and sells edible oils and animal rations.

The relevant product market is the market for edible oils packed for domestic consumption, and the geographic market coincides with the national territory.

To implement the proposed operation, Soja will detach and create within Sorgal an economic entity of edible oils (other than soybean) and will ensure its subsequent transfer to Nutrinveste, which then will have a market share of 60 per cent (compared with the present 53 per cent share). Sorgal is expected to abandon the production of edible oils (except soybean) and will concentrate in the production of animal rations and soybean oil. Afterwards, Sorgal is also expected to licence in exclusive terms its oil trademarks to Nutrinveste for a period of three years, renewable, and attached to a purchase option after the fourth year. For a period of five years, Soja and Sorgal will not develop any activity that may compete with Nutrinveste and its subsidiaries on this relevant market or that may cause harm to the economic value of the trademarks licensed. After that period and for an additional 20 years, Nutrinveste may demand that the amount of royalties related to the licensing of the trademarks be readjusted, in case any of those two companies act in a way that may harm its activity in the market of oil meal.

The DGCP rendered a favourable opinion to this operation, taking into account that:

-- other powerful competitors are present in the national market, especially in the retail distribution sector, whose own trademarks considerably influence the competitive pressure in this market;

-- European financing in this sector has been decreasing, which helps new entrants on this market; and

-- the European market is controlled by large multinationals, which are potential competitors on the Portuguese market.

TRIUNFO, NACIONAL, NUTRICEREAIS/PROALIMENTAR

This merger, which was notified on 11 April 1995 by TRIUNFO, MASSAS E BOLACHAS, SA (TRIUNFO), NACIONAL-Companhia Industrial de Transformação de Cereais, SA (NACIONAL) and NUTRICEREAIS - SGPS, SA (PROALIMENTAR), will be realised in different phases. First, a specialisation agreement between NACIONAL and TRIUNFO will be concluded, through the cross-exchange of the respective production and distribution plants, which will have to be followed by several payments between the two companies. They will licence their respective trademarks (NACIONAL and TRIUNFO) to each other for a period of seven years. Finally, Proalimentar will be transferred to TRIUNFO.

TRIUNFO is wholly owned by Fábricas Triunfo, SA, the holding company of the Triunfo group, divided through EPAC (32.3 per cent), NUTRICEREAIS (21.8 per cent), TABAQUEIRA (five per cent) and others (40.9 per cent). NACIONAL has the following structure: NUTRICEREAIS (48.4 per cent), EPAC (20 per cent), BANCO PINTO & SOTTO MAYOR, SA (17.5 per cent) and others (14.1 per cent). NUTRICEREAIS is a holding company of the NUTRINVESTE group, whose activity consists of products derived from cereals, wholly owned by NUTRINVESTE. NUTRICEREAIS owns 49.6 per cent of PROALIMENTAR, Companhia Leiriense de Moagens owns 11.7 per cent, Prosint, SGPS owns 16.1 per cent and other shareholders own 22.6 per cent.

After this operation, TRIUNFO will absorb all biscuit production activities, and NACIONAL will absorb the pasta production, and PROALIMENTAR, which only produces and sells biscuits, will have disappeared as an independent undertaking, coming under TRIUNFO's influence, which will be the majority shareholder, with a participation of 80 per cent.

The transfer of PROALIMENTAR to TRIUNFO will take place through either the sale of the biscuit production plant to TRIUNFO or through the acquisition by TRIUNFO of a majority position (eventually 100 per cent) of PROALIMENTAR. These operations imply that TRIUNFO will have enough financial capacity in order to pay either the difference between the exchange of plants with NACIONAL or the transfer of PROALIMENTAR to TRIUNFO.

TRIUNFO's possession of the necessary financing required for these operations will depend on the significance of the role played by NUTRICEREAIS, which belongs to the NUTRINVESTE group, in that company, through Fábricas Triunfo, SA. In fact, the financing may result from the increase of share capital of Fábricas Triunfo, SA, which owns 100 per cent of TRIUNFO, entirely subscribed by NUTRICEREAIS, or from the change into capital of the credits due to shareholders of NACIONAL and PROALIMENTAR, companies in which NUTRICEREAIS holds a significant position.

The notified merger came within the scope of the definition set by Portuguese competition law, since it created market shares exceeding 30 per cent in each of the markets concerned. In the analysis of this merger, two relevant markets were considered: long or considerable duration biscuits, usually packed for general consumption, and pasta packaged for general consumption. The relevant geographic market coincides with the national territory.

This merger operation will allow TRIUNFO, and therefore NUTRICEREAIS, to reinforce its share on the biscuit market, in which it will have a market share of over 30 per cent. An identical situation will occur as far as NACIONAL is concerned, which will have a market share of over 40 per cent on the pasta market.

Given that both markets were open and competitive, and considering the characteristics of the products involved, and the receptiveness of consumers to new presentations, the DGCP did not find any reason to oppose the operation.

EXIDE CORPORATION/SOCIEDAD ESPAÑOLA DEL ACUMULADOR TUDOR, SA

This merger operation, which was notified on 23 August 1994, concerned the acquisition by the EXIDE CORPORATION (EXIDE) of the indirect control of Sociedade Portuguesa de Acumuladores Tudor, SA (TUDOR), as a result of the acquisition of the Spanish company Tudor, which controlled 66.4 per cent of the Portuguese TUDOR.

EXIDE is quoted on the New York Stock Exchange. It expressed the intention of developing a takeover bid for 100 per cent of Spanish Tudor. The majority shareholder of Spanish Tudor, Corporation Industrial y Financera de Banesto, with 57.3 per cent of the company, was willing to sell its shares. Tudor Portuguesa is owned by Spanish Tudor, 0.9 per cent by the Spanish company Gaztambide, SA and seven per cent by the Luxembourg company Mercolec, SA. The remaining 15.6 per cent is spread through private investors.

EXIDE is indirectly active on the national market in the sector of replacement/rechargeable batteries, through the distributor Big Batteries Distribution Ltd., which is owned by Big Batteries Group PLC, 100 per cent owned by EURO EXIDE, a managing company equally owned by EXIDE CORPORATION.

EXIDE's sales are negligible in Portugal (approximately two per cent) and are realised through an independent distributor. TUDOR leads all the segments of the battery market, as far as starter batteries, replacement/rechargeable batteries, fixed-installation batteries and drive batteries are concerned.

The relevant market is the sector of replacement/rechargeable batteries, the only one in which EXIDE CORPORATION is active, and the relevant geographic market is the national market. Tudor Portuguesa had a market share of over 40 per cent in that market before the conclusion of the proposed merger.

The Portuguese competition authorities did not raise any objection to this operation, considering that the reinforcement of that share will not be significant, since EXIDE's sales in Portugal do not represent more than two per cent of this market. Therefore, the competitive structure of the market for replacement/rechargeable batteries does not appear to have been considerably changed.

CIMPOR/TERRAZUL

This merger, which was notified on 30 December 1994, concerned the acquisition of 100 per cent of TERRAZUL-SGPS, SA (TERRAZUL) by Cimentos de Portugal, SA (CIMPOR).

The operation fell within the scope of application of the provisions relating to the thresholds set by Portuguese competition law, as the total turnover involved exceeded Esc 30 billion in 1993. The Portuguese Republic owns 80 per cent of CIMPOR and private investors own 20 per cent. CIMPOR primarily produces cement and concrete. TERRAZUL is a holding company of group Terrazul, which operates in the sector of concrete and related products, and is almost entirely owned by the French company Société des Ciments Français (99.95 per cent).

The relevant markets are the markets for concrete and related products, and the relevant geographic market is the national market, since both companies are active there.

After the investigation, the DGCP found that this merger did not create a dominant position in the market for related products, even if a position of this sort could be created on the concrete market, as Cimpor already held a dominant position in that market. Bearing in mind these considerations, no objections were raised to this operation, although the DGCP imposed on Cimpor the obligation to ensure the monitoring of the future behaviour of the companies, particularly concerning cement prices and sales conditions.

III. The Role of Competition Authorities in the Formulation and Implementation of Other Policies

Privatisation

The political and economic context

During the mid-1970s, Portuguese society and the Portuguese economy went through a process of swift change. The fall of the political regime, on the domestic side, and the first oil crisis in the international context, accelerated its course. After the revolution in 1974, a wave of nationalisations took place, transferring to the public sector almost all banking and insurance activities, road transportation, oil refining, steel, cement and pulp and paper production, the chemical industry and some newspapers. The size of the public sector then became similar to those of most Western European countries after the Second World War.

Portugal's accession to the Common Market in 1986 entailed profound structural changes regarding price control and the reform of the tax system and helped to modernise the banking and insurance sectors. The privatisation programme officially began in 1989, under favourable economic and social conditions.

The privatisation of one brewery, one bank and insurance companies, the first state-owned enterprises to be sold, occurred in 1990, after the amendment of the Portuguese Constitution, which until late 1989 had expressly reduced the sale of state-owned companies to a maximum share capital of 49 per cent. In April 1990, the Parliament authorised the government to privatise companies and assets which had been nationalised without further restraints, establishing the main objectives to be pursued as well as the general framework of privatisation (Act 11/90, of 5 April 1990).

The government exercises the enabling powers conferred by the framework law through decree-laws subject to promulgation by the President of the Portuguese Republic, and eventually to the *ex-post* control of the Parliament, in order to ensure compliance with the law. Each privatisation is regulated by a specific set of rules, the detailed conditions of which are approved by a resolution of the Council of Ministers.

By the end of the current legislature in September 1995, most of the public companies included in the privatisation programme will have already been transferred to the private sector, the majority of which were sold in the last year and a half, since the beginning of 1994.

The Portuguese privatisation programme showed the clear preference of the Portuguese Government for public offerings in the Stock Market, immediately followed by competitive tenderings, as far as methods are concerned, as well as a deliberate political choice to intervene as little as possible in the

shareholding structure of the privatised companies, and the fact that very few "golden shares" were retained in those operations also confirms that option.

The applicants to a public competitive tendering may be subject to compulsory notification of a merger proposal to the DGCP, within the framework of merger control legislation: until the operation is approved by the Minister of Trade, after having received the DGCP's opinion, the competitive tendering will not proceed. This situation occurred several times, and most recently in the privatisation procedure of the chemical conglomerate Quimigal, SA, which is a holding company whose equity shares are being sold at the moment. Furthermore, the DGCP analysed and gave its opinion on the draft decree-laws concerning each privatisation procedure.

Privatisations in 1994 and in the first half of 1995

Cement

-- The joint privatisation of SECIL -- Companhia Geral de Cal e Cimento, SA (Secil) and CMP -- Cimentos Maceira e Pataias, SA (CMP) was carried out in two phases: the first through public competitive tendering and the second through public offering.

-- The first phase of the privatisation of CIMPOR -- Cimentos de Portugal, SA, in which a shareholding of 20 per cent was sold through public offering, was completed.

Banks

-- The last two phases of the privatisation of BPA - Banco Português do Atlântico, SA were completed, the first one consisting of the sale of a minority shareholding, i.e. 7.5 per cent, to selected strategic investors through direct sale, and the last one through a direct sale consisting of the acceptance of a public offering.

-- The privatisation of BPS&M -- Banco Pinto & Sotto Mayor, SA was completed in two phases: the first through public competitive tendering (80 per cent of the share capital), and the last one through public offering (the remaining 20 per cent).

-- The first phase of privatisation of BFE -- Banco do Fomento Exterior, SA was completed, consisting of the sale of 19.5 per cent of the share capital through public offering.

-- The last phase of the privatisation of UBP -- União de Bancos Portugueses, SA was completed, through a direct sale consisting of the acceptance of a public offering (20 per cent).

Insurance

-- The last phase of the privatisation of Companhia de Seguros BONANÇA, SA was completed, through a public offering (20 per cent).

Naval repairs

-- The direct sale of the public shares In SOPONATA -- Sociedade Portuguesa de Navios Tanques, SA, which became completely private.

Iron and steel industries

-- Siderurgia Nacional-Empresa de Produtos Planos, SA, Siderurgia Nacional-Empresa de Produtos Longos, SA and Siderurgia Nacional-Empresa de Serviços, SA were privatised. The three companies were created from the former company active in these areas in Portugal (SIDERURGIA NACIONAL), through public competitive tendering, which resulted in the sale of the first two companies.

Transport

-- The last three companies held by the state-owned holding company RODOVIÁRIA NACIONAL, i.e. Rodoviária da Estremadura, SA, Rodoviária do Sul do Tejo, SA and Rodoviária de Lisboa, SA, were privatised through public offerings.

Telecommunications

-- The first phase of the privatisation of PORTUGAL TELECOM, SA was completed through public offering and a direct sale to a group of financial institutions, in order to spread the shares in foreign markets ("book-building").

Pulp and paper production

-- The first phase of the privatisation of PORTUCEL INDUSTRIAL, SA was completed, through a public offering and a direct sale to a group of financial institutions, in order to spread the shares in foreign markets.

-- The direct sale of the majority equity share held by the public company IPE -- Investimentos e Participações Sociais, SGPS, SA, In CELBI -- Celulose da Beira Industrial, SA was completed.

Chemical industry

-- The companies held by the public conglomerate QUIMIGAL-Química de Portugal, SA were privatised through public competitive tendering

Although the legal framework of other privatisation operations has already been approved -- such as those of the tobacco manufacturer TABAQUEIRA-Empresa Industrial de Tabacos, SA (competitive tendering), the petrochemical company CNP -- Companhia Nacional de Petroquímica, SA and the state-owned naval repairs company SETENAVE-Estaleiros Navais de Setúbal, SA (both through direct sale) -- they have not yet been implemented.

Deregulation

The DGCP plays an important role in the process of deregulation, either proposing draft legislative acts to the Minister of Trade or analysing draft legislative acts from other departments of the government. During 1994 and the first half of 1995, new efforts were developed in order to liberalise economic activity as far as price control and market access are concerned.

As a result of this policy, several products of different natures were excluded from the declared price regime: the extraction of minerals such as iron, stain, uranium, precious metals, non-metallic minerals and industrial rocks; gas production, pulp and paper production, health-care services, medical and dental services, film production, radio and television, and the sterilisation and packaging of milk.

In search of increased flexibility as concerns price controls, the sugar industry, at the stage of production or importation, was subject to the regime of price surveillance as was the industrial gas used to supply hospitals and similar units, when produced or imported, which was formerly under a stricter price regime.

SWEDEN*

(1994)

I. Changes to competition laws and policies adopted or envisaged

The EEA Agreement entered into force on 1 January 1994. The major part of the competition rules in the agreement were incorporated into Swedish law by the EEA Act. On 1 January 1995, Sweden became a member of the European Union which means that Community rules are now directly applicable in Sweden.

Amendments to the Swedish Competition Act

Following Swedish membership, Article 5 of the Swedish Competition Act was repealed as of 1 January 1995. The article stated that where both the Competition Act and the competition rules in the EEA Agreement were applicable in a particular case, decisions taken in pursuance of the Competition Act must be compatible with the EEA provisions.

Special rules for the agricultural sector

Parliament decided on changes to the Competition Act by introducing special rules to apply to the agricultural sector as of 1 July 1994. The prohibition against anti-competitive co-operation is not applicable to certain forms of co-operation in economic associations, whose members are undertakings within the agricultural, forestry or horticultural sectors, so-called primary associations. Co-operation in primary associations is often necessary for individual farmers where it concerns the production or sale of agricultural produce, the use of jointly owned facilities and the handling or processing of agricultural produce. Such co-operation is regarded as having sufficiently positive effects to be exempted from the provisions of the Competition Act. However, agreements that prevent or impair the mobility of association members on the market, e.g. provisions on obligations to deliver to specific entities, are covered by the prohibition against anti-competitive co-operation.

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* The original language of this report is English.

The Act on Action against Improper Practice Regarding Public Procurement

On 1 July 1994, the Act on Action against Improper Practice Regarding Public Procurement entered into force. This act empowers the Competition Authority to refer to the Market Court to issue a decision terminating the improper practice of procuring entities in the public sector. Such practice is deemed to exist if any undertakings are tangibly discriminated against or if the practice in any other way manifestly distorts conditions for competition.

Other legislation affecting competition

Parliament decided in December 1994 that the entry into force of the new legislation on electricity was to be postponed. A broader analysis of the consequences of the deregulation of the electricity market, e.g. for smaller distributors and consumers, was deemed necessary. The Energy Commission, given the task of performing this analysis, has come to the conclusion that the legislation reforming the electricity market should come into force as soon as possible, preferably by l January 1996.

II. Enforcement of competition laws and policies

Table 1 below shows the number of new cases -- mergers, agreements and others -- registered during 1994 and the number of decisions taken during the same period.

Table 1

Cases registered and decisions taken in 1994

	Registered	Decided
Mergers	200	186
Agreements	247	550
Other cases	1 177	1 030
Total	1 624	1 766

A total of 31 Competition Authority decisions were appealed to the Stockholm City Court (court of first instance). Ten of those appeals were later withdrawn. Most appeals concerned cases where undertakings were not granted negative clearance or where a notified agreement was not exempted from the prohibitions against anti-competitive co-operation. In one case, however, a decision by the Authority to exempt co-operation in the taxi sector was appealed by competitors of the co-operating undertakings. The Court recently decided to revoke the decision of the Authority. The undertakings concerned in turn appealed this judgement to the Market Court (court of appeal).

The Stockholm City Court rendered decisions in four other cases. In three of these, the Court upheld the decisions of the Competition Authority, and in one case concerning an agreement on the use of the national power grid, the Authority's decision was revoked. The first three cases have been appealed to the Market Court.

Anti-competitive co-operation

Information exchanges

The Swedish Competition Authority has examined several agreements concerning the exchange of information between competitors. Generally these exchanges have been initiated and handled by trade associations. The Swedish Competition Authority has in most cases taken a negative view of this kind of co-operation.

The Association of South Swedish Wood Exporters produces statistics regarding wood products sold by sawmills in southern Sweden. The association has some 80 members, and the co-operation concerning statistics gives detailed and current figures regarding individual business agreements concluded by member companies. The statistics show, among other things, contract prices, delivery volumes, data regarding quality and delivery procedures. Although the individual parties to the business agreements do not appear in the statistics, the Competition Authority nevertheless stated that the exchange between competitors of detailed and current statistical information had an appreciable effect on the market and therefore restricted competition. On those grounds, the statistical co-operation could not be given negative clearance or be granted exemption.

The Trade Association of Wooden House Manufacturers (STR) administered co-operation on standard terms of sale. Among the standard terms was a clause concerning how prices should be regulated using a certain index, MT 74, which is based on price changes within the wooden house industry. The Competition Authority was of the opinion that standard terms of sale normally contribute to more efficient distribution and thus benefit consumers. However, a common pricing clause based on a particular index has a direct impact on price and could be used as a means of restricting competition. The Competition Authority rejected STR's application for negative clearance and did not grant exemption.

The Swedish Gramophone Suppliers' Association, consisting of the seven largest suppliers of phonograms in Sweden, collected and compiled information which was distributed on a monthly basis to the participants in the information system. The exchange system provided information on sales, prices and market shares of individual firms. This exchange of information took place on an oligopolistic market, where the seven leading firms had a combined market share of approximately 85 per cent.

Since competition could be reduced by parallel or concerted behaviour between the firms involved, the Competition Authority concluded that the effect of the exchange of information was anti-competitive, and that it was therefore incompatible with the Swedish Competition Act. The Competition Authority rejected the application for negative clearance and individual exemption concerning the exchange of information.

Horizontal price co-operation

Swedish trade organisations have traditionally distributed price-lists containing recommended selling prices to their members. The main argument in favour of these lists was that they saved smaller companies a considerable amount of work. The Authority's view, however, is that the positive effects of the co-operation for smaller companies cannot counterbalance the harmful effects, particularly when companies belonging to a group of companies or to a retail chain are part of the co-operation and where this covers a substantial part of the market.

The Swedish Association for Motor Car Retail Trades and Repairs issued a purchase price-list and a sales price-list regarding second-hand cars. The sales price-list contained anticipated sales prices for different car models. The purchase prices were calculated on the basis of the sales price-list. The Competition Authority stated in a decision that the sales price-list could in some respects be cost-saving for the firms. However, the result that the participating firms might be able to predict the pricing policy pursued by competitors could lead to price rigidity and weakened competition. Setting prices for different products is part of normal market behaviour and should be done by the undertaking itself. The Competition Authority did not grant exemption, but pointed out that the objectives of the applicants could be attained, for instance, by publishing aggregate industry-wide statistical data on historical prices.

The Trade Association of Electricians (EIO) issued recommended prices to its members, electricians and electrical resale companies, as a means of helping them in their pricing. The EIO claimed that the recommended prices were time and cost-saving and gave smaller companies more time for installing or selling activities. The Competition Authority argued that the negative effects of the co-operation outweighed the positive effects for the smaller companies, because many large companies participated in the co-operation which covered a large share of the market. The Competition Authority rejected the EIO's application for negative clearance and did not grant exemption.

In an agreement concluded between the two largest commercial television companies with a combined market share of approximately 80-90 per cent, the sale of advertising time in the two television channels was regulated through co-operation in a third, jointly controlled company. Since the co-operation agreement constituted a high risk for concerted behaviour between competitors concerning the fixing of prices and other terms of sale, the Competition Authority concluded that the effect of the co-operation agreement was anti-competitive and therefore incompatible with the Competition Act. The Authority rejected the application for negative clearance and individual exemption concerning this co-operation agreement.

According to the rules of the credit card operator Visa, an acceptor (e.g. a selling unit) is prohibited from imposing a surcharge on transactions, unless national law expressly permits this (the discrimination rule). The non-discrimination clause is incorporated into every agreement between acquirers (the acceptor's bank) and acceptors. If an acceptor does not agree to this clause, it is not permitted to accept Visa cards. Acquirers are thus able to ensure that acceptors cannot charge different prices to different customers. This means that the acceptors' freedom to decide how they shall pass on their costs is restricted. If the acceptors were able to pass on such costs to the cardholders, they might decide that the cards would be of such use to them that they would not pass on any costs or only a small part thereof. Another effect of this horizontal co-operation is that the cardholder does not have all of the necessary information concerning the costs of the card system. If the cost of the cards for the acceptor were passed on to the cardholders, the cardholders' choice of card would be based not only on the costs specific to different cards, but also on the prices charged by acceptors. The Competition Authority is of the opinion that this horizontal co-operation might lead to restrictions on competition. Negative clearance therefore could not be granted.

Vertical co-operation

In Sweden, it is customary that suppliers issue price recommendations for their retailers, i.e. vertical price recommendations which appear either in price-lists or in product catalogues handed out to consumers. The Competition Authority has taken decisions in a number of cases regarding vertical price recommendations where companies have applied for negative clearance or an individual exemption. When considering these cases, the question of how prices have been decided and by whom has been of conclusive significance. In cases where the recommendation has been unilaterally decided by the supplier, i.e. without consultations with retailers, such conduct has been considered not to violate the Swedish Competition Act since no agreement exists.

If, however, the retailers are in any way forced by the supplier to keep the recommended price, the result might be that vertical price recommendations violate the Competition Act. If retailers agree among themselves on price fixing, the result might be a horizontal agreement that is prohibited. The Competition Authority considers that a price-list should emphasise that such prices are only to be seen as recommendations by the supplier and that the retailers are free to set their own prices.

Exclusive distribution

A general agent of agricultural machinery planned to appoint a retailer as exclusive distributor in the south of Sweden. The retailer was owned by a large Swedish agricultural association, which also owned another company on the same relevant market. The two companies were the biggest actors on the market for agricultural machinery. One company had salesmen on the premises of the other, and they co-operated on the sale of spare parts.

The agent made a notification to the Competition Authority with a view to obtaining exemption for the agreement. The Competition Authority stated in its decision that the exclusive distribution agreement would imply that a farmer who wants to buy, for example, a plough could do so only through the above-mentioned agricultural association. Service and sale of spare parts would also be affected. The agreement would give the association too strong a position among retailers and it would limit the buyer's freedom of choice to one retailer. The agreement was thus not compatible with the Competition Act, and the Competition Authority did not grant exemption.

Abuse of dominant position

Interlining

Transwede Airways made a complaint to the Swedish Competition Authority that Scandinavian Airlines Systems (SAS) abused its dominant position by refusing to enter into a reciprocal interlining agreement with Transwede. Interlining means that one airline accepts another airline's tickets for all or part of a journey. As a condition for entering into a reciprocal interlining agreement with Transwede, SAS had required that Transwede put up a financial guarantee. In addition, SAS was only willing to accept interlining on routes which were operated by both airlines.

The Competition Authority found that SAS, due to its dominant position on the market for domestic flights, had a strong responsibility not to behave in a way detrimental to the functioning of that market. However, as SAS and Transwede later entered into an interlining agreement that was more advantageous to Transwede, the Competition Authority found no reason to take further action.

Ground handling

Based on several complaints, the Competition Authority investigated the activities of the Swedish Civil Aviation Administration (CAA), in the market for ground handling services, e.g. the check-in of passengers and luggage, loading and unloading aircraft, etc., at airports owned by the Swedish state. The CAA is active on the market for ground handling services and at the same time controls entry to the market for other companies. The CAA has a dominant position on the market for ground handling services which are also performed by SAS.

Following discussions with the Competition Authority, the CAA has undertaken to allow new companies to enter the market for ground handling services at the two largest airports in Sweden, Arlanda in Stockholm and Landvetter in Gothenburg. The commitment made by the CAA was supposed to take effect from 1 April 1995. In addition, the CAA undertook to set up transparent criteria for market entry to other airports owned by the State.

In its decision, the Competition Authority found that these measures were designed to increase competition on the market for ground handling services and found no reason to take further action. Following the Authority's decision, the CAA presented a detailed plan for admitting new entrants to the market for ground handling services at Arlanda and Landvetter airports.

Postal services

The postal sector in Sweden was fully liberalised in 1993. As a result, reserved postal services giving exclusive rights to the Swedish Postal Administration (Sweden Post), similar to the present conditions for all national postal administrations within the EC, no longer exist in Sweden. As a result, some competition from new entrants has been established in certain areas of the postal market. This new competition also appears at the very core of the traditional postal service sector, i.e. the distribution of addressed letters to businesses and households. Several of these new entrepreneurs have filed complaints concerning alleged abuse of dominant position by Sweden Post.

In the Privpak case, it was found that Sweden Post entered into exclusive agreements with customers obliging them to buy all or most of their mail order distribution from Sweden Post. It was also found that different types of rebates and sales target schemes with fidelity effects were put into practice. The arrangements resulted in a situation where customers had limited or no possibilities at all to use Privpak, a new entrepreneur in the field of mail order distribution. This practice unfairly strengthens Sweden Post's dominant position on the market and was found to constitute an abuse.

In the CityMail case, a "cream-skimming" clause used in agreements with customers was examined. According to this clause, a customer could expect a price rise if the customer used CityMail, a local mail operator in the Stockholm area, for a part of its mail distribution. The clause gave no information as to how much the price would rise in such a situation, thus keeping the customers in a state of uncertainty. As a consequence, a customer needing nation-wide distribution had few opportunities to use CityMail for distribution in Stockholm and simultaneously use Sweden Post for distribution in the rest of the country. It was found that the way Sweden Post used this clause constituted an abuse of dominant position.

The SDR case referred to the problems arising when an undertaking is both a competitor and a customer of a firm with a dominant position. SDR competes with Sweden Post in the field of distribution of unaddressed letters. SDR operates nation-wide except in rural areas where it is thus obliged to let Sweden Post distribute its customers' unaddressed letters. It was found that the price for distribution in these areas was dependent upon whether the customer also used Sweden Post for distribution in urban areas. As a consequence, SDR paid a higher price for this service compared to other customers. This practice was also found to constitute an abuse within the meaning of the Competition Act.

Inter-connection

The state-owned telecommunications company Telia controls the main telecommunications infrastructure in Sweden, including the access networks which Telia's competitors need in order to be able to carry on their activities. In January 1995, Telia's competitor Tele2 requested that the Competition Authority examine whether Telia's actions in connection with the signing of a new agreement on inter-connected traffic were compatible with the Competition Act. Tele2 was of the opinion that the price demanded by Telia made competition impossible.

The Competition Authority stated that Telia charged Tele2 a much higher price for distributing a national call than Telia charged its own customers when making such a call. Telia's practice was regarded by the Authority as price discrimination giving rise to a foreclosure effect. The Authority's assessment was that there were strong reasons to consider this discrimination as an abuse of dominant position. In an interim decision by the Authority, Telia was prohibited from charging the price it wanted for inter-connection. Under penalty of a fine amounting to SKr ten million, an injunction was issued.

Mergers and concentrations

Voluntary commitment to reduce ownership

The Swedish brewery Bryggeri AB Falken, which owns 45 per cent of the shares of the company Falcon AB, filed an application regarding their intention to buy the remaining 55 per cent. After the acquisition, the company Branded Consumer Products AB (BCP) would own 70 per cent of the shares in Falken. BCP also owns the largest brewery in Sweden, AB Pripps Bryggerier. Together Pripps and Falcon hold a large share of the market. BCP has, however, declared its intention to sell both companies.

To keep Falcon's position as an independent actor and to prevent strategic co-ordination between the activities in the market, BCP made a voluntary commitment under penalty of a fine of SKr 50 million to diminish direct or indirect ownership in Falken to below 50 per cent and also that no integration measures would occur between Falcon and Pripps. In addition, Falcon would not be bound in any way by directives from BCP concerning market behaviour in relation to Pripps. After BCP's voluntary commitment, the Competition Authority decided not to take any action against the acquisition.

Voluntary commitment to divest

The two largest lock companies in Sweden and Finland notified the Competition Authority of their proposed merger. The two companies were the leading suppliers of locks in both Sweden and Finland with a total market share in some sectors amounting to 95 per cent. During the in-depth investigation, the Authority opposed the merger since it would strengthen an already dominant position on the Swedish market. For this reason, the companies made a voluntary commitment under penalty of a fine of SKr 50 million to divest a Finnish manufacturing subsidiary. According to the commitment, the sale was to take place within six months and the buyer should have both the financial strength and industrial experience necessary to run and develop the divested company in the future. Referring to the voluntary commitment given by the companies, the Competition Authority decided not to intervene. A few months later, the companies presented a buyer: a Finnish holding company owned by different insurance, holding and industrial companies, as well as members of the former boards of directors of the subsidiary. The Competition Authority stated that the merging companies had thus fulfilled their commitment regarding the conditions of the divestiture.

Removal of non-competition clause

The two main Swedish slaughter-houses, Farmek and Skanek, decided to merge their processing operations into a jointly owned company named Scan HB. The Competition Authority initially raised serious doubts as to the merger's compatibility with the rules governing concentrations. The parties to the concentration undertook to make certain amendments to the merger agreement. A non-competition clause was removed, and two clauses aiming at the non-discrimination of other undertakings in the meat processing industry were included. The amendments in the merger agreement made it possible for the Competition Authority to clear the merger. The commitment of the parties to amend the agreement was made under penalty of a fine of SKr 60 million.

Vertical control

Vattenfall, the largest producer of electricity in Sweden, acquired two municipal distribution companies. The Competition Authority examined whether Vattenfall, through its acquisitions, obtained a position on the market which impeded the existence or development of effective competition. The Authority found that the acquisitions strengthened Vattenfall's dominant position on the electricity market. It is also likely that the competitive conditions on a market to be deregulated in the future are impaired, if the largest producers of electricity acquire independent distribution companies. Considering the fact that Vattenfall had a comparatively small share of distribution of electricity to consumers, the Authority did not find sufficient reason to regard the acquisitions as being an infringement of the Competition Act and consequently did not proceed further.

In its decision, however, the Authority stated that these acquisitions do influence the development of effective competition on the market for electricity. The prerequisites for effective competition may be jeopardised if the dominant producer is permitted to acquire distribution companies without restriction. The Authority stresses in its decisions that the government, as owner of Vattenfall, can prevent acquisitions and other steps taken by the company which undermine the aim of creating an electricity market with effective competition.

Telecommunications

Sweden and the United Kingdom have the most deregulated telecommunications markets in Europe. Several international companies have already entered the Swedish telecommunications market to compete with Telia, which was formed 1 July 1993 when Televerket (Swedish Telecom), a government agency, became a state-owned limited liability company. Efficient competition has been established in several market segments through the entry into the Swedish market of several economic agents, such as AT&T, France Telecom, Network Services Nordic and British Telecom. Tele2 also offers national telephone services.

Telia has, however, a strong position on the Swedish market and is dominant in several areas. At present, Telia has a *de facto* monopoly on the market for local calls and is also dominant on the market for national calls. Telia is the main owner of the public network and the dominant supplier of different network services. Other providers of telecommunications products or services need inter-connection and depend on Telia to be able to deliver their services, whilst customer equipment vendors need connection to the public network.

In order to improve conditions for effective competition on different parts of the telecom market, it is necessary to make some structural changes to the Telia group. Structural intervention is generally a powerful tool for influencing market behaviour.

In order to promote competition on the customer equipment market, the Authority has proposed that the division in the Telia group responsible for supplying customer equipment, such as PBXs, needs to be separated from the Telia group.

The market for mobile services is dominated by the NMT systems run by Telia Mobitel, a subsidiary of Telia. A GSM system was introduced in 1992. On this market, Telia Mobitel faces competition from Comviq GSM and Europolitan. In order to promote competition on the market for mobile services, the Competition Authority has suggested that Telia Mobitel's NMT business be separated from its GSM business. A separate company providing NMT services would make it possible for Telia Mobitel's competitors to offer NMT as well as GSM services to the benefit of their customers.

The public sector

During the 1990s, municipalities, county councils and government agencies have increasingly begun to compete with private enterprises on markets which traditionally have been subject to competition. This has caused important competition problems judging by the number of complaints made to the Competition Authority. One of the reasons for this is that operators from the public sector are able to subsidise their activities with taxpayers' money, which leads to a distortion of competition. Undertakings in the public sector are allegedly using predatory pricing as a means of entering markets where competition exists. However, in a recent report, the Competition Authority stated that the concept of predatory pricing within the meaning of the Competition Act is not applicable in these cases. For instance, the purpose of the pricing policies of municipalities is not to force competitors to leave the market and thus be able to raise prices to levels above what may be considered as commercially reasonable. The purpose might instead be to ensure continued employment and efficient use of existing resources.

III. Regulation and deregulation

Regulation

During 1994, the Swedish Competition Authority gave competition views on a large number of government reports covering different areas, such as environmental protection. The Authority underlined that different actions to protect the environment should be formulated with regard to competition rules. Neutral competitive conditions and international co-operation must be the basis for improved environmental protection. Considerations regarding the environmental aspect of production are increasingly becoming an important instrument for improving the ability to compete.

National requirements in the environmental domain may result in trade hindrance effects that are in conflict with international commitments thereby limiting competition. Insofar as possible, companies and other economic actors must be given opportunities to find their own solutions for achieving environmental goals. The Competition Authority underlined the importance of general economic policy controls being predictable and giving companies legal security. It is important that the economic controls regarding polluting products, processes and companies be competitively neutral. This is in line with the Polluter Pays Principle.

With regard to the Nordic environmental marking system, the Competition Authority thought it should be maintained and developed parallel with the corresponding marking system within the European Union. The Competition Authority underlined the necessity that environmental rules are also given international importance.

Sweden has adopted a number of regulations on packaging and packaging waste. The regulations lay the responsibility for the achievement of recovery and recycling goals on economic operators. Even though the regulations do not expressly force economic operators to co-operate over recycling systems, they nevertheless constitute an incentive for co-operation. With reference to the provisions in the regulations, economic operators jointly create recycling systems -- one nation-wide system for each packaging material.

There is a risk that such types of environmental regulations might lead to activities restricting competition on the market, although they do not expressly provide for it. For instance, it can be anticipated that systems for collecting packaging will, at least to begin with, each obtain an exclusive position on the market for their respective packaging material. Hence, it is of great importance to make sure that the administrators of the systems do not abuse this position by , for example, imposing unfair trading conditions or discriminating against imports of foreign products. One other example is that the functioning of the systems requires a certain exchange of information, i.e. the volume of packaging placed on the market. It is important to ensure that this information is indeed necessary and that it is treated as strictly confidential. Another example is where the use of recycled material is limited, i.e. available only to certain producers or products. This might diminish incentives for technical progress.

Generally, in these cases, it is a delicate and complicated task to decide to what extent an activity is necessary in order to achieve the targets for recovery and recycling laid down by law, and to what extent the activity goes beyond what is a requirement of the law.

Deregulation

The selling of alcoholic beverages

Two state-owned companies, Systembolaget AB and Vin & Sprit AB, have held a monopoly on the market for alcoholic beverages. Systembolaget holds a monopoly in the consumer retail trade, and Vin & Sprit on imports and wholesale trade and, with some exceptions, on exports and manufacturing. Due to the EEA Agreement and Swedish membership in the EU, conditions regarding these monopolies have changed greatly.

On 1 January 1995, a new act on the sale of alcohol entered into force. Among other things, the new act states that only the retail monopoly will remain. All other monopolies are replaced by a new licensing system. Thus the market for alcoholic beverages is being opened up to competition in several respects. A new authority, the Swedish Alcohol Inspection Board, is responsible for issues regarding monitoring and licensing. Market actors who wish to manufacture or to conduct wholesale trade in alcoholic beverages, must apply for a licence from the Board. To obtain a licence, certain conditions, such as availability of storage facilities, must be satisfied. At present, the market is in a transitional state. The Swedish Alcohol Inspection Board granted the first licences during March 1995.

A result of the negotiations concerning Sweden's membership of the EU was that the Competition Authority will monitor the non-discriminatory functioning of the retail monopoly and report to the European Commission.

SWITZERLAND*

(November 1993 - March 1995)

I. Changes to competition laws and policies adopted or envisaged

Complete revision of the Cartels Act

Progress report

On 23 November 1994, the Federal Council sent Parliament its new draft legislation on cartels and other restraints on competition. Both houses of Parliament are expected to examine the bill again this year, making it likely that the new law will take effect sometime in 1996.

Main features of the bill

The government's determination to revitalise the Swiss economy by further unleashing the forces of competition required a radical overhaul of the existing Cartels Act. While the bill retains the principle of abuse (as the constitution requires), the provisions dealing with the civil and administrative law applicable to cartels unified and worded more incisively the rules of substantive law. At the same time, "the elimination of effective competition" has been made the primary criterion for determining whether restraints on competition exist or not.

Compared with the current law, the bill innovates on the following points: It introduces the presumption that horizontal price-fixing agreements, quotas or market-sharing agreements eliminate effective competition and are therefore unlawful. Other agreements are lawful, provided that they enhance economic efficiency. It will also be possible to acknowledge that some types of agreements improve economic efficiency.

In respect of firms holding dominant positions, the bill contains a general clause and a list of potential abuses. The practices of such companies, on either the supply or the demand side, are treated in the same manner, regardless of whether the firms belong to the public or the private sector.

Under the proposed restrictions on business concentration, concentration operations exceeding certain thresholds (annual turnover of SF two billion world-wide or SF 500 million in Switzerland) would have to be reported. Concentrations that might eliminate effective competition would not be authorised.

As proposed, the law would apply to firms that perform public services or that operate in a government-regulated market, if the legislation setting forth the State's role does not exclude competition.

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* The original language of this report is French.

Institutionally, the bill would separate investigative and decision-making powers, with the Secretariat of the Competition Commission responsible for the first and the Competition Commission (which would replace the Cartels Commission) responsible for decision-making.

Competition policy

The reform of cartel legislation is part of a wide-ranging programme to revitalise the Swiss economy, based on the conviction that the international competitiveness of the Swiss economy can best be improved by substantially increasing competition in the domestic Swiss market. Among the first measures the government has taken to achieve this end, in addition to revising thoroughly the Cartels Act, was to propose legislation eliminating technical barriers to trade, which restrain foreign competition, and to draft the Domestic Market Act, intended to eliminate government-imposed impediments to trade between cantons.

Concerning competition policy, the Cartels Commission stepped up its activity with regard to federally regulated markets, such as health care, motor vehicle sales and trade in agricultural products.

II. Enforcement of competition laws and policies

Activity of the Cartels Commission

Investigations

The investigations carried out by the Cartels Commission during the period under review dealt with :

-- sand, gravel and ready-mix concrete;

-- the motor vehicle market;

-- automatic switches;

-- the market for bread flour;

-- the Berne medical services market;

-- the medicinal drug market;

-- regulation of the cheese market;

-- cantonal banks; and

-- codes of conduct for selected firms in the media sector.

Motor vehicle market

This investigation examined three segments of the motor vehicle market : the import of new cars and spare parts; trade in spare parts and services; and motor vehicle retailing. The Cartels Commission has now completed the first stage of its work. Its investigation has shown that federal approval requirements in effect gave importers a *de facto* monopoly over import of their brands of cars -- a position they can exploit in the Swiss market by charging prices that are high relative to those prevailing abroad. These importers are also able to impose steadily greater demands on dealers, making them increasingly dependent. New cars are being sold with longer and longer warranties which are conditional upon the use of original spare parts, and which require that routine maintenance and repairs be carried out by garages of the brand in question. Such provisions tend to dissuade motorists from patronising garages that are not authorised dealers for their brand of car.

The Cartels Commission vigorously advocated amendments to the legislation governing vehicle approval (the revised standards are to take effect on 1 October 1995). In a second stage of the investigation, the Commission will initiate negotiations with each importer. Its action will then be based on directives aimed at rectifying the restraints on, and distortions of, competition that were observed during the first stage of its work.

Medicinal drug market

The purpose of this latest investigation of the drug market was to examine a number of questions of principle, such as the authorisation of parallel imports, mutual recognition of registration, provisions relating to market power (especially as regards sets of products and pricing), the consequences of the liberalisation of advertising and the partial or total abolition of the trade association that currently oversees the market.

In addition, the subcommittee conducting the investigation examined several bills currently under preparation. It will participate in various ways in framing a new law on drugs. The group's mandate from the government explicitly states that it should address the opening up of markets and competition issues.

Regulation of the cheese market

This investigation deals with the regulation of the Swiss cheese market. In particular, there are regulations that govern the selling of Emmental, Gruyère and Sbrinz -- the varieties that together account for the bulk of Swiss cheese production. The investigation complements the Cartels Commission's 1993 published report on the milk market.

In its evaluation, the Commission deems that regulation of the cheese market has highly detrimental repercussions on competition. Agricultural policy and the terms of foreign trade form a policy context that in no way justifies such a rigid, government-controlled market that leaves little room for competition at any level in the economy. Where the current regulations fail is that guarantees for prices, margins, purchases and certain costs excessively restrain free enterprise. The upshot is that economic agents are not accountable for their actions, since the State carries the risk for insufficient performance on the market. Another drawback of this regulation is the high cost borne by the State to promote cheese sales, since it covers the deficit of the Union suisse du commerce de fromage (USF, or Swiss Union for the Cheese Trade), which markets the cheeses mentioned above. Whereas exports play a pivotal economic

role in the cheese industry, the competitiveness of Swiss cheeses, particularly Emmental, has declined sharply. As a result, the Commission has recommended that the government repeal State regulation of the cheese market and adjust milk prices on the basis of price levels within the European Union.

The Cartels Commission has come out in favour of a market system consistent with the principles of competition, and a system of protection for brands, and has also advocated that agricultural products be labelled with their place of origin, in response to consumer demand.

Codes of conduct for selected firms in the media sector

In its (1993) report on concentration in the Swiss press, the Cartels Commission pointed out that concentration was inevitable in this sector and that this had positive, as well as negative, effects; much depended on how publishers behaved in the market. The Commission also looked into external influences on the press, in particular, the role played by advertising agencies. In addition, exclusive distribution through news-stands has long been a matter of interest to the Commission, which concluded that codes of conduct ought to be established for certain large companies that dominate the respective markets. The Commission selected Édipresse, which controls half the circulation of French-language dailies; the Merkur and Naville news-stand agencies, which have divided up the Swiss market geographically; and, lastly, Publicitas, which runs the advertising for a large number of dailies, has exclusive access to an efficient system for placing advertisements and possesses a large database from which advertisers can select titles whose readership most closely matches their target markets.

The Commission noted that the recipients of these directives acknowledged the need for rules of conduct. The companies involved were especially keen that any directives that were formulated should be easy to apply. The three codes were drawn up in a spirit of resolutely constructive co-operation. The codes were published in Publ. CCSPr 5/1994.

Preliminary investigations

During the year, 33 preliminary investigations were opened and 16 were completed. At the end of the year, 27 were still in progress.

These preliminary investigations focused *inter alia* on medical services (activities, health insurance funds, etc.), specialised trade (sporting goods and children's articles), media (books, advertising consultants and advertisements) and monopoly public services.

Examination of draft legislation

The Cartels Commission gave its opinion on a number of subjects, including:

-- liberalisation of public procurement, including bringing the procedures into line with GATT agreements;

-- the legal status of semi-public bodies, such as the Institut fédéral de la propriété intellectuelle (Federal Institute for Intellectual Property) and the Société coopérative suisse de cérérales et matières fourragères (Swiss Feed Grain Co-operative);

-- amendment of legislation on brands, unfair competition and wheat;

-- private insurance policies (life, motor vehicle liability, etc.);

-- banks and S&Ls;

-- energy (CO_2 tax);

-- health (application of the Health Insurance Act, pricing of medical testing and distribution of condoms); and

-- the media (RTL licence for a Swiss television network and applications for local television stations).

In addition, the Cartels Commission contributed to the revision of the Cartels Act, as well as to the framing of the Domestic Market Act and the Technical Barriers to Trade Act.

Price surveillance

In addition to the Cartels Act, Switzerland also has legislation on price surveillance. Price surveillance is carried out by the Price Inspector, who is appointed by the Federal Council. This law is an instrument of competition policy insofar as it provides for an examination of pricing in sectors where monopolies exist. The Inspector's authority extends to economic activities regulated by the State.

In 1994, the Price Surveillance Office took action (which in most cases has already been successful) with regard to:

-- private hospital fees;

-- pricing policy for postal and telecommunications services (internal subsidies);

-- cantonal monopolies over real estate insurance;

-- dentists' fees;

-- architects' fees;

-- repercussions of the introduction of VAT (on 1 January 1995);

-- radio and television licence fees; and

-- motor vehicle liability insurance premiums.

New studies on competition policy

The Cartels Commission publishes its investigative reports, opinions and annual reports in "Publications of the Swiss Cartels Commission and the Price Inspector" (Publ. CCSPr). These publications also contain decisions by the Minister for the Economy with regard to the implementation of

recommendations, as well as court rulings made under the Cartels Act. For 1994, the contents were as follows :

Part 1a/1994	Cartels Commission: Annual Report for 1993
Part 1b/1994	Price Surveillance Office: Annual Report
Part 2/1994	Sand, gravel and ready-mix concrete - Automatic switches
Part 3/1994	Competition in the motor vehicle (passenger car) market
Part 4/1994	Regulation of the cheese market The market for bread flour
Part 5/1994	The Berne medical services market Codes of conduct in respect of Édipresse, Kiosk/Naville and Publicitas

The main studies and articles on competition published in Switzerland since the last report were :

BALDI, M., "Zur Konzeption des Entwurfs für ein neues Kartellgesetz", Zäch/Zweifel, *Grundfragen der schweizerischen Kartellrechtsreform*, St. Gallen 1995, 253-297.

BAUDENBACHER, C., "Zur Revision des Schweizerischen Kartellegesetzes". *Aktuelle Juristische Praxis*, 1994, 1367-1375.

BENOÎT, C., *Le régime des ordres de marché du droit public en droit de la concurrence*, Fribourg 1994.

BORNER, S., BRUNETTI, A. and WEDER, R., "Ökonomische Analyse zur Revision des Schweizerischen Kartellegesetzes." Zäch/Zweifel, *Grundfragen der schweizerischen Kartellerechtsreform*, St. Gallen 1995, 35-92.

BOVET, C., "Concurrence et personnalité économique". *Contributions en l'honneur de P. Tercier*, Fribourg 1993, 139-164.

DUTOIT, B., "Les contrats de concession exclusive et de distribution sélective sous le double projecteur du droit suisse et du droit européen des ententes". *Zeitschrift für Schweizerisches Recht* 1993 I., 377-398.

HOMBURGER, E., *Recht und private Wirtschaftsmacht Ein Versuch zur Erhellung wechselseitiger Besüge*, Zürich 1993.

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RHINOW, R. and BIAGGINI, G., "Verfassungsrechtliche Aspekte der Kartellgesetzrevision." Zäch/Zweifel, *Grundfragen der schweizerischen Kartellrechtsreform*, St. Gallen 1995, 93-144.

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SCHMIDHAUSER, B., *Kartellrecht und Umweltschutz. Schweiz, Deutschalnd, Europäsche Gemeinschaft*, Basel 1993.

SCHULTHEISS-BÜLMANN, C., *Die Europaverträglichkeit des shweizerischen Kartellrechts: eine Untersuchung anhand der Beurteilung von Patent -und Know-how-lizenzverträgen im Wettbewerbsrecht der EG und der Schweiz*, Hallstadt 1993.

STOFFEL, W.A., *Wettbewerbsrecht und staatliche Wirtschaftstätigkeit*, Fribourg 1994.

STOFFEL, W.A., "Das schweizerische Kartellrecht: Rückblick auf die jüngste Praxis und Ansblick auf die Revisionsbemühungen". *Schweizerische Zeitschrift für Wirtschaftsrecht* 1994, 105-116.

TERCIER, P., "Du droit des cartels au droit de la concurrence". *Zeitschrift für Schweizerisches Recht* 1993 I, 399-418.

WEVER, R.J., *Vom Monopol zum Wettbewerb, Regulierung der Kommikationsmärkte im Wandel*, Zürich 1994.

ZÄCH, R. and ZWEIFEL, P., "Plädoyer für das neue Kartellegesetz". Zäch/Zweifel, *Grundfragen der schweizerischen Kartellrechtsreform*, St. Gallen 1995, 19-33.

UNITED KINGDOM*

(1994)

Executive Summary

While there were no fundamental changes in 1994 to the competition legislation, a number of significant procedural changes were brought about by the Deregulation and Contracting Out Act 1994 (some to come into effect on 3 January 1995) or by secondary legislation. The most significant of these extended the provisions by which legally enforceable undertakings may be accepted in lieu of an investigation by the Monopolies and Mergers Commission (MMC). This change should allow speedier solutions to straightforward competition problems.

An important judgment of the House of Lords in the case *of Director General of Fair Trading v. Pioneer Concrete (UK) Limited and another* ([1994] 3 WLR 1249) has removed a defect arising from earlier Court of Appeal judgments by making it clear that companies are legally responsible should their employees participate in unlawful restrictive agreements in the course of their employment, whether or not those companies forbade their employees to enter into such agreements.

There was a significant increase in merger activity compared with 1993, and in the number of references to the MMC. Among the monopoly cases referred to the MMC or on which reports were published during the year were several involving vertical restraints and intellectual property rights which had an international dimension or interest - including video games, performing rights, recorded music (CDs) and films.

There were some significant reports by the Director General of Fair Trading under the special regulatory regimes that apply to the financial services sector, notably reports on rules of the London Stock Exchange and on applications for recognition of four overseas investment exchanges.

I. Changes to competition laws and policies adopted or envisaged

Summary of new legal provisions in competition law and related legislation

There were no fundamental changes in 1994 to the existing competition legislation. The government was unable to make parliamentary time available to reform the legislation dealing with cartels. A number of significant procedural changes were brought about by the Deregulation and Contracting Out Act 1994 (some to come into effect on 3 January 1995) or by secondary legislation. There are two main changes.

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* The original language of this report is English.

Undertakings in lieu of a merger or monopoly reference

The scope for the Secretary of State to accept enforceable undertakings in lieu of a reference to the Monopolies and Mergers Commission (MMC) under the Fair Trading Act 1973 has been extended. Hitherto it had been possible to consider only undertakings to divest assets as an alternative to a merger reference; the new provisions enable the Secretary of State to accept undertakings on any matter as an alternative to a merger reference and, for the first time, as an alternative to a monopoly reference. These changes should allow speedier solutions to straightforward competition problems which otherwise would have entailed a full-scale investigation by the MMC.

Anti-competitive practices

The amendment abolishes the provision in the Competition Act 1980 for the Director General of Fair Trading (DGFT) to undertake his own statutory investigation of a suspected anti-competitive practice and publish a report on that investigation preparatory to either the acceptance of enforceable undertakings to remedy the adverse effects of the practice, or, in the absence of such undertakings, to make a reference to the MMC.

Changes in competition rules, policies or guidelines

A judgment of the House of Lords in the case of *DGFT v. Pioneer Concrete UK Limited (and others)* has removed a defect arising from earlier Court of Appeal judgments by making it clear that companies are legally responsible should their employees participate in unlawful restrictive agreements in the course of their employment, whether or not those companies forbade their employees to enter into such agreements. This judgment has served to strengthen the hand of the OFT in its efforts to uncover and deal with secret cartels.

II. Enforcement of competition laws and policies

Action against anti-competitive practices by competition authorities and the courts

Restrictive agreements (Restrictive Trade Practices Acts 1976 and 1977)

The Restrictive Trade Practices Acts of 1976 and 1977 provide the means to evaluate the effect on competition of certain commercial agreements and to prevent the operation of arrangements that are significantly anti-competitive. Details of all relevant agreements must be sent to the OFT to be entered on the public register it maintains, i.e. the Register of Restrictive Trading Agreements.

The OFT has two main responsibilities under the 1976 Act. First, it appraises the relevant restrictions in agreements which have been sent for registration at the proper time and, if necessary, refers them to the Restrictive Practices Court. The restrictions in such agreements are lawful unless and until the Court strikes them down. Secondly, it seeks out, investigates and evaluates registrable agreements which have been made secretly, and which contain restrictions whose application is unlawful, with a view to referring them to the Court.

New registered agreements

Details of 1 280 agreements were sent to the OFT in 1994, compared with 1 251 in 1993. Not all agreements prove to be registrable. In 1994, 581 agreements were added to the register (15 per cent fewer than in 1993), bringing the total number entered since the register was established in 1956 to just under 12 000.

Restrictions

Most agreements placed on the public register do not contain restrictions of such significance that they call for investigation by the Court. In other instances the OFT is sometimes able to negotiate amendments which remove the anti-competitive effect of restrictions. In these circumstances, under Section 21(2) of the 1976 Act, the Secretary of State can decide -- on the DGFT's advice -- that reference to the Court is not required. In 1994, the DGFT was able to advise the Secretary of State that 1 261 agreements (77 per cent more than in 1993) did not contain significant restrictions on competition.

In a number of other cases, the DGFT was able to exercise his discretion -- under Section 21(1) of the 1976 Act -- not to refer to the Court agreements which had ended or from which all restrictions had been removed.

Although large numbers of agreements containing restrictions are submitted for registration in accordance with the 1976 Act, the OFT continues to discover agreements which, by accident or design, have not been notified. When the DGFT has reasonable cause to believe that persons may be party to an undisclosed but registrable agreement, he can -- under Section 36 of the Act - issue a statutory notice requiring them to provide details. In 1994, some 80 new investigations were started, Section 36 notices were issued in respect of nine investigations and a number of less formal letters of enquiry were also sent.

The DGFT almost invariably refers to the Court any unlawful agreement which he believes was kept secret deliberately. Under Section 35, the Court may then make orders requiring the parties not to enforce restrictions in the agreement and not to enforce restrictions in any other registrable agreements which have not been notified to the OFT within the prescribed time limits. The DGFT may also ask the Court to make orders, under Section 2, requiring the parties not to make any similar restrictive arrangements. Breaches of orders, or of undertakings given in lieu of orders, constitute contempt of court and may lead to unlimited fines and, for directors or employees, imprisonment.

Court cases heard in 1994

i) Televised broadcasts of horse-racing to betting shops

Legal proceedings brought by the DGFT against Satellite Information Services Ltd. (SIS) and the Racecourse Association Ltd. (RCA) and its members were successfully concluded following a hearing in the Restrictive Practices Court on 11 January. The restriction in the agreement between the RCA and SIS, which prevented the RCA from offering services to any competitor of SIS without offering SIS similar terms, was struck down. SIS gave the court an undertaking not to enter into any similar agreement, and the RCA and its members were made subject to a similar order.

ii) Newspaper distribution

In March, undertakings were accepted by the court from W.H. Smith Ltd. and G.R. & J. Pemberton & Sons that they would furnish particulars of registrable agreements within the time limits specified in the 1976 Act. This followed a hearing in December 1993 when the court ruled in favour of an application by the DGFT for an order under Section 35(3) of the Act to be made against the parties because of their failure to provide details of an agreement to rationalise the wholesale distribution of newspapers, magazines and periodicals in Preston and the surrounding area.

Court proceedings

Proceedings were issued or continued in four cases during 1994.

i) Grounds maintenance

In April, proceedings were issued and served on eleven firms allegedly party to a price-fixing and market-sharing agreement involving Property Services Agency grounds maintenance contracts awarded in England and Wales.

ii) Sugar

In July, proceedings were issued and served on British Sugar plc and Tate & Lyle Industries Ltd. in respect of an agreement on prices and market-sharing in the retail sugar market between June 1986 and July 1990.

iii) Newsagents

In August, proceedings were issued and served on the National Federation of Retail Newsagents for failure to furnish details of letters that were sent to its officials and members in August 1992, and which contained implied recommendations to take collective action affecting the Saturday edition of *The Daily Telegraph*.

iv) Concrete

Proceedings continued against nine companies and eight individuals for breaches of previous court orders or undertakings in respect of some 26 registered agreements. On 12 April, the court heard an application by several of the companies to stay the proceedings pending the outcome of the House of Lords judgment in *DGFT v. Pioneer Concrete UK Ltd (and others)* (see above). The court agreed to this application, and the next stage in proceedings was delayed until 24 January 1995.

Court cases in preparation

i) Net Book Agreement

In August, the DGFT announced that he had decided to seek leave of the Court to apply to have its earlier decisions in respect of the Net Book Agreement reversed. The decisions were that the agreement was not contrary to the public interest and that books were exempt from the general prohibition on resale price maintenance in the Resale Prices Act 1976.

ii) Scottish solicitors' property centres

In November, the DGFT announced his intention to refer to the Court an agreement between the Edinburgh Solicitors' Property Centre (ESPC) and its members. A restriction in the agreement forbids ESPC's members to submit property details to the Centre if an estate agent is advertising the property elsewhere. Following the DGFT's reference to the Court in 1993 of a similar case against the Aberdeen Solicitors' Property Centre (ASPC), the ASPC's statement of case is expected early in 1995.

iii) Pre-recorded music charts

Preparations started for court proceedings against agreements which provide for the compilation of music charts. The parties to the agreements include, amongst others, the British Association of Record Dealers (BARD), Chart Information Network Ltd., CIN Ltd., Social Surveys (Gallup Poll) Ltd. and Millward Brown Ltd. The DGFT is concerned about a restriction which prevents BARD members from supplying record retail information for the purpose of compiling charts to anyone other than Chart Information Network Ltd. or its nominated contractor.

Resale price maintenance (Resale Prices Act 1976)

Under the Resale Prices Act 1976, it is unlawful for suppliers of goods to impose minimum resale prices on dealers, or to compel them to charge those prices by threatening to withhold supplies or impose some other penalty. In 1994, the OFT received 34 complaints alleging contravention of the Act, compared with 45 in 1993. In six cases, the DGFT obtained written assurances from suppliers that they would not seek to impose minimum prices at which dealers could resell their goods.

Anti-competitive practices (Competition Act 1980)

Anti-competitive practices can be investigated under the provisions of the Competition Act 1980 (as amended with effect from 3 January 1995 by the Deregulation and Contracting Out Act 1994 -- see above), although many complaints to the OFT are dealt with through informal enquiries.

From 14 August, the Anti-Competitive Practices (Exclusions) (Amendment) Order 1994 came into effect amending the thresholds under which firms can be investigated under the Competition Act. A company now falls within the anti-competitive practice provisions of the Act if its relevant annual turnover in the United Kingdom is £ten million or more, and if it has one-quarter or more of a relevant market, or it belongs to a group of inter-connected companies whose turnover and market share meets these thresholds.

Report by the DGFT

The DGFT published one report in 1994:

16 March: Fife Scottish Omnibuses Ltd.

The investigation into the behaviour of Fife Scottish (a subsidiary of Stagecoach Holdings plc) followed complaints from its main competitor, Moffat & Williamson Ltd., that it ran loss-making commercial bus services against Moffat & Williamson services and operated under subsidy from the local authority. Fife Scottish was found to have acted anti-competitively and gave satisfactory undertakings to the DGFT on 6 May 1994, without reference of the matter to the MMC.

Action on earlier report

i) Southdown Motor Services Ltd.

Undertakings were secured from Sussex Coastline Buses Ltd. (previously called Southdown Motor Services) following a reference to the MMC about the company's behaviour in Bognor Regis.

Monopoly situations (Fair Trading Act 1973)

Section 2 of the Fair Trading Act 1973 requires the DGFT to keep commercial activities in the United Kingdom under review in order to detect monopoly situations (as defined in Sections 6-11) and anti-competitive practices.

The OFT carries out this function in two ways. First, it monitors the economic performance of industries to identify areas where there may be monopolies and abuses of monopoly situations. Secondly, it takes note of complaints and other representations it receives from business and the public.

Where there is evidence of the existence of a monopoly situation, the DGFT can refer the case to the MMC for investigation, but there is no presumption that he must always do so. When he does make such a reference, however, it is for the MMC to determine whether a monopoly situation does exist and, if so, whether any matters relating to the situation operate, or may be expected to operate, against the public interest.

References to the MMC

The DGFT made three monopoly references in 1994:

14 January: The supply of video games

25 November: The supply of bus services in the North East of England

30 November: The supply of the services of administering performing rights and film synchronisation rights

Reports by the MMC

Seven monopoly reports were published in 1994:

11 February:	Private medical services
29 March:	Ice cream
30 March:	Contraceptive sheaths
28 April:	Residential mortgage valuations
12 May:	Historical on-line database services
23 June:	Recorded music
6 October:	Films

i) Private medical services

The MMC found that a complex monopoly situation existed in the supply of private medical services by consultants who followed British Medical Association (BMA) guidelines on fees or British United Provident Association benefit maxima. It also found that the BMA's publication of guidelines for medical and surgical procedures operated against the public interest. On 21 September, the BMA gave an undertaking not to publish, in any form, the document "Private Consultant Work : BMA Guidelines 1992", or any document similar in effect and relating to fees charged or to be charged for private medical services.

ii) Ice cream

The MMC found that a "complex monopoly situation" as defined in the Fair Trading Act existed in favour of Birds Eye Wall's Ltd. (BEW), Nestlé UK Ltd. and Mars UK Ltd., which between them had 88 per cent of the market in 1992. It also identified BEW, a subsidiary of Unilever plc, as a scale monopolist with some two-thirds of the market.

The enquiry centred on the widespread practice of ice-cream manufacturers of supplying retailers with freezers on condition that those freezers were stocked exclusively with the supplier's own products. The MMC found that BEW and Nestlé supplied freezers on this basis and that Mars' practice of requiring the stocking of a full range "of its products without explicitly excluding those of other suppliers had a similar practical effect".

An earlier investigation in 1979 had concluded that freezer exclusivity was not against the public interest. The MMC found that, since then, competition in the ice-cream market had changed significantly. New entrants and substantial changes in market shares meant that freezer exclusivity was a less important issue. Retailers wanting to sell ice cream had several options. Those not taking a manufacturer's freezer on an exclusive basis were usually able to obtain ice cream on better terms. Consumers had a choice of more than one manufacturer's product in at least half the shops selling ice cream, and most of them could buy readily from an alternative retailer if they wanted to.

During the course of the enquiry, BEW told the MMC that retailers stocking the company's products were under no contractual obligation to obtain supplies of ice cream exclusively from BEW concessionaires. It agreed to modify its terms of trade to make this clearer.

The MMC found insufficient evidence that the freezer exclusivity practised by BEW and Nestlé, and, in effect, by Mars, inhibited competition or choice, or that it adversely affected prices, innovation or efficiency. Nor did it find any evidence that the companies made excessive profits. It therefore concluded that, in the circumstances of the United Kingdom market, the practice of freezer exclusivity did not operate against the public interest.

iii) Contraceptive sheaths

The MMC identified a scale monopoly in favour of LRC Products Ltd., and found that the company had adopted certain practices that had the effect of maintaining its monopoly. These included selling to the National Health Service (NHS) at prices below full cost and recommending retail prices that were high in relation to trade prices.

The MMC found that the low prices charged to the NHS had resulted partly from price controls introduced following its earlier investigation in 1982. This had given LRC an incentive to maximise sales volume by allowing it to make up in one sector of the market revenues lost in another. The MMC reported that many retailers had ceased to observe LRC's high recommended retail prices following a price war initiated in 1993. It concluded that such prices nevertheless provided a benchmark against which aggressive retailers could publish price cuts.

The MMC concluded that neither of these practices operated against the public interest. Further, noting that LRC's returns on its United Kingdom business in the last two financial years had been neither unreasonably high nor unreasonably low, it concluded that the price control should be removed. LRC's ability to raise prices in the over-the-counter and vending sectors would be constrained by market forces. Moreover, in the absence of price control, there was sufficient competition to protect the NHS as a purchaser. The MMC recommended that LRC should be released from the undertakings on price control given after the 1982 investigation, and that the DGFT should then keep the position under review. The MMC also noted, however, that in the past the company had made payments to three major customers in return for their agreement to stock only LRC condoms. It found that these actions were attributable to the monopoly situation and concluded that they operated against the public interest.

On 30 March, LRC was released from its undertakings on price control. The Minister for Corporate Affairs asked the DGFT to seek new undertakings from the company that it would not enter into agreements with wholesalers or retailers under which it would grant special payments, higher discounts or any other material benefit in return for an undertaking to stock only LRC condoms or not to stock condoms of any other supplier; and that it would put in place arrangements to ensure that its staff complied with this requirement. The DGFT secured suitable undertakings on 30 June.

iv) Residential mortgage valuations

Although the MMC found that a complex monopoly existed in favour of a number of mortgage lenders, it concluded that most lenders' arrangements for mortgage valuations did not operate against the public interest. Nevertheless, the failure by some lenders to disclose to borrowers the existence and

amount of administration charges collected with valuation fees distorted competition between mortgage lenders and was against the public interest.

It recommended that, where lenders referred to valuation fees in their promotional material and mortgage application forms, they should specify separately, and clearly, the valuation fee together with any administration charges levied in connection with that fee. The Council of Mortgage Lenders subsequently issued guidance to its members to that effect. The Council also acted on a separate MMC recommendation for clarification of advice to be given to borrowers wanting to commission a homebuyer's report or structural survey in conjunction with a valuation. Finally, the MMC suggested that the rules for calculating annual percentage rates of interest on mortgage loans should be reviewed.

v) Historical on-line database services

The MMC investigated the service of providing access to historical on-line databases containing archival business and financial information, including text reproduced (or summarised) from daily and Sunday newspapers circulating generally in the United Kingdom. It concluded that there was a monopoly in favour of certain companies.

The MMC found that the practice of The Financial Times Ltd. to license only its own service, FT Profile, to include copies of *The Financial Times* in its database may have disadvantaged some of FT Profile's competitors and caused some initial inconvenience and cost to users. That step was nevertheless a legitimate competitive action intended to differentiate FT Profile from its competitors. The market was highly competitive in terms of the companies' data coverage, price, the ease of use and the extent of back-up services. There were potentially major new competitors such as suppliers of real-time services, suppliers of historical database services which did not currently include newspapers and overseas suppliers not yet offering their services in the United Kingdom, and new forms of competition were likely to come on stream as a result of technological change.

While *The Financial Times* enjoyed a special position as a newspaper because of its standing among users of business and financial information, almost all the factual information it contained was also available from a variety of other sources. Although exclusive access to *The Financial Times* in electronic form conferred an advantage on FT Profile, it was by no means an unassailable advantage. There was no evidence that FT Profile was charging systematically higher prices or making excessive profits. The MMC concluded that the licensing practice of The Financial Times Ltd. did not operate against the public interest.

vi) Recorded music

The MMC identified five United Kingdom subsidiaries of multinational record companies as complex monopolists: EMI Records Ltd., Polygram UK Holdings plc, Warner Music UK Ltd., Sony Music Entertainment (UK) Ltd. and BMG Records (UK) Ltd. They are collectively known as "the majors". Between them they accounted for about 70 per cent of the UK market for recorded music. A complex monopoly situation existed in their favour by reason of their pricing policies, arrangements over parallel imports and terms of contract with artists. On the retail side, the W. H. Smith Group plc, with its subsidiary, Our Price Ltd. (together supplying around 27 per cent by value of the market), was identified as a scale monopolist.

The MMC found that the majors competed vigorously among themselves and with the independent sector, consisting of some 600 companies. The majors were not able to exercise market power to the disadvantage of consumers as their strength in the marketplace was balanced by the influence of powerful retailing groups. Retail prices were set at competitive levels, and the majors were not making excessive profits. The MMC also found that record retailing was a competitive market and that W. H. Smith's retailing profits from recordings were not excessive. It concluded that neither the complex nor the scale monopoly situation operated against the public interest.

The enquiry was prompted by concerns about the prices of compact discs (CDs). In particular, prices appeared to be significantly higher in the United Kingdom than in the United States. The MMC found that much of this resulted from tax differences: sales taxes in the United States were considerably lower than the United Kingdom's 17.5 per cent VAT. Moreover, prices were displayed exclusive of sales tax in the United States whereas, in the UK, VAT was included. After adjusting for tax differences and using the average exchange rate for the second half of 1993 of $1.50 to the pound, prices charged in the United Kingdom for full-priced popular CDs were, on average, from seven per cent to nine per cent higher than they were in the United States. Although the differential was greater, at about 25 per cent, for full-priced classical CDs, classical music represented only nine per cent of the UK market and four per cent of the US market. Moreover, some 55 per cent of classical CDs sold in the United Kingdom were in the mid-price or budget categories and, if these were included, average price differentials were likely to be lower. The MMC also found that UK prices were generally lower than those in a number of other industrialised countries.

The UK/US price differential for full-price popular CDs was found to be no higher than that for a wide range of comparably priced manufactured goods. This further suggested that real price differentials for CDs were not the result of circumstances specific to the record industry, but related to the larger size of the US market and to generally lower retailing costs in the United States.

The record industry was a high-risk business, with sales of most recordings failing to recoup the initial investment costs, and prices had to be set accordingly. Moreover, as manufacturing costs made up a small proportion of total costs, prices often did not strictly reflect the comparative manufacturing costs of CDs, cassettes and vinyl but, rather, consumers' perceptions of the quality and value of different formats and recordings.

The MMC rejected arguments for removing the record companies' power to control parallel imports under Section 27(3) of the Copyright, Designs and Patents Act 1988. It had been suggested that this would lead to retailers importing records from the USA, thus forcing UK record companies to lower their prices. In response to this argument, the MMC pointed to the UK/US price differential for other consumer goods where there was no control on parallel imports, and to the increased risk of piracy and a general weakening of copyright protection. Moreover, removal of the right to control imports from outside the European Community would be contrary to European law on rights to control the distribution of sound recordings.

Nor was there a case for changing the contractual or copyright framework governing the relationship between artists and record companies, and the proper forum for resolving any specific dispute would be the courts.

The MMC expressed misgivings about the practice, adopted by some major retailers, of displaying "hit lists" that were not based on the national charts. Such lists might mislead or confuse consumers, particularly where they reflected the retailers' predicted sales rather than their actual sales in the preceding week. Assurances should be sought from retailers that they would specify clearly, at the

point of display, how their hit lists had been compiled. In accepting the MMC's findings, the Minister for Corporate Affairs asked the DGFT to seek such assurances. Negotiations were in progress at the end of the year.

vii) Films

The MMC valued the United Kingdom market for the distribution of films to cinemas at some £100 million in 1993. It identified a complex monopoly situation that involved: five film distributors (Buena Vista International (UK) Ltd., Columbia Pictures Corporation Ltd., Twentieth Century Fox Film Company Ltd., United International Pictures (UK) and Warner Bros Distributors Ltd.), each affiliated to Hollywood studios and together accounting for about 75 per cent of receipts from film rentals from year to year; four independent distributors (Entertainment Film Distributors Ltd., First Independent Films Ltd., Guild Film Distribution Ltd. and Rank Film Distributors Ltd.); and six exhibitors (Metro-Goldwyn-Mayer Cinemas Ltd., Odeon Cinema Ltd., Natl Amusements (UK) Ltd., United Cinemas International (UK) Ltd., Warner Bros Theatres Ltd. and Warner Bros Theatres (UK) Ltd.). Apart from Odeon, all the exhibitors had ownership links with a Hollywood studio; together these six accounted for almost 80 per cent of box-office receipts valued at around £300 million in 1993.

MGM Cinemas, with around 27 per cent of the market, was also identified as a scale monopolist. Nevertheless, in view of the strength of the chain's competitors, it was felt that this situation did not operate against the public interest. The complex monopolists were, however, engaged in two practices which operated against the public interest: alignment and minimum exhibition periods.

Aligned distributors normally first offered their films to either MGM Cinemas or Odeon, and discussed the release of those films with them. In places where both exhibitors operated directly competing cinemas, the distributors normally supplied films to only one, their aligned exhibitor. The MMC found that this practice reduced competition both among aligned distributors and between the aligned exhibitors and made the market less responsive to consumer preferences. While alignment had been previously condemned following an investigation in 1983, the MMC had stopped short of making a recommendation against the practice at that time because of the film industry's then parlous condition. In the intervening years, the industry had become stronger, and it now recommended that the practice should be ended.

The MMC found that the practice by distributors of insisting on lengthy exhibition periods (perhaps four weeks or longer) as a condition of supplying exhibitors with prints of popular films reduced the ability of cinemas with few screens to respond to consumer demand, and added to the difficulties faced by independent distributors in getting their films shown. It recommended that minimum exhibition periods should be restricted to a maximum of two weeks on first release and one week subsequently.

More generally, the MMC found there was effective competition in the distribution and exhibition of films. The industry had been transformed since 1983 and was still undergoing change. The MMC did not consider that admission prices were excessive.

In considering complaints by independent exhibitors about distributors' refusal to supply prints of popular films, the MMC looked at the accepted mechanisms for calculating film rentals. It noted that these had the effect of reducing distributors' receipts if a given audience was divided between two cinemas, and this often led to refusals to supply one of the cinemas. Given the general level of effective competition, the MMC considered it reasonable for distributors to determine supply with a view to

maximising profits on individual films, but proposed the establishment of independent machinery to consider exhibitors' complaints.

The MMC made no adverse finding on the effects in the United Kingdom of vertical integration by the Hollywood studios, but suggested that the DGFT should continue to monitor this situation.

In accepting these findings, the Minister for Corporate Affairs asked the DGFT to negotiate undertakings to end the practice of alignment and limit minimum exhibition periods. Negotiations were in progress at the end of the year. The Minister also encouraged the industry to establish a panel to draw up guidelines and consider complaints about refusal to supply.

Action on earlier reports

i) Structural warranties for new homes

The National House-Building Council (NHBC) agreed to amend its rules to enable its members to use competitors' warranty schemes instead of (rather than as well as) the NHBC scheme.

ii) Electrical contracting services at exhibition halls in London

On 22 August, the Minister for Corporate Affairs published a statutory notice of his intention to make an order implementing recommendations made by the MMC in 1990. His decision followed advice from the DGFT that, after eight months of negotiation, satisfactory undertakings would not be forthcoming from the five monopolists identified by the MMC.

iii) Animal waste

In 1993, the MMC found that a monopoly situation existed in England and Wales in the acquisition of animal waste for processing in favour of Prosper De Mulder Ltd. and other companies owned by the De Mulder family and managed as a single entity (PDM), and in Scotland in favour of William Forrest & Son (Paisley) Ltd. and its ultimate holding company, Hillsdown Holdings plc. The DGFT was asked to seek undertakings from PDM and Forrest that each company would publish a sample of prices and charges on a weekly basis, and would not engage in discriminatory pricing. Negotiations were nearing conclusion in December 1994.

iv) Matches and disposable cigarette lighters

As a consequence of developments in the market (in particular the removal of excise duties on disposable lighters and a resulting decline in the market for matches), undertakings given to the Secretary of State by Bryant and May Ltd. were reviewed and Bryant and May gave revised undertakings whereby a price freeze on matches was lifted, and less onerous conditions were placed on the provisions to be included in agreements with customers.

v) Bus services in mid and west Kent

The DGFT was unable to negotiate satisfactory undertakings with The Maidstone & District Motor Services Ltd. At the end of the year, the Department of Trade and Industry (DTI) was considering making an order against the company under Section 56(2) of the Fair Trading Act.

vi) Contact lens solutions

Following publication of the MMC's report in 1993, the Minister for Corporate Affairs announced that the government was fully committed to the implementation of the EC Directive on medical devices, which would mean that less stringent licensing would be accepted in the United Kingdom from January 1995. The Medicines Control Agency subsequently relaxed its rules restricting retail sales of solutions to opticians and pharmacies, and suppliers were enabled to vary their product licences to allow them to supply solutions to other retailers, such as supermarkets.

vii) Fine fragrances

In October, the DGFT invited the fragrance houses to volunteer an annual report on the operation of their range-stocking and minimum-purchase arrangements for the calendar year 1994. Similar information will also be requested for 1995 and 1996.

viii) National newspapers

In 1993, the MMC found a complex monopoly existing in favour of 77 newspaper wholesalers who refused to supply new applicants when they thought an area was adequately served, and also required retailers to sell only by retail from specified outlets. Subsequently, the Minister for Corporate Affairs said that he proposed to prohibit these practices by order. Nevertheless, the industry was invited to put forward voluntary proposals designed to lead to an increase in competition comparable to that which might otherwise be achieved by the proposed order.

Following consultations among the DTI, the OFT and the industry, a satisfactory code of practice was produced. The DGFT was asked to negotiate undertakings from the monopolists that they would abide by the provisions of the code. Suitable undertakings were secured, and the code came into effect on 1 October 1994.

The code defines simple, transparent and objective criteria by which retailers' applications to wholesalers are to be assessed. Any prospective retailer who can meet a specified minimum entry level (defined as half the average value of the newspapers invoiced weekly to all retailers in the wholesaler's area) and who pays a deposit (set at three times the minimum entry level) will be guaranteed supplies of newspapers. In the event of a retailer being refused supplies, the code provides for an independent appeals procedure. In addition, established retailers may, under the code, sub-retail or transfer supplies of newspapers within specified areas.

Although the MMC report dealt only with the supply of newspapers in England and Wales, wholesalers voluntarily agreed to abide by the code in Scotland and in Northern Ireland.

ix) Petrol

On the basis of recommendations made by the DGFT following a recent review, the Minister for Corporate Affairs released petrol wholesalers from certain undertakings. These had limited the extent to which they might restrict the freedom of retailers to supply alternative brands of lubricants, paraffin or anti-freeze preparations. Limits on the extent to which wholesalers might restrict retailers' sources of supplies of non-oil goods were amended to apply to independent sites only. The OFT continues to monitor the situation and expects to conduct a further review of competition in the petrol market in 1997.

x) Beer

The OFT continued to monitor brewers' compliance with the 1989 Beer Orders and to investigate evidence of anti-competitive behaviour in the brewing industry. Information provided by the four brewers that gave undertakings in 1992 to supply details each year of the composition of their estates was checked to ensure that the number of their tied premises remained within the maximum permitted under The Supply of Beer (Tied Estate) Order 1989. A fifth major brewer, Scottish & Newcastle plc, gave similar undertakings in January, and provided information on its estate for the first time in June.

In September, following intervention by the DGFT, the Bedford brewer Charles Wells Ltd. released restrictive covenants it had placed on a number of public houses sold to private purchasers for use as dwelling houses. The DGFT took the view that the covenants, intended to prevent the premises from being used for any commercial purpose after the sale, breached The Supply of Beer (Loan Ties, Licensed Premises and Wholesale Prices) Order 1989, which provides that, when disposing of unwanted premises, brewers may not impose any prohibition on their future use as licensed premises.

Informal enquiries

i) Vertical integration in the travel industry

Following an extensive review, the DGFT concluded that allegations against the travel industry of anti-competitive behaviour had not been substantiated. Notwithstanding ownership links between some tour operators and travel agents, there continued to be a wide choice of competitively-priced packages available to holidaymakers from both new and established firms.

The review looked at discriminatory rates of commission, decisions by agents not to carry some tour operators' brochures, tour operators' limiting the supply of brochures to agents and late-season directional selling by leading firms in the trade. In particular, it considered the behaviour of the largest player, the Thomson Travel Group, including Lunn Poly. The central issue was whether any such practices damaged competition from independent travel agencies or operators. The evidence showed that there was vigorous competition between a relatively large number of tour operators and travel agents. There was no indication that any of the leading operators with agency links had been able to insulate themselves from competition.

The DGFT was nevertheless concerned that customers might not always be aware when a travel agent had links with a particular tour operator, and urged operators and agents to disclose to customers the links between them, and to ensure that any advice given was impartial.

ii) The Times and *Daily Telegraph* price cuts

In 1993, an informal OFT enquiry had found that a reduction in the cover price of *The Times* reflected a calculated commercial decision by the newspaper's owner, News International Corporation, to increase circulation, and was not predatory. In 1994, there was another informal enquiry into cuts in the cover price of both *The Times* and the *Daily Telegraph*. This followed complaints that the reductions were predatory and intended to eliminate specific competitors, such as *The Independent*.

The DGFT concluded that a formal investigation would not be justified. The structure and characteristics of the market for national daily newspapers suggested that predatory pricing was unlikely to prove a feasible strategy for *The Times* or the *Daily Telegraph*. Their price cuts had wide-ranging effects on national and regional newspapers and did not appear to be targeted at any particular title. In view of the number of competing titles, it seemed unlikely that a predator would be able to recoup any financial losses out of supra-normal profits in the future.

Financial services

Under the terms of the Financial Services Act 1986, the DGFT is required to consider the implications for competition of the rules of the Securities and Investments Board (SIB) and of bodies seeking recognition as self-regulating organisations, investment exchanges and clearing houses, and to report his findings to the Chancellor of the Exchequer. He is further required to report on amendments to those rule books and on the organisations' practices whenever he identifies competition concerns.

In the field of retail financial services, the main event of 1994 was the establishment of a new regulator, the Personal Investment Authority (PIA). Recognised by the Chancellor of the Exchequer in June, the PIA takes over responsibility for the regulation of bodies retailing financial services to private investors.

Another major development was the introduction of new product and commission-disclosure rules on investment-linked insurance products. The new rules reflected a Treasury direction to SIB, following a report from the DGFT that had criticised earlier proposals. As the year closed, the OFT was in discussion with the PIA about disclosure rules for non-life products.

On the wholesale side, dealing with financial markets, the DGFT published reports on applications for recognition from four overseas investment exchanges. In the domestic financial markets, attention focused on the rules of the London Stock Exchange, and a report was produced on the Exchange's arrangements for publishing information on large trades. The OFT also continued its review of market makers' privileges and obligations. This is expected to be concluded in the first half of 1995.

Finally, the OFT continued its review of the underwriting of share issues (under the DGFT's general duties under the Fair Trading Act). In November, the DGFT published research commissioned from Professor Marsh of the London Business School.

The Securities and Investments Board

i) The new product and commission-disclosure rules

The DGFT's report to the Chancellor of the Exchequer on SIB's and LAUTRO's amended rules on "life products" was published in October. Overall, the report welcomed the new disclosure rules, but the DGFT commented on two issues:

-- disclosure of an average of payments made to all agents of the same life office when selling a particular product, rather than the actual payment received by the agent selling the product; and

-- the use of two columns in the new "Key Features" document to show a company's charges.

The DGFT said that he would keep these issues under review.

The London Stock Exchange

i) Publication of large trades

On 24 November, the DGFT published a report to the Chancellor of the Exchequer in which he concluded that the rules of the London Stock Exchange permitting delays in the publication of trade details for 90 minutes in respect of large trades, and for five days in respect of very large trades had, or were likely to have, the effect of restricting or distorting competition to a significant extent.

ii) Market makers' privileges and obligations

The OFT started a review of the effects on competition of market makers' privileges and obligations. These were last considered in the DGFT's report on the application for recognition by the London Stock Exchange (then the International Stock Exchange), published in 1988.

Applications for recognition

i) Société des Bourses Françaises (SBF) and Société de Compensation des Marchés Conditionnels (SCMC)

In January, the DGFT reported on applications for recognition by SBF, the operator of the Paris Bourse, and SCMC, operator of MONEP, the Bourse's equity options market. He concluded that none of the rules governing the operation of the two exchanges had, or was likely to have, the effect of restricting, distorting or preventing competition to any significant extent. He did, however, identify two rules that could have the potential to produce significant anti-competitive effects - although they did not appear to do so at this time. They covered:

-- compulsory holdings in the share capital of the SBF; and

-- price limits and trading halts.

He undertook to keep these rules under review.

ii) The Personal Investment Authority

In May, the DGFT reported on an application by the PIA to become a recognised self-regulating organisation (and in June reported on its application in respect of friendly societies). He concluded that, overall, none of the rules governing the operation of the PIA had, or was likely to have, the effect of restricting, distorting or preventing competition to any significant extent. He did, however, identify three rules that might, in certain circumstances, have anti-competitive potential in the future, and he promised to keep them under review. They covered:

-- the "capital adequacy" requirement for all members to have £10 000 of net assets;

-- the controls preventing the employment of salespeople with debts of more than £1 000 to industry participants; and

-- rules requiring different levels of professional indemnity insurance cover to be held by certain members.

The DGFT also noted that the costs to the industry of self-regulation were increasing. He recommended that SIB and PIA should keep this matter under review.

iii) The Belgian Futures and Options Exchange (BELFOX)

In October, the DGFT reported on an application by BELFOX for recognition as an overseas investment exchange. He identified one rule as having the potential to produce significantly anti-competitive effects. This related to the application of minimum commissions to be charged by members of BELFOX to their clients. Following discussions with the OFT, BELFOX removed the rule, enabling charges between members and clients to become freely negotiable. The DGFT concluded that none of the other rules governing the operation of the exchange had, or was intended or likely to have, the effect of restricting, distorting or preventing competition to any significant extent.

iv) Marché à Terme International de France (MATIF)

In December, the DGFT reported on an application by MATIF, the French Futures and Options Exchange, to become a recognised investment exchange in the United Kingdom. He concluded that MATIF's rules raised no present competition concerns, but he identified two rules which could have the potential to produce significant anti-competitive effects and which he undertook to keep under review:

-- the limit on membership numbers; and

-- the capital requirements for MATIF members.

Regulatory developments

Electricity

In 1994, Scottish Hydro-Electric did not accept the proposals of the Director General of Electricity Supply (DGES) for changes in its distribution and supply price controls, which had been set in 1990. The DGES therefore asked the MMC to report on whether continuation without modification of the controls operated, or might be expected to operate, against the public interest and, if so, whether it could be remedied or prevented by modification to the licence conditions. The MMC is expected to report in May 1995.

Water

Following the first full review of price limits since privatisation, the Director General of Water Services (DGWS) referred the price limits for South West Water Services Ltd. and Portsmouth Water plc to the MMC. Both companies had, under the terms of their licences, requested a referral of the limits set by the DGWS. The MMC was asked to report on the disputed price limits by March 1995.

Rail privatisation

Considerable progress was made in 1994 towards implementation of the rail privatisation plans. A government-owned company, Railtrack, was set up to own and manage the railway infrastructure; it will be sold by stock market flotation in due course. The sale process for the first passenger service franchises began in 1994, and contracts are due to be awarded by the end of 1995. Plans for the sale of the three rolling stock leasing companies also proceeded during 1994.

Mergers

Under the merger provisions of the Fair Trading Act, the DGFT is required to keep himself informed about actual or prospective merger situations and to recommend to the Secretary of State whether a merger which qualifies for investigation should be referred to the MMC for more detailed investigation. If the MMC finds a merger operates or is likely to operate against the public interest, the Secretary of State can make orders or obtain undertakings from the parties to remedy the adverse effects identified in the MMC's report.

A merger situation may qualify for investigation if it meets a market-share test or an assets test. From 9 February 1994, the assets test was increased, so that a merger now qualifies for investigation if the gross worldwide assets being acquired exceed £70 million, rather than £30 million as previously.

Despite this change, the total number of mergers considered by the OFT rose from 309 in 1993 to 381 in 1994. This represented a year-on-year increase of around 23 per cent, and followed a rise of some 50 per cent in 1993. Only seven of the cases were considered under the voluntary pre-notification procedure.

The DGFT advised on 113 requests for confidential guidance, an increase of 65 per cent on the 1993 total of 76; 61 received favourable guidance (that is, were not likely on present information to be

referred), and 15 received unfavourable guidance. The remaining 37 requests were found not to qualify or were abandoned. Another nine cases remained outstanding at the end of the year.

These figures exclude newspaper mergers, which are dealt with by the DTI under Sections 57-62 of the Fair Trading Act. Mergers of water enterprises (where each enterprise has gross assets of at least £30 million) are also considered separately, under the provisions of the Water Industry Act 1991. No references under this heading were made in 1994.

The Annex to this report contains statistical information on merger activity.

References to the MMC

The Secretary of State made eight references to the MMC in 1994, compared with three in 1993. All except one (British Aerospace/VSEL) were on competition grounds and, in all these cases, in accordance with the DGFT's advice. In the exceptional case, the DGFT recommended against reference on competition grounds, but suggested that the Secretary of State consider whether the bid raised other public interest issues that might merit reference. The Secretary of State considered such issues to arise in connection with the possible effect of the merger on the procurement of warships.

The eight references were:

14 July:	More O'Ferrall plc/London Transport Advertising Ltd. (reference laid aside, 24 August)
3 November:	Stagecoach Holdings plc/Mainline Partnership Ltd.
9 November:	Thomas Cook Group Ltd./Interpayment Services Ltd.
30 November:	SB Holdings Ltd./Kelvin Central Buses Ltd.
7 December:	British Aerospace plc/VSEL plc
7 December:	GEC plc/VSEL plc
20 December:	Service Corporation International Inc/Plantsbrook Group plc
21 December:	Stagecoach Holdings plc/SB Holdings Ltd.

Reports by the MMC

Two merger reports were published in 1994:

17 February:	National Express Group plc/Saltire Holdings Ltd.
24 February:	Alcatel Cable SA/STC Ltd.

In each case, the MMC found that the merger might not be expected to operate against the public interest and should be allowed to proceed.

National Express Group plc/Saltire holdings

The acquisition by National Express Group of Saltire's subsidiary Scottish Citylink Coaches Ltd. (SCC) increased NEG's share of the supply of scheduled coach services from some 70 per cent to about 80 per cent. Prior to the merger, NEG's subsidiary, National Express Ltd. (NEL), and SCC were the only two scheduled coach service operators on the Glasgow and Edinburgh routes to London, each with passenger loading of about one-third capacity and each making a loss. Following the merger, the pattern of services and passenger loading improved, increasing the prospects for retaining the routes as a viable alternative to British Rail's Intercity operations. Intercity's heavily discounted fares represented a constraint on NEL's ability to raise fares on these routes. On the only other routes where the merger removed direct competition between SCC and NEL (i.e. Glasgow and Edinburgh to Aberdeen), the MMC found that services had been adjusted with no loss of frequencies, and fares had been harmonised at the level of the cheaper of the two services.

The MMC had some concerns about the future level of prices on all of SCC's network of routes within Scotland, but these arose primarily from the dominant positions already enjoyed by SCC and NEL and not from the merger situation itself.

Alcatel Cable SA/STC Ltd.

This concerned the proposed acquisition by Alcatel Cable SA of STC Ltd. (STC). STC was ultimately owned by Northern Telecom Ltd. (NT), a multinational company registered in Canada. Alcatel's ultimate parent company is Alcatel Alsthom SA (Alcatel), a multinational company registered in France. Both Alcatel and STC supply submarine cable systems.

NT stated that STC did not fit in with its core strategy; if the proposed sale did not go forward, STC might be unable to secure funds at the appropriate level, given the heavy demands of NT's core business. The MMC was satisfied that STC needed the long-term support of a strong parent company if it were to continue to thrive. It accepted that Alcatel would provide that support and would continue both to manufacture submarine cable systems and to carry out related research and development in the UK.

The MMC found that the proposed merger would reduce an already small number of suppliers in the long-haul sector of the market (systems which require repeaters at intervals to maintain transmission quality), but that this might be inevitable, given the increasing complexities of the product and the consequent rising need for research and development and capital investment. Barriers to entry were high in the sector, which was subject to rapid technological change. The short-haul sector was also highly concentrated, but there was a larger number of suppliers and the sector was taking an increasing share of the total market. Technical demands, however, were not as great as in the long-haul sector, making the short-haul sector attractive to smaller competitors, and market entry was relatively easy.

The MMC believed that any tendency which the merged group might have to abuse its market position would be kept in check by competition between suppliers and the strong purchasing power of international telephone operators and consortia commissioning new submarine systems.

Undertakings in lieu of reference

When it appears that a reference to the MMC may be necessary, the Secretary of State may, on the advice of the DGFT, accept undertakings to remedy the adverse effects, in lieu of reference.

In 1994, there were three cases where undertakings were given in lieu of reference, bringing to eleven the total number of cases in which this procedure has been used since its introduction in 1990. All three cases related to mergers involving independent television (ITV) companies, and in each case the undertakings were designed to remedy possible adverse effects of the mergers in the market for the sale of television advertising air-time.

The cases involved, and the dates on which the undertakings were given, were:

4 February: Carlton Communications plc/Central Independent Television plc

4 February: Granada Group plc/London Weekend Television (Holdings) plc

18 February: MAI plc/Anglia TV Group plc

In each case, the Secretary of State accepted (in accordance with the DGFT's recommendation) undertakings from the acquiring party to the effect that it would, by 31 August 1995, divest all or part of its shares in television advertising sales houses, and/or terminate sales contracts, to the extent necessary to bring the share of all television advertising revenue over which it had control or significant influence to below 25 per cent.

In his advice to the Secretary of State, the DGFT observed that the smaller regional ITV licensees, in particular, might find it difficult to sell their air-time economically if they were not able to do so alongside the larger companies. He pointed out that the undertakings contained some flexibility and advised that he would consider sympathetically proposals to exceed the 25 per cent ceiling by a small amount if satisfactory selling arrangements could not otherwise be made.

On 16 June, the Secretary of State decided, in accordance with the DGFT's advice, not to allow a request by Granada for a variation to its undertakings in order to allow it to sell the airtime of STV and Grampian. Granada's request, if granted, would have allowed it to retain around 29 per cent of all television advertising revenue, which is very close to the level of 30 per cent which the Secretary of State had earlier accepted gave rise to competition concerns.

Action on earlier reports

Avenir Havas SA/Brunton Curtis Outdoor Advertising Ltd.

In 1992, following an adverse report from the MMC, Avenir gave undertakings to the Secretary of State to divest itself of the 48-sheet and larger poster panels it had acquired from Brunton Curtis. A year later, the company asked to be released from this obligation. The DGFT carried out a review of the situation and confirmed that all but 418 of the original 3 186 panels had been divested. In view of this, the Minister for Corporate Affairs said he was satisfied that the retention of the remaining panels would not lead to any materially adverse effect on competition. On 21 April, Avenir was released from its obligation to divest any further panels.

Elders IXL Ltd. and Grand Metropolitan plc

In July, the Minister for Corporate Affairs announced that he had agreed to a variation to undertakings, given in 1991, that had prevented Inntrepreneur Estates Ltd. from re-tying any public house

in its licensed estate which had become free. The effect of the variation is to permit the company to re-tie free houses that have fallen vacant, provided that its total tied estate continues not to exceed 4 350 licensed premises.

Allied-Lyons plc and Carlsberg A/S

Undertakings given in 1992 required that Allied-Lyons plc (now Allied Domecq plc) should, by 14 December 1994, reduce the number of tied houses in its licensed estate to 100 fewer than the number required by The Supply of Beer (Tied Estate) Order 1989. The company confirmed its compliance with these provisions. It is now required to implement a further reduction of 300 tied houses by 14 December 1996.

Buses

Undertakings were secured from Stagecoach Holdings plc regarding its acquisition of Formia Ltd., and from Mainline Partnership Ltd. regarding acquisitions in the Sheffield area. At the end of the year, negotiations were still continuing with Stagecoach (North West) Ltd. following its acquisition of Lancaster City Transport Ltd.

Newspaper mergers

The transfer of the ownership of newspapers can raise issues that touch on accurate news presentation and the free expression of opinion. For this reason, newspaper transfers and mergers are treated differently from other company mergers. These procedures, first introduced under the Monopolies and Mergers Act 1965 and retained in the Fair Trading Act, are administered by the Secretary of State. In some circumstances, newspapers cannot change hands without the Secretary of State's consent. And, unless the proposed transfer meets particular conditions, he cannot give that consent until the MMC has reported on the matter.

References to the MMC

The Secretary of State made two references in 1994:

31 March:	Johnston Press plc/Halifax Courier Holdings Ltd. (report published 17 June)
14 June:	Daily Mail and General Trust plc/T Bailey Forman Ltd. (report published 31 October)

Johnston Press/Halifax Courier Holdings

The MMC concluded that there were no concerns on public interest grounds. Accordingly, the Secretary of State gave his consent to the proposed merger.

Daily Mail and General Trust/T Bailey Forman

The MMC was asked to investigate and report on whether the proposed transfer to Daily Mail and General Trust plc (DMGT) of the newspapers published by T Bailey Forman Ltd. (TBF) might be expected to operate against the public interest. TBF published the *Nottingham Evening Post* and five weekly newspapers which circulated in or around Nottingham. DMGT is a major publisher of national and local newspapers. Its subsidiary Associated Newspapers Ltd. publishes the *Daily Mail*, the *Mail on Sunday* and the *Evening Standard*. A separate subsidiary, Northcliffe Newspapers Group Ltd. (Northcliffe), is responsible for its substantial interests in local newspapers.

The MMC noted that if the merger were to take place, Northcliffe would have a monopoly of the daily newspapers published in Derbyshire, Leicestershire, Nottinghamshire, Lincolnshire, Humberside and the northern part of Staffordshire. This would be the largest contiguous grouping of regional newspapers anywhere in the United Kingdom. It concluded that two concerns arose from this increase in regional concentration. The first related to the consequences for free expression of opinion, and in particular for diversity of opinion in the press. The second, arising from the increase in regional concentration, was the very considerable market power that Northcliffe would acquire.

While acknowledging that some immediate benefits would accrue to the readers of TBF's titles from the capital investment that would follow the merger, the MMC considered that these would be outweighed by the adverse consequences and concluded that the acquisition of the newspapers by DMGT would be expected to operate against the public interest. Accordingly, it recommended that the Secretary of State should not give his consent to the proposed transfer of ownership.

On 5 December, following a period of public consultation, the Minister for Industry, acting on behalf of the Secretary of State, gave conditional consent to the transfer.

Transfers not referred to the MMC

The Secretary of State announced his consent to the following transactions without requiring the MMC to report:

18 February:	Trinity International Holdings plc/Southport Globe
16 March:	Independent Newspapers plc/Capital Newspapers Ltd.
18 March:	United Newspapers plc/Pembroke County and West Wales Guardian
18 March:	Independent Newspapers plc/Newspaper Publishing plc
18 March:	Mirror Group Newspapers plc, Espresso International Holding SA, Promotora de Informaciones SA, and Independent Newspapers plc/Newspaper Publishing plc

III. New publications relevant to competition policy

OFT reports

Competition Act report

Fife Scottish Omnibuses Ltd.: the conduct of the company in respect of the registration of commercial bus services in the Fife region of Scotland (March 1994).

Financial Services Act reports

The Paris Bourse and MONEP: the rules governing the operation of the Société des Bourses Françaises and the Société de Compensation des Marchés Conditionnels. A report by the Director General of Fair Trading to the Chancellor of the Exchequer (January 1994).

The Personal Investment Authority: application for recognition as a self-regulating organisation. A report to the Chancellor of the Exchequer by the Director General of Fair Trading (May 1994).

BELFOX: the rules governing the operation of the Belgian Futures and Options Exchange. A report to the Chancellor of the Exchequer by the Director General of Fair Trading (October 1994).

Trade publication rules of the London Stock Exchange. A report to the Chancellor of the Exchequer by the Director General of Fair Trading (November 1994).

MATIF: the rules governing the operation of the Marché à Terme International de France. A report to the Chancellor of the Exchequer by the Director General of Fair Trading (December 1994).

Research papers

Barriers to entry and exit in UK competition policy: a report by London Economics for the Office of Fair Trading (March 1994).

Predatory behaviour in UK competition policy by G. Myers (November 1994).

MMC reports

British Waterways Board: a report on the service provided by the Board (Cm 2431, January 1994).

Private medical services: a report on agreements and practices relating to charges for the supply of private medical services by NHS consultants (Cm 2452, February 1994).

National Express Group PLC and Saltire Holdings Ltd.: a report on the merger situation (Cm 2468, February 1994).

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LOCKE, S. "A New Approach to Competition Policy", *Consumer Policy Review* 4(3) 1994, pp. 159-168.

PRATT, J. H. "Changes in UK Competition Law: A Wasted Opportunity?" *European Competition Law Review* 15(2) 1994, p. 89.

WHISH, R. "Enforcement of EC Competition Law in the Domestic Courts of Member States", *European Competition Law Review* 15(2) 1994, p. 60.

Annex

Statistics on merger activity

The statistics shown in this Annex broadly relate only to those mergers that the OFT examined in the context of the DGFT's responsibilities under the Fair Trading Act. They do not represent an estimate of total merger activity in the United Kingdom. The following points should be borne in mind:

-- the figures cover merger proposals as well as completed mergers and, where there is more than one proposal for a given target, each is counted separately;

-- the figures cover only proposals considered for investigation under the "other mergers" provisions of the Fair Trading Act (newspaper mergers, considered separately by DTI, and mergers of water enterprises, considered under the provisions of the Water Industry Act 1991, are both excluded);

-- the figures include requests for confidential guidance as well as publicly announced mergers, although confidential guidance cases that subsequently become public are not included twice.

A better indicator of overall merger activity in the industrial and commercial sectors (but excluding the financial sector) is provided by statistics collected by the Central Statistical Office, and published in *Business Bulletin: Acquisitions and Mergers within the UK*. These figures are shown in Table 1.

Table 1

Merger activity: 1990-1994

	Proposals qualifying under the Fair Trading Act 1973			Business Bulletin	Fair Trading Act cases as
	All cases		Industrial and commercial	Industrial and commercial	% of industrial and
Year	Numbers	Assets bid for: £m	Numbers	Numbers	commercial cases
1990	261	100 043	227	779	29.1
1991	183	87 333	158	506	31.7
1992	125	83 172	112	432	26.3
1993	197	50 085	181	524	34.5
1994	231	162 202	215	676	31.8

Types of merger

The percentage shares of horizontal, vertical and diversifying mergers is shown in Table 2. "Horizontal" mergers are those where the largest and/or second-largest activities of the enterprises overlap. "Vertical" mergers are those where either the largest or second-largest activities are at different stages in the production or distribution of the same product. Mergers that are neither horizontal nor vertical are classified as "diversifying".

Comparing the analysis for 1994 with that for 1990, the figures show that, over the five-year period, horizontal mergers have remained dominant. The significant shift away from diversifying mergers evident from 1990-1991 has not been reversed.

Table 2

Percentages of proposed mergers by number and value of assets of target companies classified by type of integration: 1990-1994

	Horizontal		Vertical		Diversifying	
Year	by number	by value	by number	by value	by number	by value
1990	75	81	5	3	20	16
1991	88	89	5	5	7	6
1992	93	97	1	0	6	3
1993	90	81	3	1	7	18
1994	88	86	5	11	7	3

Source: Office of Fair Trading

Target companies' gross assets

There was a dramatic rise, of more than 200 per cent, in the value of assets bid for in all qualifying cases (Table 3). (In order to give some indication of the real, inflation-adjusted value of assets bid for, the current asset values shown have been deflated by the Gross Domestic Product deflator.) And, notwithstanding the overall rise in the numbers of qualifying mergers (Table 1), the average size of assets bid for rose from £254 million in 1993 to £702 million in 1994.

Table 3

Value of assets bid for in merger proposals qualifying under the Fair Trading Act 1973 at current and at constant prices: 1990-1994

	All cases: assets bid for			
	At current prices		At 1990 prices	
Year	£m	% change	£m	% change
1990	100 043	+4.1	100 043	-2.2
1991	87 333	-12.7	82 003	-18.0
1992	83 172	-4.8	74 862	-8.7
1993	50 085	-39.8	43 685	-41.6
1994	162 202	+223.9	139 070[1]	+218.8

Source: Office of Fair Trading

1. Deflated by GDP at factor cost; estimate based on first three quarterly statistics only (not full year).

Taking a five-year time-span, a comparison of the figures for mergers within the United Kingdom examined in 1994 with those for 1990 shows a dramatic increase in the proportion of target companies in the smallest asset size band (Table 4). Between 1993 and 1994, the proportion of total assets bid for accounted for by companies in the largest asset size class rose by 25 per cent -- reaching the highest level for the last five years (Table 5).

Table 4

Analysis by size of gross assets of target companies -- numbers and percentages of totals: 1990-1994

	Gross assets of target companies (£m)							
Numbers in:	0-24.9	25-49.9	50-99.9	100-249.9	250-499.9	500-999.9	1 000 and over	Totals
1990	48	51	50	44	23	25	20	261
1991	39	28	38	36	17	11	14	183
1992	28	39	16	21	6	8	7	125
1993	67	31	39	31	10	8	11	197
1994	112	25	29	25	17	9	14	231
Percentages of totals in:								
1990	18.4	19.5	19.2	16.9	8.8	9.6	7.7	100.0
1991	21.3	15.3	20.8	19.7	9.3	6.0	7.6	100.0
1992	22.4	31.2	12.8	16.8	4.8	6.4	5.6	100.0
1993	34.0	15.7	19.8	15.7	5.1	4.1	5.6	100.0
1994	48.5	10.8	12.6	10.8	7.4	3.9	6.1	100.0

Source: Office of Fair Trading

Table 5

Analysis by size of gross assets of target companies -- value of assets and percentages of totals: 1990-1994

	Gross assets of target companies (£m)								
Total assets in:	0-24.9	25-49.9	50-99.9	100-249.9	250-499.9	500-999.9	1 000 and over	Totals	(Average assets)
1990	257	1 845	3 519	6 757	7 742	18 262	61 662	100 043	(383)
1991	209	1 116	2 795	5 478	6 300	7 368	64 067	87 333	(477)
1992	171	1 356	1 152	3 123	1 880	5 882	69 607	83 172	(665)
1993	536	1 174	2 515	5 069	3 374	6 149	31 268	50 085	(254)
1994	1 018	777	2 181	3 522	6 305	6 321	142 079	162 202	(702)
Percentages of totals in:									
1990	0.2	1.8	3.5	6.8	7.7	18.3	61.7		100.0
1991	0.2	1.3	3.2	7.5	7.2	8.4	73.4		100.0
1992	0.2	1.6	1.4	3.8	2.3	7.0	83.7		100.0
1993	1.1	2.3	5.0	10.0	6.7	12.3	62.4		100.0
1994	0.6	0.5	1.3	2.2	3.9	3.9	87.6		100.0

Source: Office of Fair Trading

Foreign companies involved in mergers

The number of foreign companies involved in mergers as targets and bidders fell in 1994, but was still higher than the 1992 low.

Table 6
Foreign companies involved in merger situations: 1990-1994

Year	Target companies		Bidding companies	
	Total numbers	Total as % of all mergers	Total numbers	Total as % of all mergers
1990	61	23.2	92	35.0
1991	36	19.6	70	38.3
1992	18	14.4	40	32.0
1993	37	18.8	51	25.9
1994	30	13.0	49	21.2

Source: Office of Fair Trading

Target companies' activities

Since 1990, the transport and communications sector has seen the largest increase in its annual share, from seven per cent to 27 per cent (Table 6). Over the same period, the mechanical and electrical engineering, the banking and finance, and the insurance sectors saw the largest falls in their shares -- of around four per cent.

In terms of assets, the banking and finance, and the coal, oil and natural gas sectors accounted for more than 65 per cent of total assets in 1994 (Table 7). This represents a falling share for banking and finance since 1990, but a significant rise for coal, oil and natural gas, which had never achieved a share of more than five per cent in the preceding four years. These figures again underline how sensitive sectoral shares are to particular, large acquisitions.

Table 7

Analysis by activity of target companies -- numbers of cases and percentages of totals: 1990-1994

	Numbers of cases					Percentages of all cases				
Industry	1990	1991	1992	1993	1994	1990	1991	1992	1993	1994
Agriculture, forestry and fishing	1	0	0	1	1	0.4	0.0	0.0	0.5	0.4
Coal, oil and natural gas	4	9	4	4	5	1.5	5.0	3.2	2.0	2.2
Electricity, gas and water	1	2	3	3	0	0.4	1.1	2.4	1.5	0.0
Metal processing and manufacturing	7	5	4	4	2	2.7	2.7	3.2	2.0	0.9
Mineral processing and manufacturing	9	9	2	7	3	3.4	5.0	1.6	3.6	1.3
Chemicals and man-made fibres	27	18	15	20	19	10.3	9.8	12.0	10.2	8.2
Metal goods (not elsewhere specified)	6	2	1	4	2	2.3	1.1	0.8	2.0	0.9
Mechanical engineering	16	7	10	13	5	6.1	3.8	8.0	6.6	2.2
Electrical engineering	16	13	7	11	5	6.1	7.1	5.6	5.6	2.2
Vehicles	8	3	0	4	9	3.1	1.6	0.0	2.0	3.9
Instrument engineering	2	1	2	1	2	0.8	0.5	1.6	0.5	0.9
Food, drink and tobacco	24	15	20	15	23	9.2	8.2	16.0	7.6	10.0
Textiles	1	3	0	1	2	0.4	1.6	0.0	0.5	0.9
Leather goods and clothing	3	2	1	1	0	1.2	1.1	0.8	0.5	0.0
Timber and wooden furniture	3	1	0	0	1	1.2	0.5	0.0	0.0	0.4
Paper, printing and publishing	8	5	6	5	6	3.1	2.7	4.8	2.5	2.6
Other manufacturing industries	4	7	5	4	2	1.5	3.8	4.0	2.0	0.9
Construction	3	3	4	4	8	1.2	1.6	3.2	2.0	3.5
Distribution	23	18	8	17	24	8.8	9.8	6.4	8.6	10.4
Hotels, catering and repairs	10	2	2	11	5	3.8	1.1	1.6	5.6	2.2
Transport and communications	18	13	11	30	63	6.9	7.1	8.8	15.2	27.3
Banking and finance	22	12	11	9	10	8.4	6.6	8.8	4.6	4.3
Insurance	11	13	1	3	1	4.2	7.1	0.8	1.5	0.4
Ancillary financial services	3	2	1	4	5	1.2	1.1	0.8	2.0	2.2
Other business services	22	12	4	12	16	8.4	6.6	3.2	6.1	6.9
Other services	9	6	3	9	12	3.4	3.3	2.4	4.6	5.2
Totals	261	183	125	197	231	100.0	100.0	100.0	100.0	100.0

Source: Office of Fair Trading

Table 8

Analysis by activity of target companies -- values of assets and percentages of totals: 1990-1994

	Values of assets					Percentages of total asset values				
Industry	1990	1991	1992	1993	1994	1990	1991	1992	1993	1994
Agriculture, forestry and fishing	8	0	0	2	73	(.)	0.0	0.0	(.)	(.)
Coal, oil and natural gas	1 740	8 807	352	107	55 540	1.7	4.4	0.4	0.2	34.2
Electricity, gas and water	39	189	1 898	270	0	(.)	0.2	2.3	0.5	0.0
Metal processing and manufacturing	249	2 752	160	382	47	0.3	3.2	0.2	0.8	(.)
Mineral processing and manufacturing	6 850	441	15	1 509	543	6.9	0.5	(.)	3.0	0.3
Chemicals and man-made fibres	6 437	4 483	787	1 996	13 762	6.5	5.1	0.9	4.0	8.5
Metal goods (not elsewhere specified)	2 666	198	668	358	17	0.1	0.2	0.8	0.7	(.)
Mechanical engineering	2 666	384	469	625	647	2.7	0.4	0.6	1.2	0.4E
Electrical engineering	1 834	10 778	586	2 313	190	1.9	12.3	0.7	4.6	0.1
Vehicles	3 979	341	0	583	2 806	4.0	0.4	0.0	1.2	1.7
Instrument engineering	56	109	63	2	20	0.1	0.1	0.1	(.)	(.)
Food, drink and tobacco	11 462	1 189	6 007	758	6 110	11.4	1.3	7.2	1.5	3.8
Textiles	6	502	0	6	32	0.4	0.6	0.0	(.)	(.)
Leather goods and clothing	182	283	236	326	0	0.3	0.3	0.3	0.7	0.0
Timber and wooden furniture	481	51	0	0	147	0.5	0.1	0.0	0.0	(.)
Paper, printing and publishing	2 139	2 703	320	705	12 036	2.2	3.1	0.4	1.4	7.4
Other manufacturing industries	173	630	626	495	77	0.2	3.1	0.8	1.0	(.)
Construction	893	3 753	1 283	1 298	1 069	1.0	4.3	1.5	2.6	0.7
Distribution	3 529	4 498	2 056	2 052	1 856	3.5	5.2	2.5	4.1	1.1
Hotels, catering and repairs	2 583	115	581	2 914	448	2.6	0.1	0.7	5.8	0.3
Transport and communications	1 737	2 235	508	11 960	3 158	1.7	2.6	0.6	23.9	1.9
Banking and finance	39 666	39 223	64 272	3 751	51 387	39.7	44.9	77.3	7.5	31.7
Insurance	3 907	4 197	30	1 088	5 527	3.9	4.8	(.)	2.2	3.4
Ancillary financial services	73	221	2	1 279	811	0.1	0.3	(.)	2.6	0.5
Other business services	7 397	2 343	318	10 220	4 354	7.4	2.7	0.4	20.4	2.7
Other services	1 856	1 908	1 935	5 086	1 545	1.9	2.2	2.3	10.2	0.9
Totals	100 043	87 333	83 172	50 085	162 202	100.0	100.0	100.0	100.0	100.0

Source: Office of Fair Trading (.) Less than 0.05

UNITED STATES*

(1 January - 30 September 1994)

Introduction

This report describes federal antitrust developments in the United States for the period 1 January 1994 through 30 September 1994. It summarises the activities of the Antitrust Division (the "Division") of the U.S. Department of Justice (the "Department" or the "DOJ") and of the Bureau of Competition of the Federal Trade Commission (the "FTC" or the "Commission").

Deborah K. Owen and Dennis A. Yao resigned their positions as FTC Commissioners in August and September 1994, respectively. Christine Varney was sworn in as Commissioner in October 1994.

I. Changes to competition laws and policies adopted or envisaged

Changes in antitrust rules, policies or guidelines

The Division participated with the FTC and the Department of Defence on the Defence Services Board Task Force on Defence Mergers, which analysed the effect of the antitrust laws on the consolidation of the defence industry. Although some observers had called for special defence industry exceptions to the antitrust laws, the Task Force concluded that it was important to preserve competition wherever feasible in defence production industries and that the antitrust laws were sufficiently flexible to take into account the changing economics of those industries. Consequently, the Task Force's report, issued in April 1994, did not endorse antitrust exemptions for defence industry mergers. Instead, it focused on ways that the Department of Defence could communicate its industry expertise to the antitrust enforcement agencies with respect to specific defence industry mergers.

On 29 July 1994, the Commission announced a new policy for terminating FTC competition orders. Under the "sunsetting" policy, core injunctive provisions of FTC orders in future antitrust cases ordinarily will be terminated after 20 years, and supplemental provisions in these orders ordinarily will be terminated after not more than ten years. Additionally, the Commission announced that, in considering petitions to reopen and set aside existing competition orders that are more than 20 years old, it will presume that the public interest requires terminating such orders. The new policies were effective immediately.

On 8 August 1994, the Division issued for public comment proposed Guidelines for the Licensing and Acquisition of Intellectual Property. The proposed guidelines explain the generally complementary relationship between the antitrust laws and the laws that protect intellectual property and

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* The original language of this report is English.

the circumstances in which an attempt to exploit intellectual property rights can raise antitrust concerns. The proposed guidelines replace those provisions and examples in the 1988 International Guidelines that related to intellectual property licensing. A Division task force drafted the proposed guidelines after extensive consultation with academic, business and legal experts. The guidelines recognise that antitrust policy and intellectual property protection share the common goal of fostering innovation as a means of advancing consumer welfare and that antitrust analysis is sufficiently flexible to accommodate the special characteristics of intellectual property. They acknowledge that the licensing of intellectual property is generally pro-competitive and that ownership of intellectual property does not by itself constitute the possession of market power. To provide greater certainty where antitrust risks are small, the proposed guidelines announce a "safety zone" within which the Division generally will not challenge most licensing arrangements if the parties collectively account for no more than 20 per cent of each relevant market. The guidelines are to be issued in final form after consideration of public comments.[1]

On 10 August 1994, AAG Bingaman announced an expansion of the Division's 1993 Corporate Leniency Policy called the Individual Leniency Policy. The new policy is designed to encourage individuals to come forward with information regarding criminal antitrust violations. Under the policy, "leniency" means not charging such an individual criminally for the activity being reported. Such assurances are contingent on the individual's meeting three criteria:

-- at the time the individual comes forward to report the illegal activity, the Division has not received information about the alleged activity from any other source;

-- the individual reports the wrongdoing with candour and completeness and provides full, continuing and complete co-operation to the Division throughout the investigation; and

-- the individual did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.

On 26 August 1994, the President of the United States signed into law the Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, 108 Stat. 1691 ("the Amendments") re-authorising the Commission through FY 1996. The Amendments contain a number of changes to the Federal Trade Commission Act, including procedural improvements such as:

-- authorisation to use civil investigative demands (CIDs) in competition investigations;

-- authorisation to obtain tangible items through the use of CIDs;

-- expansion of venue, joinder of parties, and service of process options available to the FTC in federal court injunction actions; and

-- elimination of the automatic stay of Commission orders upon appeal, except in a few circumstances.

Additionally, the Amendments codify certain existing restrictions on the Commission's authority regarding agricultural co-operatives and marketing orders.

To lessen the uncertainty of business participants about the antitrust implications of adapting their businesses to the changing economics of health care, the Division and the FTC jointly issued *Statements of Antitrust Enforcement Policy in the Health Care Area* in September 1993, and revised and expanded these statements in September 1994. These Policy Statements provide detailed guidance to businesses and their counsel as they adjust to the rapidly changing health care market. As revised, the 106-page Policy Statements provide antitrust guidance with respect to nine separate areas that play an important role in the emerging health care system:

-- mergers among hospitals;

-- hospital joint ventures involving high-technology or other expensive health care equipment;

-- hospital joint ventures involving specialised clinical or other expensive health care services;

-- providers' collective provision of non-fee-related information to purchasers of health care services;

-- providers' collective provision of fee-related information to purchasers of health care services;

-- provider participation in exchanges of price and cost information;

-- joint purchasing arrangements among health care providers;

-- physician network joint ventures; and

-- multi-provider networks.

The two agencies also committed to providing expedited 90-day business reviews for the health care industry. During FY 1994, the Division provided such expedited guidance in response to 12 enquiries involving the health care industry.

The Division reorganised a number of sections to ensure that adequate resources would be devoted to specific sectors. At the end of FY 1994, the Division reorganised the Communications and Finance Section into a Computers and Finance Section and a Telecommunications Task Force. The new Task Force includes lawyers with extensive telecommunications experience and will specialise in telecommunications issues. To combat anti-competitive conduct that does not rise to the level of criminal violation, but that unreasonably raises prices for consumers or otherwise harms the competitive process, the Division created a Civil Task Force dedicated to cases of national and international importance. The Division also established a New Cases Unit with the responsibility of reviewing and assessing potential cases. The Unit hands off promising leads to the Civil Task Force or to other appropriate litigating sections for further investigation. As a result of these changes and efforts, the Division issued compulsory process in 54 new civil non-merger investigations in FY 1994, a large increase over FY 1993. This increase in investigations parallelled an increase in the number of civil non-merger cases filed.

During FY 94, the Division and the FTC drafted proposed Antitrust Enforcement Guidelines for International Operations to replace those issued by the Division in 1988. The proposed guidelines were published for public comment in October 1994. The new guidelines articulate the agencies' resolve to protect both American consumers and American exporters from anti-competitive restraints where such restraints have direct, substantial and reasonably foreseeable effects on U.S. commerce. As more countries have adopted national antitrust laws, co-operation between national antitrust enforcement agencies has

increased, and the proposed guidelines emphasise the importance of such international co-operation. The guidelines also recognise that comity-based doctrines such as sovereign compulsion may counsel against antitrust enforcement in some circumstances (outlined in the Guidelines) or indicate that U.S. agencies should work with foreign agencies.[2]

In FY 1994, the Division stepped up its efforts to co-ordinate with State Attorneys General in the enforcement of state and federal antitrust laws. One aspect of these efforts was the appointment of a Senior Counsel to the Assistant Attorney General with direct responsibility for liaison with state enforcement authorities. In addition to increased communication and understanding between the Division and the states, these efforts produced tangible results in the form of joint and co-ordinated prosecutions and reduced compliance costs for business. For example, the Division joined the Arizona Attorney General in challenging exclusionary practices by that state's largest dental insurance plan and joined the Florida Attorney General in challenging a hospital merger that would have increased health care costs in that state. Similarly, the Division co-ordinated its challenge to price information exchanges by Utah hospitals with the Utah Attorney General. Increased state-federal co-operation avoids unnecessary duplication of enforcement efforts and harmonises the application of the state and federal antitrust laws, thus creating greater certainty for businesses and their counsel and lowering compliance costs. The Division currently has six on-going joint investigations with State Attorneys General.

Proposals to change antitrust laws, related legislation or policies

Department of Justice

AAG Bingaman appeared before the Economic and Commercial Law Subcommittee of the House Judiciary Committee on 26 January 1994, and the Telecommunications and Finance Subcommittee of the House Energy and Commerce Committee on 27 January 1994, to present the views of the Department on proposed legislation that would accelerate the telecommunications revolution and the completion of the National Information Infrastructure (NII). AAG Bingaman voiced the Department's support for the Antitrust Reform Act, which would enable the Regional Bell Operating Companies (RBOCs) that are now barred from competing in long-distance telephone services to enter the market, but only if the telephone companies satisfy both the Federal Communications Commission and the Department that their entry will not harm competition in other markets. In addition, the proposal would permit the RBOCs to research, develop and manufacture telecommunications equipment unless the Department challenges such activity as posing undue threats to competition. AAG Bingaman also stated the Department's support for the National Communications Competition and Information Infrastructure Act, which would allow for more competition in both local telephone and cable service by stripping away regulations that impede the development of at least two wires to the home and opening the telephone companies' "local loop" to full and fair competition. AAG Bingaman also testified on 20 September 1994, on the Senate's companion telecommunications bill (S.1822).

AAG Bingaman appeared before the Economic and Commercial Law Subcommittee of the House Judiciary Committee on 15 June 1994, to discuss antitrust-related provisions in the Health Security Act, the Clinton Administration's health care reform proposal. The Health Security Act includes a provision which would repeal the antitrust exemption provided by the McCarran-Ferguson Act for the business of health insurance. Another provision in the Act with antitrust implications would allow providers to jointly negotiate with insurance providers on the fee schedule for "fee-for-service" health plans.

To enable the agencies to cope with the enforcement challenges inherent in economic globalisation, the Division and FTC supported the International Antitrust Enforcement Assistance Act of 1994, which was introduced with strong bipartisan support in both houses of Congress on 19 July 1994. Congress passed the Act in October with overwhelming support, and it was signed into law by the President on 2 November 1994. The new law authorises the Department of Justice and the FTC to negotiate reciprocal assistance agreements with foreign antitrust enforcement authorities, provided those authorities protect law enforcement information with the same degree of confidentiality accorded it in the United States. The law greatly expands the ability of the DOJ and the FTC to co-operate with foreign antitrust authorities. It does so by permitting the agencies to use their investigative powers in response to a request from a foreign antitrust authority, and to exchange most forms of confidential information, all in accordance with the terms of the mutual assistance agreement. The law also permits the U.S. Attorney General to apply to a U.S. court for an order requiring the production of evidence by a person in the United States to assist a foreign antitrust authority. The assistance may be given without regard to whether the conduct under investigation violates U.S. antitrust laws, but the foreign antitrust law must prohibit conduct similar to conduct prohibited under U.S. antitrust law. The law permits the disclosure of most otherwise confidential information, except for Hart-Scott-Rodino pre-merger notification information and certain other categories of information related to national security.

FTC comments on proposed legislation

The Commission commented on the proposed Health Care Antitrust Improvements Act, which would create certain exemptions from the normal application of the federal antitrust laws for joint conduct by health care providers under certain circumstances. The Commission opposed enactment of the revised bill, stating that it would:

-- immunise various forms of anti-competitive conduct by health care professionals that yield no pro-competitive benefit to consumers;

-- eliminate the flexibility that the enforcement agencies need in applying the antitrust laws; and

-- create an unnecessary, elaborate and costly regulatory scheme.

The bill was not passed.

II. Enforcement of antitrust laws and policies: action against anti-competitive practices

Department of Justice and FTC statistics

DOJ staffing and enforcement statistics

During FY 1994, the Division continued its increase in personnel, adding 25 attorneys and 56 paralegals. At the end of FY 1994, the Division had 719 employees, comprised of 325 attorneys, 51 economists, 131 paralegals and 212 support staff.

In FY 1994, the Antitrust Division opened 366 investigations and filed 78 antitrust cases, both civil and criminal, in federal court. The Division was a party to 13 U.S. antitrust cases decided by the federal Courts of Appeals, and filed *amicus curiae* briefs in one Supreme Court case and two Court of Appeals cases.

In FY 1994, the Division filed 57 criminal cases against 55 corporations and 50 individuals. Ninety-two corporate defendants were assessed fines totalling $40 236 000 and nine defendants were sentenced to a total of 1 497 days of incarceration. Another 22 individual defendants were sentenced to spend a total of 2 475 days in some form of alternative confinement.

In FY 1994, the Division reviewed 2 301 notified merger transactions, as well as a number of structural transactions that did not fall under the Hart-Scott-Rodino pre-merger notification requirements. The Division investigated 105 mergers and challenged 22.

The Division opened 84 civil investigations in FY 1994, both merger and non-merger, and issued 1 135 civil investigative demands (a form of compulsory process). During the year, the Division filed 21 civil complaints and 19 proposed consent decrees or final judgments. Nine of the Division's consent decrees were entered in FY 1994, some of which had been proposed and filed in earlier years.

FTC staffing and enforcement statistics

At the end of FY 1994, the FTC's Bureau of Competition had 213 employees: 152 attorneys, 33 other professionals and 28 clerical staff. The FTC also employs 40 economists who participate in its antitrust enforcement activities.

During FY 1994, 2 301 proposed mergers and acquisitions were submitted for review under the notification and filing requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act), representing a 25 per cent increase over the number reported in the previous fiscal year. Twenty enforcement cases were initiated against allegedly anti-competitive mergers in a wide variety of industries. The Commission authorised the staff to seek preliminary injunctions in federal district court to block three proposed mergers, accepted 15 consent agreements for public comment to settle anti-competitive concerns raised by proposed transactions and issued two administrative complaints. In addition, acting on cases begun during previous years, the Commission found antitrust violations in two cases and dismissed one complaint on jurisdictional grounds.

In the non-merger area, 13 enforcement cases were brought during FY 1994 involving allegedly anti-competitive conduct by, among others, medical professionals, interpreters, automobile dealers and cable television systems. Nine of these cases concerned cases of alleged horisontal restraints that were settled by consent agreements. The Commission also accepted two consent agreements settling charges of alleged monopolisation activities. The Commission obtained 400 000 dollars in civil penalties for violations of an outstanding order and 2.6 million dollars in civil penalties against a U.S. company for its failure to observe the pre-merger notification requirements and waiting periods under the HSR Act before consummating a notifiable acquisition.

Antitrust cases in the courts

United States Supreme Court

DOJ or FTC cases

Ticor Title Insurance Co. v. FTC, 998 F.2d 1129 (3d Cir. 1993), *cert. denied,* 114 S.Ct. 1292 (1994), was a petition for review of an FTC decision holding that collective rate-setting

activities by title insurance companies for title search and title examination services constitute an unfair method of competition (price-fixing). The companies contended that their conduct was protected by the "state action" doctrine and was also exempt from the antitrust laws, because it was "the business of insurance". On 15 June 1992, the U.S. Supreme Court issued an opinion holding that the Commission had properly rejected the "state action" defence with respect to the states of Montana and Wisconsin, and remanded the case to the Court of Appeals for further proceedings. On 15 July 1993, the Court of Appeals held that the sale of title search and examination services was not the "business of insurance" and was therefore subject to antitrust liability. On 29 November 1993, the companies filed a petition for *certiorari* seeking review of this decision. The Supreme Court denied the petition on 21 March 1994.

Olin Chemical Co. v. FTC, 986 F.2d 1295 (9th Cir.), *cert. denied*, 114 S.Ct. 1051 (1994), was a petition for review of an FTC decision requiring divestiture in a case involving a merger of manufacturers of swimming pool chlorinating products. On 26 February 1993, the Court of Appeals affirmed and enforced the Commission order in its entirety. On 5 November 1993, Olin filed a petition for *certiorari* seeking review of the Ninth Circuit's decision. On 22 February 1994, the Supreme Court denied the petition for certiorari.

Private cases

There were no private antitrust cases decided in the Supreme Court in the same period.

Court of Appeals cases

DOJ cases decided in 1994

Thirteen antitrust cases involving the Department as a party were decided in FY 1994 at the Court of Appeals level. Nine of the cases involved criminal appeals, and four were civil matters. Most of the appeals involved criminal procedure, sentencing or evidentiary issues, and none had major international policy implications. In *U.S. v. Porat*, 17 F.3d 660 (3rd Cir. 1994), the parties appealed the defendant's sentence following his conviction for making material false declarations before the grand jury. The Court upheld the Department's argument that following his five-month imprisonment, the defendant be required to serve his five-month period of home detention under supervised release in the United States, and not, as the lower court had allowed, in Israel.

FTC cases decided in 1994

FTC v. Hospital Board of Directors of Lee County, 38 F.3d 1184 (11th Cir. 1994), is a suit to enjoin the acquisition by Lee Memorial Hospital of the assets of Cape Coral Hospital pending an FTC administrative adjudication to determine the legality of the acquisition under Section 7 of the Clayton Act, 15 U.S.C. sec. 18. The complaint was filed on 28 April 1994, and the district court granted a temporary restraining order preventing the acquisition. On 16 May 1994, the district court granted defendants' motion to dismiss the complaint and dissolve the temporary restraining order, on the ground that the acquisition was immunised from antitrust liability by the "state action" doctrine. On 18 May 1994, the Court of Appeals stayed the district court's order pending appeal, thereby enjoining the acquisition temporarily. On 30 November 1994, the Court of Appeals affirmed the district court's order. On 14 December 1994, the Commission filed a suggestion of rehearing *en banc*, requesting that the entire

Eleventh Circuit reconsider the case. The Commission's petition was denied. The parties subsequently abandoned the transaction.

Private cases having international implications

In *re Dual-Deck Video Cassette Recorder Antitrust Litigation*, 1993-2 Trade Cas. (CCH) ¶ 70 445 (9th Cir. 15 Dec. 1993), a dual-deck video cassette recorder ("VCR") patentee selling VCRs with two decks sued various multinational consumer electronics manufacturers alleging that they conspired to prevent introduction of dual-deck VCRs to the U.S. by agreeing that they would refuse to manufacture such VCRs or deal with manufacturers or sellers of dual-deck VCRs, and conspired to monopolise the market for consumer electronics products in general, other than VCRs. The Court of Appeals upheld a district court judgment in favour of the defendants. On the first claim, the plaintiff was collaterally estopped by reason of an earlier jury verdict finding no conspiracy: although the claim alleged a later time period from the earlier complaint, it asserted no change in facts or circumstances of the alleged conspiracy to differentiate the later conduct. On the second claim, the plaintiff failed to demonstrate antitrust injury and lacked standing: even if the defendants had conspired to monopolise the vaguely defined "market for consumer products", there was no evidence that the plaintiff had ever marketed or sold products in this market, or had taken any steps to enter that market.

In *Gushi Brothers Co. v. Bank of Guam*, 28 F.3d 1535 (9th Cir. 1994), the Court held that the anti-tying provisions of the Bank Holding Company Act did not apply where all conduct related to the alleged tie (between a loan and a requirement that the debtor remove its funds from another bank) occurred in the independent Republic of Marshall Islands. Relying on the presumption against extra-territoriality, the Court determined that Congress did not intend to extend the reach of the Act to conduct occurring wholly within the Republic of Marshall Islands. The Court also noted that the Act's antitrust provisions are analogous to those of the Sherman and Clayton Acts. The Court did not decide, however, whether the jurisdictional reach of the Bank Company Holding Act is as broad as that of the Sherman Act with respect to the effects doctrine, because even if it were, there were no allegations of anti-competitive effects within the territory of the United States.

Statistics on private and government cases filed during FY 1994

According to the annual report of the Director of the Administrative Office of the U.S. Courts, 748 new civil and criminal antitrust actions, both governmental and private, were filed in the federal district courts in the calendar year ending 30 December 1994.

Significant DOJ and FTC enforcement actions

DOJ criminal enforcement

The Division filed 57 criminal antitrust cases against 55 corporations and 50 individuals in FY 1994. Sentences resulted in 40 236 000 dollars in total fines, 1 497 days of actual incarceration and 2 475 days of alternative forms of confinement. Significant cases are discussed below; more detailed summaries of indictments and information can be found at 6 Trade Reg. Rep. (CCH) ¶ 45 094.

On 11 February 1994, the Division in *U.S. v. Exolon-ESK Co., et al.* filed a four-count indictment charging Exolon-ESK and Washington Mills Electro Minerals Corp and three corporate executives with conspiring to fix the prices of artificial abrasive grain sold in the United States. Artificial abrasive grains are used in the manufacture of bonded, coated and refractory abrasive products, including grinding wheels and sandpaper. The second count charges Exolon-ESK with violation of a 1948 consent decree that enjoined Exolon-ESK from fixing prices. The case is still pending in district court.

On 17 February 1994, the Division obtained an indictment in the district court for the Southern District of Ohio against General Electric, DeBeers Centenary and two individuals charging them with conspiring to raise list prices in the 500 million dollars-a-year industrial diamond industry. The two corporate defendants account for 80 per cent of the industrial diamond market and allegedly fixed prices by secretly exchanging information about intended price hikes. Price increases went into effect worldwide in February and March of 1992. DeBeers and the two individuals remained overseas and beyond the reach of the U.S. Courts. The trial of General Electric began in October 1994, but charges were dismissed after the presentation of the government's case.

On 9 June 1994, the Division filed information and obtained indictments against three companies and seven of their corporate executives, alleging price-fixing and conspiracy to drive up the price of plastic cups and glasses and other products in the 100 million dollars-a-year disposable plastic dinnerware industry. According to the information filed, executives of Plastics, Inc., Polar Plastics Mfg. Ltd. and Comet Products Inc., which produce over 90 per cent of the plastic dinnerware used in the United States, secretly telephoned and met with each other to further a conspiracy that lasted from December 1991 to December 1992. To date, two of the corporate defendants have been fined 8.36 million dollars. Additional fines and possible jail sentences are expected. The information and indictments were filed in the district court for the Eastern District of Pennsylvania. This investigation depended on crucial assistance from Canadian authorities, who searched the Canadian offices of one of the defendants pursuant to the Mutual Legal Assistance Treaty between the U.S. and Canada.

On 14 June 1994, the Division in *U.S. v. Premdor Corp.* charged Premdor, one of the two leading manufacturers of flush doors, with conspiring with other companies to fix the price of doors sold for installation in residences. The sales of such doors, sold to door distributors, wholesalers, home improvement centres and residential construction companies, amount to 600 million dollars annually. Premdor agreed to pay six million dollars in criminal fines. On 23 June 1994, the Division obtained a second indictment against Steves & Sons Inc., another flush door manufacturer. On 1 July 1994, Steves & Sons pleaded guilty and was fined 650 000 dollars.

After a two year investigation co-ordinated with Canadian antitrust officials, the Division and its Canadian counterpart, on 14 July 1994, brought criminal charges under their respective laws against an international cartel that had fixed prices in the 120 million dollars-a-year thermal fax paper market. The Division's criminal information charged a Japanese corporation, two U.S. subsidiaries of Japanese firms and an executive of one of the firms with conspiring to charge higher prices to thermal fax paper customers in North America. Thermal fax paper is used primarily by small businesses and home fax machine owners. The defendants pleaded guilty and agreed to pay 6.4 million dollars in fines. This case was the Division's first criminal prosecution to be co-ordinated with Canadian authorities under the authority of the Mutual Legal Assistance Treaty.

As of 30 September 1994, the Division had filed 124 criminal cases against 73 corporations and 78 individuals in the milk and dairy products industry. To date, 63 corporations and 57 individuals have been convicted, and fines imposed total approximately 59 million dollars. Twenty-seven individuals have been sentenced to serve a total of 4 774 days in jail, or an average of approximately six months. Civil

damages assessed total approximately eight million dollars. In FY 1994, the Division filed 18 criminal cases against 14 corporations and eleven individuals in the milk and dairy products industry. Seventeen grand juries in 14 states continue investigations in this industry.

DOJ non-merger civil enforcement

The Division filed simultaneously a civil complaint and proposed consent decree in *U.S. v. Alliant Techsystems Inc. and Aerojet-General,* No. 94-1026 (C.D. Ill. filed 19 Jan. 1994). The complaint charged Alliant and Aerojet, who are the only two U.S. suppliers of a particular type of cluster bomb, with entering into a "teaming" arrangement that eliminated competition between the two companies supplying the Department of Defence with those bombs. Under the arrangement, the companies agreed between themselves to submit one bid for the bombs contract instead of submitting two separate bids. The consent decree, which was entered on 13 May 1994, prohibits further teaming by Alliant and Aerojet in response to government solicitations for competitive offers to supply these munitions. The text of the consent decree appears at 1994-1 Trade Cas. (CCH) ¶ 70 595.

As part of its efforts to combat anti-competitive exchanges of price and wage information, the Division, in *U.S. v. Utah Society for Healthcare Human Resources Administration, et al.,* No. 94C282G (D. Utah filed 14 Mar. 1994), charged eight Utah hospitals and two related associations with violations of Section 1 of the Sherman Act. The government alleged that the defendants exchanged information about current and prospective wage rates for registered nurses, thus short-circuiting competition for nurses' services. The Division negotiated a consent decree that prohibits the defendants from fixing the wages paid to nurses and exchanging information about current or future wages. Simultaneously, the Utah Attorney General entered a consent decree with the University of Utah, which had not been named as a defendant in the Division's suit. That decree contains the same relief with respect to the University's involvement in nurse compensation agreements, as well as injunctions against allocating hospital services with competing facilities and requiring pediatricians to negotiate contracts with managed health care plans exclusively through the University. A summary of the Division's complaint appears at 6 Trade Reg. Rep. (CCH) ¶ 45 094, Case No. 4044. The text of the consent decree appears at 7 Trade Reg. Rep. (CCH) ¶ 50 751.

In 1992, the Division alleged that eight major airlines and the Airline Tariff Publishing Co. (ATP), a computerised fare information system owned by the airlines, had conspired to raise consumers' prices from April 1988 to December 1992. Two airlines accepted a consent decree when the complaint was filed in December 1992. In March 1994, after extensive pretrial litigation, the remaining seven defendants in *U.S. v. Airline Tariff Publishing Co., et al.,* No. 92-2854 (D.D.C. 1994) accepted a consent decree that allows the airlines to continue to use ATP for legitimate purposes, but eliminates the information exchange features that let the airlines negotiate prices with each other. The text of the consent decree appears at 1994-2 Trade Cas. (CCH) ¶ 70 687.

The Division filed a complaint and consent decree in *U.S. v. International Ass'n of Machinists and Aerospace Workers, et al.,* C.A. No. 94-0690 (D.D.C. filed 30 Mar. 1994). According to the Division's complaint, the defendants violated Section 8 of the Clayton Act, which prohibits the same person from serving as an officer or director of competing companies. Under the terms of the consent decree, the International Association of Machinists (IAM) is permitted to appoint union members to the boards of two competing airlines. Union members are prohibited, however, from exchanging confidential information, and the consent decree restricts communications between IAM representatives relating to competitively sensitive subjects such as pricing. A summary of the Division's complaint appears at

6 Trade Reg. Rep. (CCH) ¶ 45 094, Case No. 4050. The text of the consent decree is located at 1994-2 Trade Cas. (CCH) ¶ 70 813.

The Division in *U.S. v. Electronic Payment Services, Inc.*, No. 94-208 (D. Del. filed 21 Apr. 1994), charged Electronic Payment Services (EPS), the operator of the largest regional automated teller machine (ATM) network in the nation, with exclusionary practices that raised the price of ATM processing for banks in Pennsylvania, New Jersey, Delaware, West Virginia, New Hampshire and Ohio. The complaint alleged that EPS monopolised the market for ATM processing in its service area by requiring all members of its ATM Network to purchase their data processing services from it. The use of this vertical restrictive practice (tying) prevented the member banks of the ATM network from using alternative suppliers of data processing services. The tying arrangement not only retarded the development of a competitive processing market, it made it more difficult for the banks to connect with competing ATM networks, thus entrenching EPS's dominant position in the market. At the same time, the Division filed a consent decree which requires EPS to open its ATM network to independent processors and prohibits it from discriminating in pricing to its members based on the processor selected. A summary of the Division's complaint appears at 6 Trade Reg. Rep. (CCH) ¶ 45 094, Case No. 4053, and the text of the consent decree is located at 1994-2 Trade Cas. (CCH) ¶ 70 796.

On 25 May 1994, the Division, in *U.S. v. Pilkington plc. and Pilkington Holdings Inc.*, No. CV 940-345 (D. Ariz. 1994), filed a civil antitrust suit charging Pilkington, a British firm, and its U.S. subsidiary with monopolising the flat glass market. The complaint alleged that Pilkington, which dominates the 15 billion dollars a year international flat glass industry, foreclosed U.S. firms from foreign markets. Flat glass is used for windows and architectural panels by the construction industry and for windshields and windows by the automobile industry. The complaint alleged that Pilkington entered into unreasonably restrictive licensing arrangements with its most likely competitors, then over the course of almost three decades used these arrangements and threats of litigation to prevent American firms from competing to design, build and operate flat glass plants in other countries. By the time the Division filed its complaint, Pilkington's patents had long since expired and its technology was in the public domain. A consent decree accepted by Pilkington to settle the case will bar it from restraining American and foreign firms who desire to sell their technology outside the United States. A summary of the Division's complaint appears at 6 Trade Reg, Rep. (CCH) ¶ 45 094, Case No. 4061, and the text of the consent decree is located at 1994-2 Trade Cas. (CCH) ¶ 70 842.

On 15 July 1994, the Division in *U.S. v. Microsoft Corp.*, No. 94-1564LFO (D.D.C. filed 15 July 1994), charged Microsoft, the world's largest computer software company, with violating Sections 1 and 2 of the Sherman Act. Microsoft licenced its MS-DOS and Windows technology on a "per processor" basis that required personal computer manufacturers to pay a fee to Microsoft for each computer shipped, even if the computer did not contain Microsoft's software. The Division's complaint further alleged that Microsoft's licensing contracts bound computer manufacturers to the contracts for an unreasonably long period of time. Microsoft also imposed overly restrictive nondisclosure agreements on software companies that participated in trial testing of new software, thereby impeding the ability of those firms to work with Microsoft's operating system rivals. The Division filed a consent decree in which Microsoft is enjoined from conducting these and other restrictive practices. The tentative settlement was reached in close co-operation with the competition authorities of the European Commission, made possible by Microsoft's decision to waive its rights to confidentiality as between the two authorities. The European Commission had been investigating Microsoft's conduct since 1993. This case was the first co-ordinated effort of the two enforcement bodies in initiating and settling an antitrust case. See 6 Trade Reg. Rep. (CCH) ¶ 45 094, Case No. 4088, for a summary of the Division's complaint. The text of the proposed consent decree is located at 7 Trade Reg. Rep. (CCH) ¶ 50 764.[3]

The Division, in *U.S. v. S.C. Johnson & Son, Inc. and Bayer A.G.*, No. 94 C 50 249 (N.D. Ill. filed 4 August 1994), filed a civil antitrust lawsuit against Bayer A.G. and S.C. Johnson & Co. Inc. to block an exclusive licensing arrangement between S.C. Johnson, the dominant manufacturer of household insecticides in the United States, and Bayer, a large German chemical manufacturer. Johnson accounts for 45 to 60 per cent of total market sales, while none of its major competitors has more than 12 per cent. According to the complaint, in March 1988, Johnson persuaded Bayer not to enter the U.S. market, but, instead, to licence cyfluthrin, a newly developed and patented insecticide ingredient, exclusively to Johnson. Johnson also acquired a right of first refusal of any other active ingredient that Bayer later developed. Bayer's agreement to licence rather than enter the U.S. household insecticide market enabled Johnson to maintain its dominance of a highly concentrated market. The Division negotiated a consent decree that ensures that Johnson's competitors will have access to Bayer's active ingredient on terms and conditions that are at least as favourable as those accorded to Johnson. The proposed relief, among other things, also ensures that the Department will receive prior notice of any exclusive or co-exclusive licence arrangement between Johnson and any active ingredient manufacturer other than Bayer. A summary of the Division's complaint appears at 6 Trade Reg. Rep. (CCH) ¶ 45 094, Case No. 4089. The text of the proposed consent decree is located at 7 Trade Reg. Rep. (CCH) ¶ 50 765.

In a case challenging an illegal resale price maintenance agreement, the Division filed a civil antitrust action and proposed consent decree in *U.S. v. California SunCare, Inc.*, No. 94-5522 (C.D. Cal. filed 12 August 1994). According to the complaint, California SunCare conspired from November 1992 through April 1994 to fix and maintain the resale price of indoor tanning products at an amount set by the company. The Division negotiated a consent decree that prohibits California SunCare, the country's largest manufacturer of indoor tanning products, from fixing and maintaining the price at which its distributors resell its indoor tanning products. The consent decree also imposed appropriate remedial sanctions designed to preserve the pricing independence of the defendant's distributors. A summary of the Division's complaint appears at 6 Trade Reg. Rep. (CCH) ¶ 45 094, Case No. 4091. The text of the consent decree is located at 1994-2 Trade Cas. (CCH) ¶ 70 843.

In a joint action with the State of Arizona, the Division, in *U.S. and State of Arizona, by and through its Attorney General Grant Woods v. Delta Dental Plan of Arizona, Inc.* (D. Ariz. filed 30 August 1994), filed a civil antitrust suit and proposed consent decree challenging the Delta Dental Plan's use of a "most favoured nation" clause in contracts with Arizona dentists. Delta is the dominant dental plan in Arizona and has affiliation contracts with approximately 85 per cent of the state's dentists. The "most favoured nation" provision discouraged dentists from offering other dental plans more favourable fee arrangements than they offered to Delta. The case has nationwide implications because such contract provisions are widely used in the health care industry. The consent decree prohibits Delta's use of the "most favoured nation" clause and enjoins other practices by Delta that could discourage Delta-affiliated dentists from offering different fee arrangements to competing dental plans. A summary of the Division's complaint appears at 6 Trade Reg. Rep. (CCH) ¶ 45 094, Case No. 4092, and the text of the proposed consent decree appears at 7 Trade Reg. Rep. (CCH) ¶ 50 767.

Modification or termination of consent decrees

In May 1994, a district court terminated two consent decrees against Eastman Kodak Co. over the Division's objection, in *United States v. Eastman Kodak Co.*, 1994-1 Trade Cas. (CCH) ¶ 70 598. The decrees, entered in 1921 and 1954, related to the sale and processing of amateur colour film. The court found that the decrees were no longer necessary because there was now a world market in film, and Kodak

no longer had market power in the United States. The Division disagreed, and the case is now awaiting decision by the Court of Appeals (2d Cir. No. 946190), where it was argued in February 1995.

In documents filed on 16 June 1994, the Division agreed to terminate a 1957 consent decree in *U.S. v. Combustion Engineering, Inc.* (S.D.N.Y. filed 16 June 1994). In this case, significant changes in the relevant market removed the threat of further abuse. In addition, none of the offending licence agreements that were in effect in 1957 remained operative.

The Division filed documents in *U.S. v. Broadcast Music Inc.* (S.D.N.Y. filed 29 June 1994), agreeing to a proposed modification of a 1966 consent decree involving licensing to broadcasters of music performance rights by Broadcast Music Inc. The proposed modification provides a mechanism to enable the court to set an appropriate licensing fee when BMI and a potential licencee are unable to agree on a fee. The complaint initiating the BMI case in 1964 alleged that BMI and its broadcaster-owners had combined to restrain and monopolise the business of acquiring and licensing to broadcasters copyrighted music rights.

FTC non-merger enforcement actions

The district court for the District of Columbia dismissed a Commission complaint filed in June 1992 against Abbott Laboratories for alleged price-fixing in the sale of infant formula in bids to supply formula to the Commonwealth of Puerto Rico under the U.S. Government's Special Supplement Food Program for Woman, Infants and Children. The Commission sought a permanent injunction and monetary equitable relief. The Commission's complaint was filed at the same time as settlements with two other infant formula companies. Abbott contested the charges. Following a trial, the district court granted judgment for the defendant, ruling that the Commission failed to prove that Abbott was acting in collusion with its competitors. During the course of the proceeding, the court ruled, however, that the Commission could properly seek monetary relief for the victims of violations of the antitrust laws enforced by the Commission in a suit under Section 13(b) of the FTC Act. See *FTC v. Abbott Laboratories, Inc.*, 853 F. Supp. 526 (D.D.C. 1994).

The Commission dismissed a 1990 complaint charging the College Football Association (CFA) and Capital Cities/ABC, Inc. with illegally restraining competition in the marketing of college football telecasts and among telecasters of college football games through agreements which gave ABC exclusive rights to televise certain college football games. In July 1991, an Administrative Law Judge (ALJ) issued an Initial Decision dismissing the complaint against CFA without prejudice, finding that CFA did not carry on business for its own profit or that of its members and therefore, under Sections 4 and 5 of the FTC Act, was not subject to the Commission's jurisdiction. Complaint counsel appealed the decision to the Commission which subsequently affirmed the ALJ's decision. In its decision, the Commission announced a two-pronged jurisdictional test requiring analysis of both the profit/nonprofit nature of the entities to which an organisation distributes its income, and the profit/nonprofit nature of the activities from which it derived that income. The Commission dismissed the complaint against CFA with prejudice and the complaint against Capital Cities/ABC without prejudice. See *College Football Association.*, Docket No. 9242, 5 Trade Reg. Rep. (CCH) ¶ 23 631.

After nearly a decade of litigation, the Commission issued final consent orders in the *Detroit Auto Dealers Association* case, settling 1984 charges that the association and nearly 200 other respondents, including new car dealerships and other dealer associations, had illegally conspired to limit the hours of operation of new car dealerships in the Detroit, Michigan area. The consent orders follow a decision by the Sixth Circuit affirming the Commission's 1989 administrative decision finding a violation

of Section 5 of the FTC Act. The consent orders are notable since they go beyond cease-and-desist orders and require affirmative relief by ordering the respondent dealerships to remain open a minimum of 62 hours a week and to disclose their hours of operation in all advertising for a one-year period. The association is subject to a requirement that it advertise that certain dealers are required by FTC consent order to maintain extended shopping hours. The case against the few remaining respondents who have not settled is before the Commission on remand. See *Detroit Auto Dealers Association.*, Docket No. 9189, 5 Trade Reg. Rep. (CCH) ¶ 23 532.

In *McLean County Chiropractic Association*, the Commission charged that the association had engaged in collective fee setting. The complaint specifically alleged that the association not only set the maximum fees its members could charge patients and third-party payers for their services, but also attempted to negotiate collectively on behalf of its members the terms and conditions of agreements with third-party payers, with the result that consumers and third-party payers were deprived of the benefits of competition of the services of chiropractors in the relevant market. Under the final consent order, the association is prohibited from entering into, or attempting to enter into, or acting in any way to further any agreement or combination with any chiropractors to discuss or collectively determine their fees, or deal with payers on collectively-determined terms. See *McLean County Chiropractic Association.*, Docket No. C-3491, 5 Trade Reg. Rep. (CCH) ¶ 23 524.

In another price-fixing case, the Commission issued final consent orders against the American Society of Interpreters (ASI) and the American Association of Language Specialists (TAALS) settling charges that the groups conspired or combined to fix the fees their members could charge for services, and engaged in illegal efforts to otherwise restrain competition among their members. Under the final orders, ASI and TAALS are prohibited, among other things, from: creating, distributing or endorsing any list of fees for interpretation, translation or other language services; entering into or maintaining any agreement or plan to fix or otherwise interfere with fees; and recommending or encouraging interpreters, translators or other language specialists to charge certain fees. ASI and TAALS are additionally prohibited from maintaining any agreement or plan to restrict the length of time any language specialist can work in a given period, the time for which specialists are paid for preparation or study or the number of language specialists hired for a job. See *American Society of Interpreters*, Docket No. C-3491, 5 Trade Reg. Rep. (CCH) ¶ 23 538.

In *Arizona Automobile Dealers Association (AADA)*, the Commission gave final approval to a consent agreement settling charges that AADA agreed with its member dealerships to restrict non-deceptive comparative advertising, and non-deceptive advertising of price discounts and the terms and availability of consumer credit, thereby depriving Arizona consumers of the benefits of competition in the sale of new cars and trucks. The order prohibits AADA from, among other things, restricting, regulating or interfering with the truthful, non-deceptive comparative, discount or price advertising, or non-deceptive advertising concerning the terms and availability of consumer credit of its members, or others, and from interfering with, or advising them against such advertising. See *Arizona Auto Dealers Association.*, Docket No. C-3497, 5 Trade Reg. Rep. (CCH) ¶ 23 560.

The Commission issued a final consent order against the Community Associations Institute (CAI), which manages condominiums and other homeowner's associations, settling charges that enforcement of CAI's code of ethics restricted competition among its members by limiting the solicitation of clients. The consent order prohibits CAI from interfering in any way with the truthful advertising and solicitation efforts of its members. See *The Community Associations Institute*, Docket C-3498, 5 Trade Reg. Rep. (CCH) ¶ 23 561.

The Commission accepted for public comment a proposed consent agreement settling 1988 charges that Boulder Ridge Cable TV and Weststar Communications, Inc., two California-based cable companies, entered into an illegal agreement not to compete with one another as part of Boulder Ridge's acquisition of Three Palms, Ltd. The FTC alleged that the agreement was not limited to the area in which the acquisition occurred, but would restrain competition unreasonably in other areas. The proposed consent agreement would prohibit the respondents from enforcing any rights they may have under certain paragraphs of the agreement not to compete and would permanently prohibit the respondents from agreeing not to compete with the seller or buyer of a cable television system or cable television service in any geographic area. See *Boulder Ridge Cable TV*, Docket No. C-3537, 5 Trade Reg. Rep. (CCH) ¶ 23 642.

The Commission issued for public comment a consent agreement settling charges of a 1992 complaint that Trauma Associates of North Broward, Inc. and ten physicians in Florida conspired to fix the fees for their services at the trauma centres of two area hospitals and forced one trauma centre to close by staging a walkout when one of the hospitals refused to meet their terms. The settlement requires the dissolution of Trauma Associates, which allegedly served as the vehicle for conspiracy, and prohibits the ten physicians from entering into similar agreements to reduce competition in the future. See *Trauma Associates of North Broward, Inc.*, Docket No. C-3541, 5 Trade Reg. Rep. (CCH) ¶ 23 644.

Also in the health care area, the Commission accepted for public comment a proposed consent agreement settling charges of an alleged boycott of an alternative health care service. The proposed complaint charged that the medical staff of Good Samaritan Regional Medical Center conspired to boycott the hospital in an effort to force it to end its involvement in a potentially cost-containing multi-specialty physician's clinic that would have competed with the medical staff. The proposed consent agreement would prohibit members of the medical staff from agreeing to prevent or restrict the services offered by Good Samaritan, the clinic or any other health-care provider. Specifically, the settlement would prohibit any agreement among the medical staff members, or between medical staff members and other health-care providers, medical societies or hospitals, to refuse (or threaten to refuse) to deal with others offering health care services, or to withhold (or threaten to withhold) patient referrals. See *Medical Staff of Good Samaritan Regional Medical Center*, Docket No. C-3554, 5 Trade Reg. Rep. (CCH) ¶ 23 661.

In addition, the Commission gave final approval to consent agreements accepted for public comment in the previous year in the following non-merger matters:

-- *Baltimore Metropolitan Pharmaceutical Assn., Inc.*, Docket No. 9262, 5 Trade Reg. Rep. (CCH) ¶ 23 510.

-- *Personal Protective Armor Association., Inc.*, Docket No. C-3481, 5 Trade Reg. Rep. (CCH) ¶ 23 521.

-- *The Keds Corp.*, Docket No. C-3490, 5 Trade Reg. Rep. (CCH) ¶ 23 463, 1994-1 Trade Cas. (CCH) ¶ 70 549.

-- *Homecare Oxygen & MedicalEquipment Co.*, Docket No. C-3530, 5 Trade Reg. Rep. (CCH) ¶ 23 678.

Business reviews conducted by the Department of Justice

From 1 January to 30 September 1994, the Antitrust Division responded to 18 requests for review of written business proposals, indicating in each of the 18 responding letters that it would not challenge the proposed conduct.

On 25 January 1994, the Division stated that it would not challenge a proposal submitted by the Insurance Services Office Inc. to create a computer database to permit users to compare the prices charged by insurers within a state for personal automobile and homeowners insurance. The Division explained that the proposed conduct falls under the McCarran-Ferguson Act, which provides an exemption from the antitrust laws to state-regulated insurance business. The text of the business review letter may be found at 6 Trade Reg. Rep. (CCH) ¶ 44 094, Letter No. 94-1.

On 25 January 1994, the Division stated that it would not challenge a proposal submitted by the Association of Independent Television Stations to continue a voluntary programme of guidelines and viewer advisories for independent television stations in an effort to reduce the negative impact of violence on television. The Division stated that the proposal, which would allow the association and its members to discuss, collect and disseminate information on the effect of the guidelines programme as well as co-ordinate the production of a series of anti-violence messages, is unlikely to be anti-competitive because it is voluntary and no joint activity is intended to result in the boycott of any person. The text of the business review letter may be found at 6 Trade Reg. Rep. (CCH) ¶ 44 094, Letter No. 94-2.

On 15 February 1994, the Division announced that it would not challenge a proposal submitted by the National Association of Credit Management to create its own department to disseminate to businesses in the leasing industry credit information specifically designed to combat fraud within the industry. The Division stated that the proposal will not be anti-competitive because the credit history information will be used only to assist members in implementing unilateral credit policies. The text of the business review letter may be found at 6 Trade Reg. Rep. (CCH) ¶ 44 094, Letter No. 94-3.

On 18 February 1994, the Division approved a proposal submitted by the Bay Area Business Group on Health (BBGH) to form a group purchasing project for health care benefits. Under the proposal, the BBGH will ask several health maintenance organisations (HMOs) to bid on two standard benefit plans and negotiate prices. The Division stated that the proposal has the potential to create efficiencies in the delivery of HMO services that could result in lower health care costs. The text of the business review letter may be found at 6 Trade Reg. Rep. (CCH) ¶ 44 094, Letter No. 94-4.

On 18 February 1994, the Division stated that it would not challenge a proposal submitted by the New Jersey Hospital Association to produce a survey and report of employee wages and salaries paid by hospitals in New Jersey. The Division explained that the proposal met substantially all of the antitrust safety zone conditions for hospital participation in exchanges of price and cost information, as outlined in the Division's Enforcement Policy Statements for the Health Care Industry. The text of the business review letter may be found at 6 Trade Reg. Rep. (CCH) ¶ 44 094, Letter No. 94-5.

On 8 March 1994, the Division stated that it would not challenge a proposal submitted by the National Telecommunications Data Exchange Inc. and its member long-distance telecommunications carriers to exchange information about defaulted commercial accounts. The proposal would lower costs to consumers by reducing the amount of uncollectible business accounts experienced by long-distance carriers. The Division stated that the proposal was designed with sufficient safeguards so that it was unlikely to facilitate collusion. The text of the business review letter may be found at 6 Trade Reg. Rep. (CCH) ¶ 44 094, Letter No. 94-6.

On 23 March 1994, the Division stated that it would not challenge the Houston Health Care Coalition's proposal to contract with health care providers to deliver health services to members' employees and their dependents at pre-determined rates. The Division believes that by jointly negotiating health care prices, the association will help ensure that health care services are provided at cost-effective rates. The text of the business review letter may be found at 6 Trade Reg. Rep. (CCH) ¶ 44 094, Letter No. 94-7.

On 19 April 1994, the Division stated that it would not challenge a proposal by the Automobile Transport Fleet Affiliation (ATFA) to create a separate group to offer customers centralised marketing and contract administration services and act as a common purchasing agent for its members. The Division stated that the proposed joint venture would not reduce competition because it contains sufficient safeguards to prevent the exchange of information between individuals, and it may enhance efficiency by lowering administrative costs. The text of the business review letter may be found at 6 Trade Reg. Rep. (CCH) ¶ 44 094, Letter No. 94-8.

On 20 April 1994, the Division approved the Fuel Cell Commercialization Group's proposal to help Energy Resource Corporation of Danbury, Connecticut, to overcome the technical and economic barriers to the commercial use of molten carbonate fuel cells (MCFC) as a source of clean and reliable electrical power. The Division stated that the proposal would not reduce competition or facilitate price-fixing in the MCFC market and may facilitate research and development of MCFC power plants. The text of the business review letter may be found at 6 Trade Reg. Rep. (CCH) ¶ 44 094, Letter No. 94-9.

On 20 May 1994, the Division stated that it would not challenge a proposal by the Hotel Employees and Restaurant Employees International Union Welfare Fund, to provide an historical claims report to the preferred provider organisation with which it contracts to provide health coverage to the unit's participants. The Division stated that the information exchange could potentially enable physicians to make more informed decisions about selling their services to the union. The text of the business review letter may be found at 6 Trade Reg. Rep. (CCH) ¶ 44 094, Letter No. 94-10.

On 7 June 1994, the Division stated that it would not challenge a proposal by four Annapolis, Maryland banks to act jointly in making home equity loans to low and middle-income households. The Division explained that the four banks combined only possess 18.2 per cent of the relevant market and that to the extent that the joint venture allows the member banks to reduce the risks of below-market rate lending to poor and middle-income households, it may have the pro-competitive effect of increasing output. The text of the business review letter may be found at 6 Trade Reg. Rep. (CCH) ¶ 44 094, Letter No. 94-11.

On 20 June 1994, the Division approved the Alabama Healthcare Council's proposal to develop the Cooperative Clinical Benchmarking Demonstration Project. The project will evaluate certain health care services provided by hospitals in Birmingham, Alabama. The Division believes that this collaboration will promote efficiency and effectiveness and could lower costs to consumers. The text of the business review letter may be found at 6 Trade Reg. Rep. (CCH) ¶ 44 094, Letter No. 94-12.

On 29 June 1994, the Division stated that it would not challenge a proposal by Seeskin, Paas, Blackburn and Company, a Cincinnati public accounting firm, to compile and publish information on prices the firm's Cincinnati area dental clients charge for certain procedures. The Division stated that the proposal contained sufficient safeguards so that it was unlikely that the participating dentists could collude on prices. The text of the business review letter may be found at 6 Trade Reg. Rep. (CCH) ¶ 44 094, Letter No. 94-13.

On 5 July 1994, the Division stated that it would not challenge the proposal of the Portable Engine Manufacturers Association (PEMA) to participate with other groups on an Environmental Protection Administration advisory committee that will draft recommendations on feasible and cost-effective emission control standards for engines manufactured by PEMA members. The Division explained that the proposal contains safeguards to significantly reduce the risk of any anti-competitive effects resulting from PEMA's participation in the rulemaking process. The text of the business review letter may be found at 6 Trade Reg. Rep. (CCH) ¶ 44 094, Letter No. 94-14.

On 6 July 1994, the Division stated that it would not challenge a proposal by the Des Moines General Hospital and 177 physicians in south-central Iowa to create the Collaborative Provider Organisation Incorporated (CPO). The CPO will offer a health care plan to business-owners seeking new ways to cover their workers' medical needs. The Division explained that the proposal will provide an additional alternative health care delivery system and could increase competition and lower health care costs for consumers. The text of the business review letter may be found at 6 Trade Reg. Rep. (CCH) ¶ 44 094, Letter No. 94-15.

On 24 August 1994, the Division approved a plan, at the request of the Securities and Exchange Commission, which would permit major securities brokerage firms to participate in the preparation and publication of a report on how to reduce possible conflicts of interest between brokers and their customers that result from the various salary, commission and bonus formulas by which brokers are compensated by their brokerage firms. The text of the business review letter may be found at 6 Trade Reg. Rep. (CCH) ¶ 44 094, Letter No. 94-16.

On 14 September 1994, the Division stated that it would not challenge a proposal by the Preferred Podiatric Network Incorporated, a subsidiary of the New York State Podiatric Medical Association, to serve as an intermediary in enrolling association members to provide foot-care service as part of managed care plans. The Division believes that the proposal was designed with sufficient safeguards so that it was unlikely to facilitate anti-competitive behaviour by the network. The text of the business review letter may be found at 6 Trade Reg. Rep. (CCH) ¶ 44 094, Letter No. 94-17.

On 22 September 1994, the Division approved a proposal by the Mortgage Asset Research Institute to establish a clearinghouse to provide information to its subscribers about private complaints it receives of fraud and misrepresentation in the industry. The Division stated that the proposal would not promote collusion and that the exchange of this type of information could have the pro-competitive effect of reducing costs in mortgage-related businesses. The text of the business review letter may be found at 6 Trade Reg. Rep. (CCH) ¶ 44 094, Letter No. 94-18.

III. Enforcement of antitrust laws and policies: mergers and concentrations

Department of Justice and FTC merger statistics

The Department and the Commission maintain statistics regarding the mergers and acquisitions reported under the Hart-Scott-Rodino Act (HSR). The HSR Pre-merger Notification Program was enacted to provide the enforcement agencies with a meaningful opportunity to review proposed transactions and to take enforcement action, if appropriate, to prevent consummation of transactions that violate the antitrust laws. Only those mergers meeting certain size or other criteria are required to be reported under the Act. During FY 1994, the two agencies received 4 403 filings for 2 301 reported transactions under the notification and filing requirements of the HSR Act. This represents a 25 per cent increase over the number reported in the previous fiscal year.

DOJ review of pre-merger notifications

The Division reviewed 2 301 notified transactions, and initiated 57 HSR merger investigations.

FTC review of pre-merger notifications

Based on its review of pre-merger notification reports, the FTC investigated 46 transactions with second requests for information.

Enforcement of pre-merger notification rules

The Commission and the Department have actively enforced the filing requirements of the Hart-Scott-Rodino (HSR) Act by bringing cases in federal court to obtain civil penalties. The complaints and settlements typically are filed in the United States District Court for the District of Columbia. On 27 September 1994, in connection with a complaint filed by the FTC, the Pennzoil Company agreed to pay a 2.6 million dollars civil penalty to settle FTC charges that it did not comply with HSR pre-merger notification and waiting period requirements when it acquired 15 million dollars worth of voting securities of the Chevron Corporation. According to the complaint, Pennzoil filed the required pre-merger notification ten months after the acquisition. See *Pennzoil Company*, FTC File No. 901-0154.

Merger cases

DOJ merger challenges or cases

On 31 January 1994, the Antitrust Division announced that it would not file a suit to challenge the acquisition by Eaton Corporation of Cleveland, Ohio, of the Distribution and Control Business Unit of the Westinghouse Corporation of Pittsburgh, Pennsylvania, subject to divestiture by Eaton of certain assets. Under the divestiture, Eaton would sell a package of assets used in the manufacture of circuit breakers and switches to a third party, Thomas & Betts, of Memphis, Tennessee. The Division stated that the divestiture preserves competition for the sale of basic products that are essential for the safe use of electricity.

On 14 February 1994, the Division announced that it would not file a suit to challenge a restructured transaction between Ashland Oil Incorporated of Russel, Kentucky, and Peter Kiewit Sons' Incorporated, of Omaha, Nebraska. To respond to the Division's antitrust concerns, Ashland would sell its APAC-Arizona construction businesses to Peter Kiewit Sons' Incorporated, but would retain, and not sell, its concrete and aggregate businesses in Tucson, Arizona. The Division expressed its belief that the restructuring would preserve competition in the construction materials markets in Tucson by promoting the continued viability of an independent competitor.

On 4 April 1994, the Division filed a civil antitrust suit in U.S. District Court in Detroit, challenging the proposed acquisition by Flow International Corporation of Ingersoll-Rand's Waterjet Cutting Systems Division. Flow International and Ingersoll-Rand are the two dominant U.S. producers in the 34 million dollars waterjet industry and combined would have acquired a market share of about 90 per cent. The suit alleged that the merger would result in a dominant waterjet manufacturer that would likely

raise prices, reduce service and lesson innovation. The parties abandoned the transaction on 2 May 1994. A summary of the Division's complaint appears at 6 Trade Reg. Rep. (CCH) ¶ 45 094, Case No. 4051.

On 14 April 1994, the Division announced that it would not file a suit to challenge a proposed merger between Valley Bancorporation and Marshall & Ilsley, two of the largest banking organisations in Wisconsin, on the condition that Marshall & Ilsley would sell branches in Madison, Oshkosh, Mayville, New Holstein and Rhinelander.

On 28 April 1994, the Division filed a civil antitrust suit and proposed consent decree in connection with the proposed merger of Tele-Communications Incorporated (TCI), the country's largest cable operator, and Liberty Media Corporation, a major cable programmer. The Division's suit alleged that the proposed merger would decrease competition among video programmers and multichannel programme distributors. Under the terms of the consent decree, the merged firm is prohibited from discriminating against independent video programmers with respect to the terms and conditions of carriage on its cable systems and against its multichannel subscription television competitors with respect to the terms and conditions of licensure of its video programming, where the effect of such actions would be unreasonably to restrain competition. A summary of the Division's complaint appears at 6 Trade Reg. Rep. (CCH) ¶ 45 094, Case No. 4054, and the text of the proposed consent decree is located at 7 Trade Reg. Rep. (CCH) ¶ 50 757.

In its first case filed jointly with a State Attorney General, the Division joined the Florida Attorney General in challenging on 5 May 1994, the proposed merger of two central Florida hospitals. The combination would have accounted for nearly 60 per cent of general acute care hospital services in North Pinellas County, a market in excess of 300 million dollars. The complaint alleged that the merger would create a dominant provider of general acute care hospital services, thereby reducing options for managed care plans that have been instrumental in containing hospital costs. The consent decree preserves competition between the two hospitals for most services, while allowing them to act jointly where such action will not harm competition. The parties are allowed to combine certain administrative functions and the performance of certain high technology medical services, but they must market the latter independently. Most acute care hospital services will continue to be provided by the two parties independently. See 6 Trade Reg. Rep. (CCH) ¶ 45 094, Case No. 4056, for a summary of the Department's complaint. The consent decree was entered on 29 September 1994 and the text is located at 1994-2 Trade Cas. ¶ 70 759.

The Division filed a civil antitrust suit in *U.S. v. Mercy Health Services and Finley Tri-States Health Group, Inc.*, No. C94-1023 (N.D. Ia., filed 10 June 1994), challenging the proposed merger of Mercy Health Center and The Finley Hospital in the Dubuque, Iowa area. The complaint alleged that the merger would create a monopoly provider of general acute care hospital services, reduce competition and lead to higher prices for hospital services in Dubuque. The case is pending in District Court, awaiting judgment following a trial concluded in October 1994. See 6 Trade Reg. Rep. (CCH) ¶ 45 094, Case No. 4074, for a summary of the Division's complaint.

On 15 June 1994, the Division filed a civil antitrust suit in *U.S. v. MCI Communications Corporation and BT Forty-Eight Company*, No. 94-1317 (D.D.C., filed 15 June 1994), to block a proposal by British Telecommunications (BT) to purchase 4.3 billion dollars of stock in MCI and to form a joint venture with MCI to provide global telecommunications services. At the same time, the Division filed a proposed consent decree. The complaint alleged that the proposed BT-MCI joint venture could substantially reduce competition because the company could obtain an unfair advantage over other competitors through superior access to BT's United Kingdom network, potentially causing the price of international telecommunications services to increase. Under the consent decree, MCI and the joint

venture must publish rates, terms and conditions under which they gain access to the British Telecommunications network, and they are prevented from gaining proprietary information or pricing data about their U.S. competitors. See 6 Trade Reg. Rep. (CCH) ¶ 45 094, Case No. 4 076, for a summary of the Division's complaint and 1994-2 Trade Cas. (CCH) ¶ 70 730, for the text of the consent decree.

On 15 July 1994, the Division filed a civil antitrust suit in *U.S. v. AT&T and McCaw Cellular Communications, Inc.*, C.A. No. 1:94-CV01555 (D.D.C., filed 15 July 1994), challenging a proposed acquisition by AT&T Corporation of McCaw Cellular Communications Incorporated that would harm competition in the cellular service, inter-exchange and equipment markets. Under a proposed consent decree, McCaw must provide long-distance competitors with equal access to its cellular systems and AT&T must ensure that its cellular equipment customers are not disadvantaged. See 6 Trade Reg. Rep. (CCH) 45 094, Case No. 4087 for a summary of the complaint and 7 Trade Reg. Rep. (CCH) ¶ 50 763 for the text of the proposed consent decree.

On 8 September 1994, the Division filed a civil antitrust suit in *U.S. v. Outdoor Systems, Incorporated*, No. 94-2393 (D.Ga.), to block the merger of Capitol Outdoor Advertising Incorporated by Outdoor Systems Incorporated, Atlanta's two largest outdoor advertising firms. At the same time, the parties filed a proposed consent decree to settle the suit. The proposed merger would have substantially reduced competition by creating a firm with about 63 per cent of Atlanta's billboards. Under the consent decree, Outdoor Systems must divest its existing outdoor advertising business in Atlanta in order to operate Capitol's Atlanta business. See 1994-2 Trade Cas. (CCH) ¶ 70 807 for the text of the consent decree.

On 26 September 1994, the Division announced that it would not file a suit to challenge the acquisition of Parsons Technology Corporation by Intuit Inc. after Intuit agreed to licence Parson's Personal Tax Edge software and related assets to Novell Corporation's WordPerfect division. Intuit entered into early licensing negotiations after being advised by the Division that its proposed purchase of Parsons would raise serious antitrust concerns.

Merger cases brought by the FTC

Preliminary injunctions authorised

In January 1994, the Commission authorised its staff to seek a federal court order to enjoin, pending the outcome of an administrative trial, a proposed transaction that would combine the only two general acute care hospitals in Pueblo County, Colorado. The FTC alleged that the acquisition of Parkview Episcopal Medical Center hospital by the Sisters of Charity Healthcare Systems, Inc., which already owned St. Mary-Corwin Hospital in Pueblo, would lessen competition for, or tend to create a monopoly in, general acute care hospital services in Pueblo County. The parties abandoned the proposed transaction before a complaint was filed. See *Parkview Episcopal Medical Center*, File No. 931-0125.

In March, the Commission authorised its staff to seek a federal court order preventing the consummation of a proposed acquisition by Healthtrust Inc.-The Hospital Co. of three hospitals from Holy Cross Health Services of Utah. The FTC alleged that the proposed acquisition would significantly lessen competition for inpatient acute-care hospitals services in three counties in the Salt Lake City-Ogden metropolitan area. Before the complaint was filed, the matter was resolved by a proposed consent agreement that would allow Healthtrust to acquire some assets of Holy Cross Health Services of Utah, including Holy Cross-Jordan Valley Hospital in Salt Lake County and St. Benedicts' Hospital in Weber

County, but would require divesture of other assets, including Holy Cross Hospital in downtown Salt Lake City. See Healthtrust, Inc.-The Hospital Co., Docket No. C-3538, 5 Trade Reg. Rep. (CCH) ¶ 23 638.

In April, the Commission authorised its staff to seek a federal court order blocking Lee Memorial Hospital's proposed acquisition of Cape Coral Hospital, in Lee County Florida. The FTC alleged that the acquisition would significantly decrease competition for inpatient, acute-care hospital services in the Lee County area as the acquisition would reduce from four to three the number of hospital competitors in the relevant market, and the combined entity would have an approximate 67 per cent market share. On 28 April, the FTC's request for a temporary restraining order was granted by a federal district court in Florida. On 16 May 1994, the district court granted defendants' motion to dismiss the complaint and dissolve the temporary restraining order, on the ground that the acquisition was immunised from antitrust liability by the "state action" doctrine. As noted above, the Commission appealed that decision to the Eleventh Circuit. The Commission also issued an administrative complaint in this matter. The parties abandoned the transaction. See *Hospital Board of Directors of Lee County*, 38 F.3d 1184 (11th Cir. 1994), Docket No. 9265, 5 Trade Reg. Rep. (CCH) ¶ 23 608, 1994-1 Trade Cas. (CCH) ¶ 70 593.

Commission administrative decisions

The Commission upheld a 1986 administrative complaint, affirming in part and reversing in part a November 1990 decision by an ALJ that Coca-Cola Company's acquisition of the Dr. Pepper Company was likely to lessen competition in the production and distribution of carbonated soft drink concentrate in the U.S. The transaction was abandoned after the Commission obtained a preliminary injunction, but the administrative case went forward because Coca-Cola was unwilling to enter into a consent order requiring it to obtain the Commission's prior approval of future acquisitions. The ALJ upheld the complaint but did not find that a prior-approval order was in the public interest. The decision was appealed by both Coca-Cola and complaint counsel. The Commission upheld the ALJ's findings that the proposed acquisition was anti-competitive, but reversed the ALJ's decision not to issue a prior-approval order, concluding that future Coca-Cola acquisitions of branded concentrate firms very likely could raise competitive concerns given market conditions. In so deciding, the Commission found that the FTC and Clayton Acts applied to unconsummated as well as completed mergers, and that the purchase agreement itself violated Section 5 of the FTC Act. The final order requires Coca-Cola to obtain approval prior to acquiring certain brand name, soft-drink concentrate manufacturers, but does not affect acquisitions of bottlers. See *The Coca-Cola Co.*, Docket No. 9207, 5 Trade Reg. Rep. (CCH) ¶ 23 625.

The Commission reversed the 1991 dismissal by an ALJ of a 1988 complaint and ruled that Coca-Cola Bottling Company of the Southwest's acquisition of the San Antonio Dr. Pepper franchise would substantially reduce competition for branded carbonated soft drinks in the ten-county area around San Antonio, Texas. In doing so, the Commission also found Coca-Cola Southwest's acquisition of the Canada Dry franchise did not violate antitrust laws as alleged in the complaint. The Commission's order requires, among other things, that Coca Cola Southwest divest the Dr. Pepper franchise and keep the assets viable and marketable prior to divestiture. See *The Coca-Cola Bottling Co. of the Southwest*, Docket No. 9215, 5 Trade Reg. Rep. (CCH) ¶ 23 681.

The Commission affirmed a 1992 decision of an ALJ and dismissed a 1989 complaint alleging that the 1988 acquisition of Ukiah General Hospital by Adventist Health System/West in Ukiah, California would substantially reduce competition for general acute-care hospitals in southeastern Mendocino County and western Lake County. In his 1992 decision, the ALJ dismissed the complaint finding that the transaction had no adverse competitive effects in a geographic market that includes Santa Rosa. In dismissing the complaint, the Commission did not adopt all of the ALJ's decision, but found that the

evidence did not support the relevant geographic markets alleged in the complaint. See *Adventist Health System/West*, Docket No. 9234, 5 Trade Reg. Rep. (CCH) ¶ 23 591.

Respondent R.R. Donnelley & Sons appealed to the Commission a decision by an ALJ upholding a 1990 complaint alleging that its acquisition of Meredith/Burda L.P. could substantially lessen competition in the highly concentrated market for high-volume publication gravure printing in the United States. The ALJ ordered Donnelley to divest four printing plants, as well as all other commercial printing assets gained in the 1990 acquisition of Meredith/Burda L.P. In addition, the ALJ's order contained a ten-year prohibition against anyone with more than one per cent of Donnelley's stock holding or controlling more than one per cent of the stock of the acquirer. The respondent's appeal was pending before the Commission at the end of the fiscal year. See *R.R. Donnelley & Sons Co.*, Docket No. 9243, Trade Reg. Rep. (CCH) ¶ 23 156.

The Commission issued an administrative complaint alleging that the acquisition by Red Apple Companies, Inc. and Designcraft Industries, Inc. of 32 Sloan's supermarkets in four Manhattan residential areas between 1991 and 1993 could result in higher prices and lower quality and selection in those areas since there are relatively few competitors and entry by new companies would be difficult and not timely enough to prevent the anti-competitive effects. The matter was settled by a consent order requiring the divestiture of six supermarkets and prohibiting the respondents from limiting or preventing any purchaser from using other stores in the relevant areas as supermarkets. See *Red Apple Companies, Inc.*, Docket No. 9266, 5 Trade Reg. Rep. (CCH) ¶ 23 620.

Occidental Petroleum Corporation agreed to a consent order to settle its appeal from the 1992 Commission decision that its 1986 acquisition of certain assets of Tenneco Polymers, Inc. likely would reduce substantially competition in the market for mass and suspensions polyvinyl chloride (PVC) homopolymer, suspension PVC copolymer and dispersion PVC in the U.S. The settlement, modified in accordance with a decision of the Second Circuit, requires divestiture to a Commission-approved acquirer (or acquirers) of Occidental's suspension PVC plant in Addis, Louisiana, and a suspension and dispersion plant in Burlington, New Jersey. The original Commission order required divestiture of Occidental's larger, suspension PVC plant in Pasadena, the Texas plant acquired from Tenneco and the Burlington plant. The Second Circuit approved the settlement. See *Occidental Petroleum Corp.*, Docket No. 9205, 5 Trade Reg. Rep. (CCH) ¶ 23 531.

In the largest merger undertaken to date in the health care industry, the Commission issued a final consent order settling charges that Columbia Healthcare Corporation's proposed $four billion acquisition of HCA-Hospital Corporation of America would substantially lessen competition in the area surrounding Augusta, Georgia and Aiken, South Carolina. The parties agreed, among other things, to divest HCA Aiken Regional Medical Centers, located in Aiken, South Carolina and to operate Aiken Regional as a separate, independent hospital until it can be sold to an FTC-approved purchaser. See *Columbia Healthcare Corp.*, Docket No. C-3505, 5 Trade Reg. Rep. (CCH) ¶ 23 547.

The Commission gave final approval to a consent agreement with Martin Marietta Corporation, settling charges that its 208.5 million dollars acquisition of General Dynamics Corporation's Space Systems Division would reduce competition in the U.S. market for satellites. Martin Marietta was engaged in the manufacture of both satellites and launch vehicles; Space Systems manufactured launch vehicles. The complaint alleged that the proposed acquisition would violate federal antitrust laws by giving Martin Marietta's launch-vehicle division greater access to competitively sensitive and non-public information of other satellite manufacturers that use launch vehicles manufactured by the merged entity. Under the final order, Martin Marietta's Expendable Launch Vehicle (ELV) division is prohibited from disclosing to its satellite division any non-public information that its ELV division receives from any other

satellite manufacturer and from using such information in any capacity except as provider of launch vehicles. The order also requires Martin Marietta to give a copy of the final order to U.S. satellite owners or manufacturers before obtaining any non-public information from them. See *Martin Marietta Corp.*, Docket No. C-3500, 5 Trade Reg. Rep. (CCH) ¶ 23 577.

The Commission issued in final form a consent order against Sara Lee Corporation settling charges that Sara Lee's acquisitions of the Esquire and Griffin brands of shoe-care products from Knomark Inc. and Reckitt & Colman plc have substantially lessened competition and tended to create a monopoly in the U.S. market for chemical shoe-care products sold through grocery stores, drug stores and mass merchandisers. Sara Lee, through its subsidiary Kiwi Brands Inc., also manufactures and sells shoe-care products under the "Kiwi" brand name. The FTC complaint also alleged that Sara Lee made the acquisitions of the Esquire and Griffin brands with the intention of lessening competition or acquiring or maintaining market power in the relevant market. Under the final order, Sara Lee, among other things, must divest its Esquire and Griffin brands of shoe-care products and related assets to Hickory Industries, Inc. See *Kiwi Brands Inc.*, Docket No. C-3523, 5 Trade Reg. Rep. (CCH) ¶ 23 627.

The Commission gave final approval to a consent agreement with Marion Merrell Dow, Inc. and the Dow Chemical Company, settling charges that their purchase of Rugby-Darby Group Companies, Inc. would eliminate competition between the only two FDA-approved competitors in the U.S. market for dicyclomine, a medication used in the treatment of irritable-bowel syndrome. Under the final order, Marion Merrell Dow is required, among other things, to licence dicyclomine formulations and production technology to a third party and to contract manufacture dicyclomine for the third party while that party awaits FDA approval to sell its own dicyclomine. See *The Dow Chemical Co.*, Docket No. C-3533, 5 Trade Reg. Rep. ¶ 23 623.

Another final consent order requires TCH Corporation, owner of Thrifty and Bi-Mart drug store chains, to divest part of its pharmacy business in Fort Bragg, California, in addition to certain pharmacy assets in five other west-coast areas. The settlement resolves FTC allegations that TCH's $1.16 billion acquisition of the PayLess drug-store chain could increase the likelihood of higher prices or reduced customer service by retail prescription-drug outlets in these six areas. Under the final consent order, TCH and its parent company, Green Equity Investors, must divest to a Commission-approved buyer the pharmacy business in either the PayLess or the Thrifty or Bi-Mart stores in the six relevant areas. See *TCH Corp.*, Docket No. C-3519, 5 Trade Reg. Rep. (CCH) ¶ 23 559.

The Commission gave final approval to a consent agreement with Columbia Healthcare Corporation, settling charges in a 1993 administrative complaint that Columbia's proposed acquisition of Medical Center Hospital in Charlotte County, Florida, would significantly reduce competition for acute care hospital services in the Charlotte County, Florida area, as there is only one other hospital in the area and entry is difficult and time-consuming. Under the final order, Columbia (now called Columbia/HCA Healthcare Corp.) must obtain FTC approval for ten years before consummating any partial or total merger of a Columbia hospital in the Charlotte County area with any other acute-care hospital in that area. Additionally, Columbia must give the FTC prior notice before completing a joint venture with any other acute-care hospital in the area to establish any new hospital or hospital service or facility. See *Columbia Hospital Corp.*, Docket No. 9256, 5 Trade Reg. Rep. (CCH) ¶ 23 548.

In another matter, Columbia/HCA Health Care Corp. entered into a proposed consent agreement to settle charges that its proposed $692 million acquisition of Medical Care America, Inc. could result in higher prices and reduced quality for outpatient surgical services in Anchorage, Alaska. Under the proposed agreement, Columbia/HCA would be required to divest the Alaska Surgery Center to an entity

that would run it independently of Columbia/HCA, thus preserving competition in the Anchorage area. See *Columbia/HCA Healthcare Corp.*, Docket No. C-3544, 5 Trade Reg. Rep. (CCH) ¶ 23 672.

The Commission accepted for public comment a proposed consent agreement with Adobe Systems Inc. and Aldus Corporation that requires, among other things, the divestiture of Aldus' "FreeHand" professional-illustration software to settle FTC charges that the merger could lead to higher prices and reduced innovation for professional-illustration software. Under the agreement, FreeHand will be divested to Altsys Corporation. See *Adobe Systems Inc.*, Docket No. C-3536, 5 Trade Reg. Rep. (CCH) ¶ 23 643.

To settle FTC allegations that Revco D.S., Inc.'s 600 million dollars acquisition of Hook-SuperRx Inc.'s retail drug stores could raise prices and reduce service for prescription drugs sold in retail stores in three towns in Virginia, Revco agreed, under a proposed consent agreement, to divest either the pharmacy business it already owns or the pharmacy business it will acquire from Hook-SuperRx in each of the three relevant towns. See *Revco D.S.*, Inc., Docket No. C-3540, 5 Trade Reg. Rep. (CCH) ¶ 23 636.

The Commission accepted, subject to public comment, a proposed consent agreement whereby First Data Corporation could acquire Western Union Financial Services, Inc. if it divested either its consumer money wire transfer business or Western Union's to an entity that will keep it operational. The FTC complaint charged that the proposed acquisition would create a monopoly by combining the only two services in the U.S. consumer money transfer market, which is very difficult for new companies to enter. The consent agreement was subsequently withdrawn when the transaction was abandoned. See *First Data Corp.*, File No. 931-0090, 5 Trade Reg. Rep. (CCH) ¶ 23 649).

In *Roche Holding Ltd.*, the Commission accepted for public comment a proposed consent agreement settling charges that Roche's 5.3 billion dollars acquisition of Syntex Corporation and its subsidiary Syva violated federal antitrust laws. Both Roche and Syntex produce drug abuse testing (DAT) products, used primarily by laboratories for testing for the presence of illegal drugs, including cocaine, marijuana and LSD. According to the FTC complaint, Roche's acquisition of Syntex could substantially lessen competition in the DAT market or tend to create a monopoly by eliminating competition between Roche and Syntex and could further enhance the likelihood of collusion in the market. The agreement requires that Roche divest Syva's DAT business to a Commission approved buyer that will operate the business in competition with Roche, thus preserving the competition for DAT business. See *Roche Holding Ltd.*, Docket No. C-3542, 5 Trade Reg. Rep. (CCH) ¶ 23 656.

The Commission accepted for public comment a proposed consent agreement whereby Rite Aid Corporation will divest either its own or LaVerdiere's pharmacy assets in retail outlets in three cities to resolve FTC concerns that Rite Aid's acquisition of LaVerdiere's Enterprises, Inc. would lessen competition and increase the likelihood of collusive activity between remaining competitors in the retail outlet sale of prescription drugs in the three relevant markets. Under the agreement, Rite Aid would divest the pharmacy assets to pre-approved entities that would operate them in competition with Rite Aid. In addition, Rite Aid is prohibited from acquiring assets or stock of any company engaged in the retail outlet sale of prescription drugs in these three markets. See *Rite Aid Corp.*, Docket No. C-3546, 5 Trade Reg. Rep. (CCH) ¶ 23 659.

The Commission accepted for public comment a proposed consent agreement with Sulzer Limited settling charges arising from its proposed acquisition of the Metco Division of the Perkin-Elmer Corporation. The FTC charged that the acquisition would eliminate direct competition between Sulzer and Metco in the highly concentrated market for aluminum polyester powder, a substance sprayed on jet engine housings to improve the efficiency of the engines, and would increase the likelihood that Sulzer

could unilaterally raise its prices to jet engine manufacturers and others who purchase this product. According to the FTC complaint, entry cannot occur quickly enough to deter anti-competitive behaviour. Pursuant to the consent agreement, Sulzer agreed to help launch a new manufacturer of aluminum polyester powder. See *Sulzer Limited*, File No. 941-0073, 5 Trade Reg. Rep. (CCH) ¶ 23 682.

In addition, the Commission gave final approval to consent agreements accepted for public comment in the previous year in the following merger matters:

-- *Dominican Santa Cruz Hospital*, Docket No. C-3521, 5 Trade Reg. Rep. (CCH) ¶ 23 653.

-- *Alvey Holdings Inc.*, Docket No. C-3488, 5 Trade Reg. Rep. (CCH) ¶ 23 508.

-- *Imperial Chemical Industries, PLC.*, Docket No. C-3473, 5 Trade Reg. Rep. (CCH) ¶ 23 507.
-- *Textron, Inc.*, Docket No. 9226, 5 Trade Reg. Rep. (CCH) ¶ 23 489.

-- *Consol, Inc.*, Docket No. C-3460, 5 Trade Reg. Rep. (CCH) ¶ 23 416.

-- *Valspar Corp.*, Docket No. C-3478, 5 Trade Reg. Rep. (CCH) ¶ 23 568.

District Court actions

A settlement filed in federal district court requires Rubus Development Corporation (formerly known as Supermarket Development Corporation) and Furr's Supermarkets, Inc. (successor to Furr's Inc.) to pay 400 000 dollars in civil penalties to settle FTC allegations that they violated several provisions of a 1988 consent order requiring divestiture of supermarkets in 12 towns in New Mexico and western Texas. Among other things, the FTC alleged that Rubus and Furr's failed to maintain the viability of six grocery stores prior to divestiture and acquired grocery stores without obtaining the required prior approval from the FTC. The first installment of 150 000 dollars was paid to the U.S. Treasury in February 1994. See *Rubus Development Corp. et al.*, Docket No. C-3224, 5 Trade Reg. Rep. ¶ 23 527.

IV. Regulatory and trade policy matters

Regulatory policies

DOJ activities with respect to federal and state regulatory matters

The Division participates actively in regulatory proceedings in order to promote competition. Past Division efforts influenced regulatory decisions to allow greater competition in the telephone, airline, trucking and securities industries, among others. During FY 1994, the Division continued these efforts by filing comments in:

-- Federal Energy Regulatory Commission proceedings involving electric power transmission pricing and oil pipeline rulemaking;

-- Interstate Commerce Commission proceedings on the rate-making authority of motor carrier rate bureaus;

-- Federal Maritime Commission proceedings that focused on the criteria to be used by the Commission in determining whether shipping conference agreements unreasonably raised prices or decreased service; and

-- Department of Agriculture proceedings relating to the economic effects of marketing orders for citrus fruit, tart cherries and milk.

In September 1993, the Division recommended in a letter to the Pennsylvania Insurance Commissioner that she disapprove a plan by Blue Cross of Western Pennsylvania (BCWP) to use a "most favoured nation" clause in its contracts with hospitals. The clause was similar to the one at issue in the Arizona dental care case discussed above and would have entitled BCWP to the lowest price that a hospital has negotiated with any private payer. Use of "most favoured nation" clauses by a dominant insurer such as BCWP -- which accounted for almost two-thirds of private insurers in western Pennsylvania compared to less than eight per cent for its nearest rival -- actually discourages hospitals from giving discounts to smaller companies. The result is likely to be increased costs for hospital services and for health plans. The Pennsylvania Commissioner subsequently issued a decision restricting BCWP's use of the challenged clause. In New York, the New York Insurance Commission cited the Division's letter in rejecting a Blue Cross proposal to use a "most favoured nation" provision in that state. Purchasers of health care plans in both Pennsylvania and New York --that is, consumers and businesses -- likely will benefit from having more alternatives and the opportunity to share in cost savings generated by competition among those plans.

In 1994, the Division reviewed five applications for new Export Trade Certificates submitted under the Export Trading Company Act and its implementing regulations and concurred in the issuance of five new certificates. The goods and services covered by the certificates included fruit, wood and trade facilitation services.

FTC activities with respect to regulatory and state legislative matters

As part of its competition and consumer protection mission, the Commission seeks to prevent or lessen consumer injury that may be caused by governmental activities that interfere with the proper functioning of the marketplace. In some instances, laws or regulations may injure consumers by restricting market access, protecting market power, chilling innovation, limiting competitive response of firms or wasting resources. The goal of the advocacy programme is to reduce such possible harms to consumers by advising appropriate governmental entities of the potential effects on consumers, both positive and negative, of proposed legislation or rulemaking.

Advocacy comments on antitrust issues are prepared by the Staffs of the Bureaus of Competition and Economics, and the ten Regional Offices under the general supervision of the Office of Consumer and Competition Advocacy. The Office of Consumer and Competition Advocacy is the central source of planning, co-ordination, review and information for the staff's work in this area. In FY 1994, the Commission staff submitted comments or *amicus* briefs to federal and state entities on competition issues in such areas as telecommunications, transportation, marketing and health.

Federal agencies

The staff of the FTC filed comments in response to a Bureau of Alcohol, Tobacco and Firearms notice of proposed rulemaking soliciting comments about proposed rules to define a prohibited

"exclusion" under the Federal Alcohol Administration Act. Staff suggested that the BATF's proposal, under which exclusion of a supplier should not be found unless a threat to retailer independence is demonstrated, could be consistent with efforts to promote a competitive marketplace if the reduction in retailer independence were due to another supplier's exercise of market power. Staff recommended that the BATF not define exclusion by reference to reduction in purchases from competitors, because that fact will always be ambiguous. Instead, the focus should be on acts by suppliers that exclude their competitors by unreasonably restraining retailers' choices.

The staff of the Bureau of Economics filed comments with the FAA in response to a notice of proposed rulemaking seeking comments on policies to govern setting airport rates and charges. Staff recommended that a policy requiring prices to reflect historical costs could frustrate the effort to use airport resources efficiently. To promote efficient utilisation of airport facilities, staff recommended that the FAA consider alternative cost-of-service rate-making methods, such as price-cap regulation, that would permit establishment of rates and charges that better reflect opportunity costs of resources.

The staff of the Bureau of Economics filed its study in response to an FCC Notice of Proposed Rulemaking, which sought comment on an AT&T petition to remove its classification as a "dominant" carrier. AT&T asked to be classified as a "non-dominant" carrier and regulated in the same manner as its inter-exchange competitors. The FTC staff transmittal letter asked that the FCC consider the Bureau of Economics study, an empirical assessment of AT&T's market power in the long-distance telecommunications market, in its deliberations on this issue.

The staff of the Bureaus of Economics and Competition filed comments with the Federal Maritime Commission, which is considering whether to issue guidelines about its competition policies under the Shipping Act of 1984. Staff recommended that the FMC consider challenging particular objectionable provisions contained in ocean-carrier rate-making agreements, rather than entire agreements; use merger and antitrust joint venture analysis in assessing competitive effects under the Shipping Act; and interpret the Shipping Act to address agreements that prevent rate reduction or service improvements.

The Commission filed comments in response to a Federal Reserve notice of proposed rulemaking on proposed revisions to Regulation M, which implements the Consumer Leasing Act. Staff supported the Board's proposal for a segregation requirement, stating that the segregation of lease disclosures could benefit consumers by making information readily apparent and easily accessible. The Commission also suggested that the use of a toll-free number to provide some of the required disclosures in media advertising may warrant consideration.

The staff of the Bureau of Economics testified before the International Trade Commission (ITC) as part of the ITC's investigation about the effects of orders in countervailing duty and dumping cases. The testimony described a BE report issued earlier this year that attempts to identify decreases in domestic industry revenues due to unfair imports. Staff surveyed 179 ITC final decisions from 1980 to 1988, and concluded that in about two-thirds of the cases there was a decline in domestic industry revenues of less than five per cent, and in about one-eighth of the cases the decline was greater than ten per cent.

States

The San Francisco Regional Office commented to the California State Assembly on a bill that would clarify the status of businesses that offer the service of "brokering" sales of new motor vehicles. The bill would enable such businesses as individual brokers, credit unions and buying clubs to compete more effectively and benefit California consumers by saving them money and inconvenience. Staff

supported the bill, but suggested that the ban on naming particular makes or models in advertisements could leave brokering services at a competitive disadvantage and increase consumers' costs.

The staff of the Bureau of Economics filed comments with the California Public Utilities Commission on a proposal to permit retail "wheeling" of electric power. The comments consisted of a cover letter, a study of competition issues in electric power which BE recently had submitted to South Carolina and a copy of an earlier BE comment filed with the Illinois Commerce Commission on price-cap regulation. To promote competition in the power generation industry, staff recommended that artificial barriers to entry be removed, and that traditional rate-of-return regulation be reviewed. Staff also recommended that the regulators position themselves to deal flexibly with competition in transmission and distribution of electric power as increased competition in these areas becomes more feasible in the future.

The Chicago Regional Office commented to the Indiana House of Representatives on a bill that would ban brokering of new vehicle transactions. The bill would prevent anyone except dealers and owners from negotiating sales or leases of new cars and trucks, thereby prohibiting many of the car sales activities now sponsored by credit unions, buying clubs and other organisations. Staff suggested that brokers can save consumers money in purchases and in search costs. Car dealers may participate with credit unions, buying clubs and referral services to offer cars at reduced prices and, in return, dealers can gain access to customers and perhaps increase volume. Staff concluded that the prohibition of these alternative methods of arranging new vehicle transactions would likely reduce competition and deprive consumers of savings that they could realise by using these methods.

The staff of the Bureau of Consumer Protection filed comments in response to a proposal by the Louisiana Board of Embalmers and Funeral Directors to amend its rules governing the removal of bodies from the state. The proposed rule would require that, with some exceptions, a body could not be removed from the state unless it was first embalmed (or cremated). This requirement, staff suggested, could force consumers to purchase services they neither need nor want, and it could increase the costs borne by residents of other states arranging funerals for their relatives who die in Louisiana and those in other states. Staff urged the Board to consider other options, noting that concerns about public health might be met by rules based on the method of handling, rather than rules based simply on political boundaries.

The Office of Consumer and Competition Advocacy staff filed comments in response to a Mississippi Supreme Court order, seeking comments on amendments to the disciplinary rule concerning advertising that have been proposed by the state bar. Staff noted that the amendments would generally establish more restrictive standards governing attorney advertising, and that several of the proposals may restrict the flow of truthful and useful information to consumers. Staff suggested that the Court consider modifying the rules to permit a wider range of truthful communications and to narrow the prohibitions to target only those representations that pose a clear likelihood of consumer injury through material unfairness or deception, or that otherwise violate significant public policy objectives in a way that threatens to cause injury to consumers.

The Cleveland Regional Office submitted comments to the Pennsylvania legislature on a bill to revise the state's laws regulating pre-need sales of funeral and cemetery goods and services. Among other things, it would require deposit into a trust fund of all or nearly all of the proceeds of such sales. Staff cautioned that a "100 per cent trusting approach" may unintentionally retard the introduction and development of innovative forms of competition, and that reducing the requirement to 90 per cent may not necessarily be the best solution as it could still require more protection than consumers would actually want. As an alternative, staff suggested allowing pre-need sellers to post a performance bond, under which a third-party guarantor would agree to pay the contract amount if the seller did not deliver at the

time of need. Staff also suggested that the legislature consider requiring only that prices for separate items in pre-need contracts be no greater than (rather than identical to) the prices on the providers' lists.

The staff of the Bureau of Economics filed comments with the South Carolina Legislative Audit Council, which asked for comments on the statutes and regulations pertaining to the state's Public Service Commission that govern the trucking, telecommunications and electric power industries. Staff recommended relaxing restrictions on entry into motor carrier markets, permitting incumbent telephone utilities more flexibility to adjust prices in response to new competition and pursuing alternatives to rate-of-return regulation for telephone utilities. In order to promote competition in the electric power industry, staff recommended revising those portions of the statutes that require traditional rate-of-return regulation and construct artificial barriers to entry.

National organisations

The staff of the FTC submitted comments to the American Bar Association Commission on Lawyer Advertising, a private organisation whose recommendations are often adopted by the states. Staff recommended that some degree of regulation may be necessary to ensure against deception, especially about aspects of legal services about which consumers are not well informed. However, the staff warned that some rules dealing with particular risks of misrepresentation seemed too broad and risked preventing communication of truthful, nondeceptive information that consumers may find useful. Staff also suggested that broad rules to enforce a dignity requirement may prevent the communication of useful, nondeceptive information and may be more restrictive than necessary. In general, the staff cautioned that restrictions which inhibit competition and consumer choice could impose costs that should be considered carefully.

Department of Justice trade policy activities

The Division is extensively involved in interagency discussions and decision-making with respect to the formulation and implementation of U.S. international trade policy. The Division participates in interagency trade policy discussions chaired by the Office of the U.S. Trade Representative and is a participant in the trade policy activities of the National Economic Council (NEC), a cabinet-level advisory group. The Division provides antitrust and other legal advice to U.S. trade negotiators and heads interagency discussion on the relationship of trade policy and competition policy, including the role, if any, of competition policy and enforcement principles in multilateral trade instruments. Both DOJ and FTC participate in bilateral and multilateral discussions and work projects to improve co-operation in the enforcement of competition laws.

The Division represents the Department on the Committee on Foreign Investment in the United States (CFIUS), an interagency group chaired by Treasury that advises the President on enforcement of the Exon-Florio provision, a 1988 statute that permits the President to block or suspend foreign acquisitions of U.S. assets that "threaten to impair the national security."

The Department and the FTC have an extensive programme to provide technical assistance in antitrust development to countries with emerging market economies. In addition to advancing the adoption of competition policies that incorporate sound economic principles and effective enforcement mechanisms, these programmes create long-term co-operative relationships with policy and enforcement officials in the countries involved.

The Division drafted comments on behalf of the United States Government for filing in a Japanese Fair Trade Commission (JFTC) proceeding that examined competition in public procurement in that country. The Division urged the JFTC to emphasise that the Japanese Government will not tolerate bid-rigging or other anti-competitive practices in the public procurement process and that practices that have the effect of unfairly excluding American and other non-Japanese firms from the Japanese public procurement market will be subjected to significant sanctions.

The Division, through Deputy Assistant Attorney General Diane Wood, co-chairs the Deregulation and Competition Policy portion of the U.S.-Japanese Framework discussions. In these discussions, the United States has urged the Japanese Government to strengthen its enforcement of that country's antimonopoly law, to make its administrative procedures fair and open, and to accelerate an effective programme of deregulation to open markets to competition.

The Division, with the participation of the FTC and other U.S. government agencies, chairs the Competition Policy Working Group of the U.S.-Korea Dialogue for Economic Co-operation. The working group focussed on a broad range of antitrust enforcement and competition-related topics. As a result of the discussions, the Korean Government decided to take steps toward strengthening the Monopoly Regulation and Fair Trade Law and its enforcement, applying competition principles in its deregulation efforts, improving access to television and radio advertising slots, addressing anti-competitive or unfair practices by industry association restrictions and revising Korean Fair Trade Commission regulations and guidelines that may impede pro-competitive activities.

V. New studies related to antitrust policy

Antitrust Division Economic Analysis Group Discussion Papers

The Division did not issue any Economic Analysis Group Discussion Papers during the period 1 January through 30 September 1994.

Commission Economic Reports, Economic Working Papers and Miscellaneous Studies

Although the Commission is primarily a law enforcement agency, it also collects, analyses and publishes information about various aspects of the nation's economy. This work is done by the Bureau of Economics, and consists of studies on a broad array of topics relating to antitrust, consumer protection and regulation. A list of FTC studies that are available to the public is provided below. Studies may be obtained from the Federal Trade Commission, Division of International Antitrust, 6th and Pennsylvania Ave., N.W., Washington, D.C. 20580.

Economic reports

IPPOLITO, Pauline and OVERSTREET, Jr., Thomas, *Resale Price Maintenance: An Economic Study of the FTC's Case Against Corning Glass Works*, January 1994. The study is intended to help increase understanding of the economic motivation for RPM when the products at issue are relatively simple goods that do not fit the most well-known efficiency rationales for the practice. The study found no evidence of collusion among Corning's dealers or competitors, and stock market movements (as well as the value of sales) for Corning and some of its competitors do not support anti-competitive theories. The authors find the results "consistent with the theory that

RPM may at times be used as a method of increasing distribution of 'simple' products sold through multiproduct dealers".

MORKRE, Morris and KELLY, Kenneth, *Effects of Unfair Imports on Domestic Industries: U.S. Antidumping and Countervailing Duty Cases, 1980-1988*, February 1994. The study analyses the effects of dumped and/or subsidised imports on the domestic industries with which they competed. The authors found that, in nearly 90 per cent of the 179 cases analysed, unfair imports caused reductions in domestic industry revenue of less than ten per cent.

Working Papers

DANIEL, Timothy and KLEIT, Andrew, *Disentangling Regulatory Policy: The Effects of State Regulations on Trucking Rates*, WP #205, July 1994.

LUDWICK, Richard, *Reversing Roles: Stackelberg Incentive Contract Equilibrium*, WP #206, July 1994.

COATE, Malcolm, *Merger Analysis in the Courts*, WP #207, August 1994.

In FY 1994, the Division began a policy of making available on the Internet all public documents issued by the Division. The address is *gopher@justice.usdoj.gov* or *http://www.usdoj.gov*. The Division can be contacted by means of Internet E-mail at *antitrust@justice.usdoj.gov*.

NOTES

1. The Antitrust Guidelines for the Licensing of Intellectual Property were issued by the Department and Commission in final form on 6 April 1995.

2. The Antitrust Enforcement Guidelines for International Operations were issued in final form by the Department and Commission on 5 April 1995.

3. The district court rejected the proposed consent decree in an order issued 14 February 1995. That decision is currently on appeal before the federal Court of Appeals (D.C. Circuit).

EUROPEAN COMMISSION*

(1994)[1]

I. Main developments in competition policy

Institutional developments

The most significant event of the year was the declaration by Austria, Finland and Sweden of their desire to join the European Union from 1 January 1995. The effect on competition policy will be limited, however, as these new member countries were already parties to the European Economic Area (EEA) Agreement, which provided for adoption of Community law. As a result, there will be no need for these countries to make any further legislative changes in the field of competition.

Competition policy and completion of the Internal Market

Despite the successful completion of the legislative programme setting up the Internal Market, there is still work left to be done in creating a genuine unified market with no internal barriers. In working towards this goal, competition policy has a two-fold role to play.

First, with the elimination of regulatory barriers to trade, the main obstacles to trade between Member States now arise either from private practices in industry, or from the behaviour of Member States which grant special rights or aid to certain of their companies. Obviously, some economic operators would prefer to avoid the consequences of the newly opened markets, which expose them to increased competition from foreign companies. Competition policy has a key role to play in ensuring that certain operators do not appropriate the benefits flowing from the opening of the markets for themselves.

Second, competition policy can also be used to open up sectors which remain closed, despite the creation of the Internal Market (such as a large part of the energy sector, and most of the telecommunications and postal sectors), because Member States have granted exclusive or special operating rights to various companies.

The creation of a genuine internal market implies that all obstacles to the unhampered operation of the market should be dismantled. This is a formidable task, as the obstacles to be removed are far more difficult to identify than those which were simply contained in legislation.

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* The original language of this report is French.

Cartels

In this context, the detection and investigation of cartels remains a priority task for the Commission. 1994 was an important year, as no less than three new major cases of cartels, involving numerous companies, were uncovered. This led to the issuance of prohibitions and the imposition of sizeable fines, commensurate with the seriousness of the violations. These decisions involved key economic sectors, such as steel (the steel beams case), paperboard and cement.

The Commission is determined to pursue its activities against cartels with ever greater vigilance. Accordingly, it has decided to create a special group within the Directorate-General for Competition (DG IV) whose specific task will be the detection and prosecution of this sort of violation. This development is part of the wider reform currently underway to increase the effectiveness of competition policy, as described below.

Similar considerations apply to abuse of dominant position, especially when a firm uses its dominant position in a market to limit competition from other companies by illegal means. Again, one of the effects of this sort of conduct is to slow down the project to create a single market contained in the EC Treaty. Several of the cases decided this year involved this issue. These cases can be divided into two categories. First, there are those where a company in a dominant position attempts to block or limit competition from other firms for the products which make up the principal market. For example, in the Microsoft case, Microsoft's practices in granting licences for the use of its software, which were designed to maintain its position in the market, were prohibited. In contrast, a second category of cases involve restrictions on competition in related markets where a company did not necessarily occupy a dominant position. While the first category of cases obviously justifies clear and firm action by the Commission, this second category requires more detailed analysis, to take into account competition within the principal market and the ease with which users of the related product can switch suppliers of the main product.

Vertical agreements

In the field of vertical agreements, the position taken by the Council has always been to prohibit and severely punish practices tending to create artificial barriers between markets. The concern to create a single market has overshadowed all other considerations, even though vertical agreements can include aspects which enhance competition. For example, they allow producers to operate more easily in new markets. The new phase that was reached during the year with the creation of the Single European Market creates a new context which has allowed the Commission to be more flexible in its enforcement of this sort of prohibition. For example, the Commission has published a draft regulation on block exemptions in the area of exclusive licensing agreements for know-how and patents which includes a much shorter list of limitations on the scope of the exemption than was contained in previous exemption regulations. However, the example of the draft regulation on exclusive and selective distribution agreements in the automobile industry shows that the Commission is still concerned with creating a free and competitive market in sectors where progress toward the Single European Market is not as advanced as in others. In this sector, the Commission is concerned with redefining the power relationships which currently exist between manufacturers and distributors in order to increase the autonomy of distributors and thus encourage parallel imports.

Control of concentrations

In the area of control of concentrations, 1994 was notable for the increase in the number of notifications over previous years, the number of cases where the notified operation was only authorised after the companies had provided certain undertakings on changes to be made to the operation and the prohibition issued in the Bertelsmann/Kirch/Deutsche Telekom/MSG case. All this comes as no surprise. The elimination of barriers, whether within the European Union or against the rest of the world, creates a more competitive environment within which only the most efficient companies can survive. Thus, it is normal to see companies grouping together to achieve this goal. Further, these companies tend to structure their grouping so as to ensure maximum protection against new competition, which explains why the Commission had to verify that notified operations did not endanger the development of genuine competition in the markets in question.

For this reason, it is misleading to assert, as has been done, that control of concentrations is ineffective merely because it has given rise to only two instances of prohibitions since it came into force. This criticism ignores both the concentration operations which have been abandoned after informal consultations with the Commission showed that they would not be authorised, and also the cases where the operation planned by the parties was modified. The Commission favours the modification approach, as the goal of effective competition policy is not to prohibit the greatest possible number of operations proposed by the parties, but rather to reconcile the interests of companies with the public service function exercised by the Commission, i.e. the protection of competition and, as a result, the protection of consumers.

Special or exclusive rights

It has already been stressed that a genuine internal market does not yet exist in certain sectors in which competition is limited, or even excluded, by special or exclusive rights granted to companies providing certain services. These concern the fundamental needs of all European citizens (e.g. telecommunications, energy, postal services, etc.). It is impossible to talk of a genuine internal market when, in everyday life, companies and Community citizens are forced to turn to state-owned companies for the provision of certain essential services. Of course, there are valid arguments justifying the existence of exclusive or special rights, especially in relation to universal services. The Commission has no intention of endangering the performance of these duties. However, it is also undeniable that these traditionally rigid and compartmentalised structures prevent the full potential of a genuine internal market from being realised. For this reason, the Commission considers that privatisation should be introduced to the greatest extent possible. At the same time, however, it is aware that the unique features of each sector must be taken into account. Consequently, deregulation of these markets should be implemented gradually.

Competition policy and economic recovery

Economic recovery

After several years of economic stagnation and recession, economic indicators rose in 1994, suggesting that a more favourable economic climate could be expected in the immediate future. However, in spite of these positive signs, the recession raised unemployment figures, which can only be reduced by the introduction of new economic measures. Further, it is important that the lessons of this crisis be learned so that Community industries will be better prepared for any future downturns. In order to

respond to these two concerns, the Council adopted the "White Paper on Growth, Competition and Employment" in December 1993, which contains a series of measures proposed to improve the global competitiveness of the European economy, and reduce unemployment. The report of the European Council in Corfu on Europe and the Global Information Society, and the Commission's Notice on an Industrial Competition Policy for the European Union argue along the same lines as the White Paper of December 1993.

These texts all stress the fundamental role which competition policy is called upon to play. For the European Union, industrial policy must not be interventionist, but rather, it must leave the initiative to industry. The role of public authorities is limited to creating a dynamic environment favourable to industrial development. Within this framework, industrial policy is not necessarily opposed to competition policy. On the contrary, because of the emphasis on the responsibilities of industry, competition policy becomes an indispensable tool of industrial policy.

The role of competition policy in economic recovery

When enforcing Community competition regulations to control the conduct of private and State entities, the Commission, within the context discussed above, has taken into account the need to promote the restructuring of European industry to increase competitiveness.

Industry has generally reacted in one of two ways to increased competition and the changing environment it faces.

Some companies have tried to retain their market position by entering into agreements restricting competition. As has already been mentioned, the Commission ruled against three major cartel cases during the year. This sort of response is not surprising, as it helps to artificially shelter a company from foreign competition. But this practice has at least two negative effects. First, it frees these companies from any pressure (or at least lessens the pressure) to improve competitiveness and, as a result, they do not carry out the rationalisations and improvements which are necessary for them to be truly efficient and competitive. Second, they deprive the community of a portion of the profits which it should derive from a normally functioning market. This generates indirect negative effects, as the lost profits could have been used to increase the general well-being. For these reasons, the Council considers one of its priorities to be effective monitoring of this type of conduct.

Other companies prefer to strengthen co-operation within their sector. This can take different forms, such as the granting of licences for technology, creation of joint ventures, so-called strategic alliances or concentrations. 1994 was a particularly fertile year for cases of this sort, with numerous decisions handed down on joint ventures, important rulings by the Commission on "strategic alliances" (in the BT/MCI and Olivetti cases) and a large number of decisions on control of concentrations.

Although each of these cases had its own specific facts, certain general principles can be drawn from them. The Commission intends to maintain a favourable attitude towards co-operative arrangements which increase the efficiency and, as a result, the competitiveness of the parties involved. The opening of markets following the completion of the Internal Market Programme, global liberalisation of trade and the need for industry to restructure in order to emerge from the recession are all factors to which industry is forced to respond. For example, in the BT/MCI case, the Commission found that the market in question was opening up to world-wide competition because of trade liberalisation and technological progress and that, as a result, the companies involved had to adapt to this new environment. This case shows the importance which the Commission places on situating the agreements under review in their individual

contexts, and its concern with issuing decisions which take the particular context of each sector into account.

The White Paper on Growth, Competitiveness and Employment stresses the need to encourage the spread of technology. Agreements for licensing know-how and patents are vital tools in this regard. The Commission intends to take advantage of the expiration of its block exemption regulations to combine them into a single law which should be more favourable to this sort of contract. In order to strengthen the competitiveness of SMEs and the contribution which they make both to the health of the internal market and to job creation, the White Paper also stresses the need to support co-operation between them. In accordance with a request from the Council[2], the Commission will examine the need to clarify exactly how far SMEs may co-operate within the framework of Community competition law (e.g. in the area of co-operative networks for joint purchasing and selling).

However, this presumption in favour of co-operative arrangements does not mean that everything labelled "co-operative" will be automatically authorised. The Commission considers that it is first necessary to analyse the situation carefully in order to determine whether the co-operative arrangement in question is, in fact, a disguised cartel, or will bring about a situation where all foreign competition is eliminated or severely restricted. In addition, the Commission examines the proposed operation to ensure that it will not entail restraints on competition which go beyond what is necessary to attain the stated goal. As a result, certain agreements have only been authorised after various provisions were modified. Further, the Council's experience with strategic alliances this year shows that these can encompass a broad range of situations and demand special attention. This type of co-operative agreement is generally made up of a number of elements (i.e. acquisition of a minor holding in the equity of a partner, product specialisation, joint research and development, transfers of technology, etc.), which, individually, do not pose any threat to competition. However, the Commission should not get bogged down in an overly analytical approach. It should take into account the entire operation, and examine each of its constituent parts as they relate to the whole.

Competition policy and the globalisation of trade

The new global environment

The success of the Uruguary Round will bring about a substantial additional decrease in the number of governmental trade barriers and, consequently, a rise in the volume of international trade. Further, the ever increasing pace of technological progress and the advent of cheaper, more efficient means of transport allow firms to operate today in markets to which it was difficult to gain access in the past. Conversely, companies from third countries will find it easier to gain access to the EC market. This globalisation trend is certainly not new, but it is becoming more pronounced.

Competition policy must respond and adapt to these new developments. This trend has three possible consequences. First, the definition of the relevant market, and of real or potential competitors, will increasingly take trade with other countries into consideration. Consequently, conduct which may have been prohibited in the past will now be tolerated in cases where the restrictions on competition are compensated by the activities of competitors from outside the Common Market.

Second, increasing numbers of cases coming before the Commission will also be reviewed by competition authorities in other countries. For example, two important cases this year, Microsoft and Shell/Montecatini, were the subject of simultaneous proceedings in the Community and the United States. This type of situation can prejudice the companies involved. They find themselves struggling with

parallel proceedings which double their notification requirements and defence costs, and can end in contradictory settlements. For competition authorities, it is sometimes difficult to obtain information on conduct taking place in other countries. The Microsoft case was a striking example of this sort of dilemma. During the case, real co-operation took place between competition authorities, which included the exchange of confidential information after this was specifically authorised by the company. This case could serve as a model for future cases. However, this would require either individual authorisations from the parties in each case, or the conclusion of more far-reaching co-operation agreements than the agreement signed in September 1991 between the Commission and the United States Government. A recent judgment of the Court of Justice found that even this September 1991 agreement should have been approved by the Council. The Commission immediately referred the matter to the Council to regularise the situation.

Third, there is a need to develop a genuine body of competition rules on an international level. The work accomplished to date under the GATT framework has only dealt with governmental trade barriers. The example of the European Union shows that in order to integrate markets, barriers created by private enterprise must also be eliminated. In order to ensure that the progress achieved under the GATT framework is not undermined and misappropriated by a small number of firms, it is necessary to define common rules on an international level. More importantly, effective mechanisms for their enforcement must also be put in place. A working group made up of independent experts and others belonging to the Commission began examining these issues in 1994.

Effectiveness and transparency of competition policy

Improving effectiveness

The Commission only has limited resources at its disposal to enforce the rules of Community competition law over the vast area covered by the European Union. It is aware of the criticisms that have been levelled at it: the monopoly on granting exemptions under Article 85(3) of the EC Treaty should be modified, the Commission's decisions should be issued more quickly and the practice of issuing administrative letters (so-called "comfort letters") should be abandoned as they afford no legal security.

The Commission believes that these criticisms highlight some of the real difficulties it faces. Accordingly, it decided to set up an enquiry focusing on three different areas. First, a working group made up of representatives of the Commission and national competition authorities studied the possible interaction between the Commission's powers and those of national authorities. Second, an internal study was carried out on the most effective way to organise the work of the Directorate-General for Competition. Third, the Commission studied different forms of co-operation with competition authorities of other countries.

The main conclusions are as follows: There is a consensus between Member States and the Commission that decentralised enforcement of competition laws will bring with it increased effectiveness. However, decentralisation must not create an insecure legal environment, making it more difficult for companies to ascertain the legality of their agreements or practices, nor lead to uneven application of competition regulations. On this question, the Commission considers that no changes to the system sharing out authority contained in Regulation No. 17 should be made.

The solution should rather be sought -- in accordance with the principle of subsidiarity introduced by the Maastricht Treaty -- in the criteria which determine whether a case would be better dealt with by the Commission or by a Member State. In this way, the Commission would be free to concentrate

its efforts on cases with real community-wide impact, leaving the other cases to be dealt with by national authorities, the goal being to ensure that a single case does not come before several different authorities.

However, this increased co-operation should not affect the monopoly on exemptions granted to the Commission. Any other solution would introduce the risk of multiple contradictory interpretations of Article 85(3) of the EC Treaty by the various competition authorities of Member States, which would perhaps place their national interests over those of the Community. Further, problems in defining the limits of authority between national authorities would be difficult to resolve, introducing the risk of "forum shopping". Attempts to provide for these problems would entail the introduction of complicated procedures, making the legal environment less certain and reducing effectiveness.

Other problems must be overcome. First, criticisms have been voiced by industry in the Community on current procedures, which are too long and rarely lead to formal decisions. Second, the decentralised application of Articles 85 and 86 of the EC Treaty can grind to a halt while authorities in Member States wait for the results of proceedings before the Commission when the case they are investigating has been notified to Community authorities. Third, the task of processing notifications prevents the Commission from concentrating on its priority tasks of detecting and prosecuting cartels and abuses of a dominant position.

The Commission, which is aware of these criticisms, continues to study what measures might be implemented to address the problems raised, subject to the constraints posed by its limited resources and the need to pursue the legitimate goals of competition policy.

Increasing transparency

In a business environment where decisions must be made quickly by industries within the Community, businessmen must be able to easily understand the criteria used to determine the validity of their projects under the rules of the EC Treaty. The competition rules of the EC Treaty have given rise to a rich and complex body of case law and opinion. The Commission is aware of this situation and considers increased transparency as one of its priority tasks.

The Commission intends to publish, as soon as possible, a series of general reports explaining its position on issues which frequently arise in its day-to-day operations. For example, a major effort has been made in the area of concentrations. Several notices have been adopted to clarify various issues raised by enforcement of the Regulation on Control of Concentrations.

The Commission is committed to adopting, or referring to the Council for adoption, simplified legislation. Nevertheless, this legislation must remain in close contact with business realities. Consequently, a certain degree of complexity remains unavoidable. An example of this new approach is the legislation introducing the new forms for notification: form A/B for cases falling under Articles 85 and 86 of the EC Treaty and form C/0 for concentrations. These texts are complicated as the Commission cannot examine a notification rapidly without a minimum of information. However, the required information has been limited to include only facts which are truly relevant. Similarly, the new draft regulation on exclusive licences for know-how and patents was intentionally made simpler than the two texts which it is designed to replace.

The Commission has decided to heighten public awareness of competition regulations. The "traditional" Annual Report on Competition Policy of the Commission will be made clearer and more widely available. Further, it will be accompanied by a general brochure, similar to the annual report of

private sector companies. In addition, the Directorate General for Competition began publishing this year a review entitled "EC Competition Policy Newsletter", appearing three times a year, which describes the main developments in the field in the quarter preceding publication. Finally, an internal office of the Directorate General for Competition has been made responsible for answering any requests for information from the public[3]. Independently of these projects, the Publications Office has published an updated version of the Collected Legislation Applicable in the Field of Competition Law.

Finally, the Commission's public information activities should extend beyond the boundaries of the European Union, as the Community rules on competition have been used as a model for those contained in the so-called European Accords concluded by the Community with countries located in Central and Eastern Europe. The Commission provided technical assistance and took part in seminars in these countries during the year.

II. Articles 85 and 86: restrictive agreements and abuse of dominant position

Legislative developments

The new legislative provisions introduced by the Commission on Articles 85 and 86 in 1994 were formulated with the following goals in mind. First, to continue the programme initiated several years ago to reduce costs attributable to industry compliance with Community regulations, especially for SMEs; second, to ensure not only that the right of firms to a fair hearing is respected during competition proceedings instituted by Community authorities, but also that these proceedings are uncomplicated and, above all, fair and objective; third, to guarantee transparency, ensuring that European industry is familiar with Commission policy; and fourth, to ensure that Community competition policy is always based on an accurate analysis of the relevant market affected by the agreement or practice under review.

Although these four goals are visible in all of the legislation drafted this year, the first (reducing regulatory costs) and the fourth (ensuring that decisions are based on a comprehensive assessment of the relevant market) were key factors behind the changes made to form A/B and the *de minimis* facility notice.

Form A/B

Form A/B is used for notifying agreements to the Commission in order to obtain an exemption or negative clearance. The new version was adopted by the Commission at the end of 1994[4], following extensive and detailed public consultations. In fact, these consultations prompted the Commission to significantly modify its original proposal. The new form should lower regulatory costs in many areas. In particular:

-- it should be easier to complete than the previous form, because of its simpler instructions and questions. As a result, companies should have less need to seek outside legal advice to prepare their notifications;

-- it should help companies present notifications which are clearer, more relevant, and also more comprehensive. This should allow the Commission to make fewer requests for additional information from companies after receiving a notification, which has often been the case in the past.

The de minimis notice

The *de minimis* notice was also revised in 1994[5]. This notice was originally drafted in 1970 as a measure to encourage SMEs. Agreements between SMEs rarely have Community-wide economic consequences, and therefore the Commission judged that it was appropriate to define clear criteria which SMEs could apply to determine whether their agreements were subject to Community competition regulations. The reasoning behind the notice remains fully applicable today, and the Commission therefore decided to raise the thresholds contained in the notice in order to take inflation and the GDP growth rate into account. The new notice provides that no notification is necessary when companies enter into agreements restricting competition in cases where the criteria laid out in the notice are met. In these cases, the Commission will not contest the validity of the agreement. Consequently, the following agreements should automatically be considered *de minimis*:

-- if the total combined turnover of the groups to which the parties to the agreement belong does not exceed ECU 300 million; and

-- if the combined market share of the groups to which the parties to the agreement belong does not exceed five per cent of the relevant market.

Amendment to the Mandate of the Hearing Officer

The third significant legislative project undertaken by the Commission in this field in 1994 involved revising the mandate of the Hearing Officer. The Hearing Officer is an officer of the Commission, administratively independent from the Directorate General for Competition. The Hearing Officer enjoys a semi-independent status: he or she can only be dismissed by a vote of a plenary session Commission. The role of the Hearing Officer basically consists in ensuring that the right of parties involved in competition proceedings to a fair hearing is respected, and especially "that the hearing is properly conducted and thus contribute to the objectivity of the hearing itself and of any decision taken subsequently. He shall seek to ensure in particular that in the preparation of draft Commission decisions in competition cases due account is taken of all the relevant facts, whether favourable or unfavourable to the parties concerned" (Article 2(1) of the Mandate of the Hearing Officer).

Since the post was created in 1982, the role of the Hearing Officer has received universal approval. Accordingly, the Commission has decided to extend the scope of the Hearing Officer's powers to the following areas[6]:

-- deadline for reply to the Statement of Objections: an enterprise may consider that the deadline imposed upon it for reply to the Statement of Objections is too short. In such a case, the Hearing Officer will in future decide whether or not an extension to this deadline should be granted;

-- access to relevant information: it is important that enterprises should be confident that the Commission carries out its responsibilities regarding access to information carefully, fairly and objectively, and, subject to the obligations imposed upon it regarding confidentiality, discloses all the documents that may be favourable to the enterprises concerned in preparing their defence. Therefore, it was decided that if an enterprise considers that the Commission has not provided it with all the documents necessary for its defence, the Hearing Officer should examine the merits of this claim and make an appropriate decision;

-- hearings: since the Hearing Officer is responsible for organising hearings, the Commission has decided that he or she should also be responsible for deciding who is to be allowed to speak. In particular, the Hearing Officer will have the power to decide whether third parties are authorised to take part;

-- business secrets and other confidential information: in carrying out his or her duties, the Hearing Officer must also decide which items of information supplied by a firm and contained in the Commission's file can be communicated to other firms or published.

Block exemption for intellectual property licences

In 1994, the Commission also continued its consultations concerning the review of the block exemption granted to intellectual property licences. The Commission published, to initiate a public debate[7], a draft regulation combining the two existing regulations (on patent and know-how licences), and also suggested including market-share thresholds in order to exempt from the scope of the regulation agreements between companies with very large market shares (40 per cent or more), or large market shares in oligopolistic markets. In addition, the proposal suggests reducing the list of clauses whose inclusion in an agreement prevents it from qualifying for an exemption.

The Commission's approach is shaped by concern that the current block exemption regulations make no distinction between a licensing agreement involving firms with a dominant position, and an agreement between small firms with minimal shares of the market. It is clear that there is a far greater risk of significantly restricting competition in the first case than in the second. However, it became abundantly clear during the consultation phase with industry and consumer associations that there was general apprehension that the introduction of such thresholds might lead to an increase in regulatory costs and a less predictable legal environment. The search for the proper balance between these conflicting elements in the approach recommended by the Commission is a dangerous, yet vital task. Consequently, the Commission has decided to extend the current regulation on patent licences (which expired in 1994), to provide more time for further study and consultations.

The Block Exemption Regulation for the Automobile Marketing Industry

Consultations have also been initiated on renewal of the block exemption regulation covering the selective automobile marketing sector. In its amended draft regulation, published to initiate a public debate,[8] the Commission recommends that the traditional provisions granting an exemption to Community automobile dealers should be renewed, subject to strictly defined conditions. Thus, while proposing that automobile manufacturers should be allowed to grant exclusive territorial rights to their dealers and impose certain minimum quality criteria, the Commission makes it clear that it does not intend to authorise these manufacturers to take measures preventing Community citizens *inter alia* from purchasing their automobile in a Member State offering lower prices. The draft regulation contains various changes to the current regulation designed to strengthen the negotiating position of dealers and, as a result, ensure that the increased profits from the distribution system be passed on to customers. The Commission should adopt the final version of the regulation in 1995, following extensive consultations.

Notice on systems for international transfer of funds

Finally, the Commission adopted a draft notice on the application of Community competition regulations to systems for international transfer of funds[9]. This draft notice is part of a larger body of measures (which include a proposal for a directive) whose aim is to improve the international payments system. The draft notice outlines the approach which the Commission proposes to adopt in examining the compatibility of systems for international transfer of funds with Community competition rules. The document contains advice on pricing and other aspects of competition (membership and operating rules). A large portion of the draft notice is devoted to interbank commissions determined jointly by banks. The Commission considers that only in exceptional cases, when it is proved that agreements on multilateral interbank commissions are actually necessary to ensure the success of certain forms of interbank co-operation, which are in themselves desirable, will such agreements qualify for an exemption under Article 85(3). If banks enter into agreements on interbank commissions, the Commission will be obliged to consider the desired economic effects of these agreements, examine whether a fair proportion of these effects are passed onto consumers and decide whether the agreements under review are actually necessary to achieve the stated goal.

Main decisions

Prohibitions

Cartels

Three prohibition rulings were issued against Community-wide cartels in 1994, which is a record in the field. Further, the fines imposed were the highest on record. There are positive and negative sides to these statistics. On the one hand, they show that the Commission is really able to identify and investigate this sort of agreement, despite the secrecy surrounding it. They are also proof of the Commission's determination to show the business world that it would be an error to continue in this direction. On the other hand, the uncovering of such well-established cartels operating across entire industrial sectors shows that European industry has not yet accepted that these practices are out-of-date and illegal, and should be abandoned. Further, the Commission is well aware that the imposition of fines is a double-edged sword. On the one hand, and most importantly, it will persuade certain firms to withdraw from existing cartels and dissuade others from forming new ones. On the other hand, however, it will encourage firms which persist in such practices to redouble their efforts not to be discovered. The growing use of computers is making the detection of such agreements increasingly difficult. Nevertheless, the decisions handed down this year are proof that the Commission's powers of investigation are effective, and it is up to the Commission to ensure that this remains the case. To allow it to meet these challenges and strengthen its activities in this field, it was decided in 1994 to create an anti-cartel division whose sole mission will be to detect cartels and draft decisions prohibiting them and imposing fines. The B, C and D Directorates of the Directorate-General for Competition will continue to play an active role in this area. By creating this new division, the Commission hopes to intensify its activities against cartels and to develop and perfect its detection and investigation techniques.

i) The steel beam cartel[10]: in 1991, the Commission carried out surprise inspections in several companies manufacturing or distributing steel beams in the Community. The documents copied during these inspections, together with other evidence obtained through written requests, confirmed that a cartel had been operating in this sector since 1984 (we can note in passing that the Commission is authorised to send written requests for information to firms and to impose fines if they do not respond or supply incomplete or inaccurate information).

The companies involved had entered into agreements fixing prices and quotas, and regularly exchanged all manner of what is normally regarded as highly confidential information, in order to allow the cartel to function. Seventeen companies were involved in the agreement, which was implemented through Eurofer, the European Steel Producers Association. The fines imposed on these companies amounted to a total of ECU 104.4 million. The Commission fixed the amount taking into account not only the seriousness and duration of the violations, but also the estimated profit which the companies would have derived from the cartel, and the fact that the sector passed through a serious crisis period between 1980 and 1988. No fines were imposed for this period of time.

ii) The paperboard cartel[11]: following complaints lodged by French and British paperboard buyers associations, the Commission carried out 16 simultaneous surprise inspections. Forty inspectors organised into teams and made up of officers from DG-IV and inspectors from Member States took part in the operation. Using the material gathered during these inspections and other information furnished in response to numerous querying letters, the Commission confirmed the existence of a cartel involving 19 companies and affecting the entire European paperboard sector. This cartel introduced "price initiatives" on a regular and concerted basis (i.e. price increases), which all suppliers followed. Further, the main suppliers had also come to an agreement on their respective market shares, each conscious of the fact that any attempt to take over any further share of the market, at the expense of one of the others, would jeopardise the semi-annual price initiatives. These initiatives led to an average rise in prices of 26 per cent in real terms between 1988 and mid-1991. Fines were imposed on the companies amounting to a total of ECU 132 million. In setting these fines, the Commission gave special consideration to the fact that several of the companies had co-operated with it. Two companies which, from the very beginning of the investigation, voluntarily supplied the Commission with information and documents that were vital to its decision had their fines considerably reduced. Lesser, although still substantial, reductions were granted to companies which admitted the basic facts alleged by the Commission, but which did so at a later stage of the proceedings.

iii) The cement cartel[12]: in November, the Commission issued a decision imposing fines amounting to a total of ECU 248 million on 23 cement producers, eight national associations of cement producers and the European Cement Federation. Following a number of simultaneous surprise inspections carried out throughout the entire Community, the Commission uncovered a cartel aimed at protecting "domestic markets" that operated throughout the European Union. Briefly, the companies had agreed -- through their national associations - not to compete with each other in their domestic markets. The cartel functioned by exchanging information on a large scale that would normally be considered confidential. These practices, whose sole aim was to restrict competition between the companies of different Member States, are contrary to the fundamental goal of the Union, which is the creation of a Single European Market. Therefore, it was hardly surprising that the total amount of fines imposed in the case was the highest ever recorded.

Transport sector

Consideration of all sorts of agreements concluded between companies competing in the transport sector poses special problems for the Commission. It is important for European Union citizens that the Community possess an integrated and efficient transport system. It is also important that trans-European networks be developed swiftly and efficiently. These two priorities mean that, in many cases, co-operation between transport companies is not only beneficial, but also essential. This explains why the Community is generally favourable to such agreements. This principle is reflected in individual cases, where exemptions are granted to agreements that affect competition significantly, but which are necessary to allow competitors to offer integrated and efficient services to the public.

However, it should be pointed out that during its examination of these cases, the Commission carefully verifies that none of these agreements will place companies in a position where they are able to eliminate competition for a significant proportion of the products in question. For example, in the ocean freight sector, the Commission will prohibit agreements aimed at restraining competition between the members of a line conference and outsider companies, as agreements of this sort effectively eliminate all competition on the routes in question. The Commission also prohibits co-operation agreements which, in other sectors such as air transport, effectively preclude any competition on a given route.

This position also explains the Commission's intransigence regarding conference agreements which go beyond the scope of the block exemption granted under Regulation No. 4056/86. Given that this regulation already authorises companies to group together and effectively offer their services for identical prices, it is logical for the Commission to prohibit co-operation agreements which attempt to go beyond the regulation's legal boundaries. This approach has been adopted by the Commission in cases decided over the last two years.

i) The Trans-Atlantic Agreement[13]: the Trans-Atlantic Agreement (TAA) is an agreement between 16 shipping lines covering transport of goods by container between Northern Europe and the United States, a market in which TAA members control a 70 per cent share. Following an unprecedented number of complaints, the Commission found that a certain number of practices adopted by the parties to the agreement violated competition regulations. These practices fell outside the scope of the block exemption granted to liner conferences and were in no way eligible for an individual exemption. The aspects of the TAA against which the Commission drew up a statement of objections concerned a two-tier pricing scheme, an agreement for non-utilisation of space available on ships and price maintenance within the land-based segment of the market. The two-tier pricing scheme allowed the conference to incorporate within its structure companies which intended to offer lower prices than conference members, and which in normal circumstances would have been their main competitors, or "outsiders". Non-utilisation of shipping capacity has never been authorised by Community law, and the accompanying price maintenance practices only aggravated the violation. These agreements on non-utilisation of available shipping capacity obliged all members of the conference to use, for any given voyage, only a fixed percentage of available capacity. From the point of view of shippers (transport users), it is far less costly and more economical to simply withdraw some ships from service. However, this reduces shipping company profits. The decision issued in the TAA case clearly states that the block exemption granted to liner conferences authorises them to temporarily control available capacity (by briefly withdrawing ships from service). However, the scope of the exemption does not extend to authorisation of agreements for non-utilisation of shipping capacity.

ii) The Far Eastern Freight Conference (FEFC)[14]: the regulation granting a block exemption to liner conferences only covers transport of goods by sea. The Far Eastern Freight Conference had introduced rules allowing its members to fix the prices for their door-to-door services, which also included the transport of goods over the land-based segment. The liner conferences receive favourable treatment under competition law regulations, as they allow their members to provide services which benefit consumers. The agreement did not provide, as regards the land-based segment of the shipping process, any co-operation which might be of benefit to the public. Consequently, it was prohibited, and a nominal fine of ECU 10 000 was imposed on each of the companies.

Agreements restricting parallel trade

i) Tretorn[15]: community competition policy has always recognised that the allocation of exclusive territorial rights to distributors or licensees is an essential part of many distribution or licensing systems. Accordingly, it not only authorises exclusivity clauses in such agreements, but also clauses prohibiting the distributor or licensee from canvassing for new clients through advertising or other means outside the territory which it has been allocated. However, the Commission, the Court of Justice and the Court of First Instance have consistently held that agreements restricting parallel trade -- i.e. preventing distributors from selling to third parties intending to export the product to another Member State -- are illegal and subject to substantial fines. Such agreements, whose effect is to recreate the borders which were opened by the Single European Market programme, prevent citizens living in countries with higher prices from taking advantage of less costly imported products. In 1994, the Commission issued a decision against a tennis ball manufacturer which had prevented its exclusive distributors from selling its product for export purposes, and which had taken measures to ensure that this prohibition was respected. A fine of ECU 600 000 was imposed on this manufacturer, Tretorn, and fines of ECU 10 000 on each of its distributors.

Agreements and practices aimed at closing or limiting access to markets

In enforcing competition regulations, one of the Commission's main tasks is to ensure that firms do not enter into agreements or, if they are in a dominant position, engage in unilateral practices which reduce competition from other firms (which are generally firms from other Member States taking advantage of the possibilities opened up by the Single European Market). Agreements of this sort covered by Article 85 are generally agreements setting up distribution networks. Established suppliers use such agreements to gain control over all available distributors. Agreements prohibited by Article 86 include, for example, a company in a dominant position which tries to prevent its customers from switching to other suppliers by offering loyalty rebates, or which attempts to eliminate an existing competitor through predatory pricing. In 1994, two major cases were decided under Article 86, and another, Carlsberg-Interbrew under both Articles 85 and 86.

i) Microsoft: following a complaint lodged by a software manufacturer, the Commission opened an investigation to determine whether Microsoft had abused its presumed dominant position in the market for computer operating systems by entering into software licensing agreements whose effect was to eliminate its competitors from the market. Following investigation of the complaint, the Commission voiced concerns that "per processor" and "per system" licences (i.e. licences with clauses requiring payment of a fee for each computer produced by a PC manufacturer, regardless of the number of computers sold with pre-installed Microsoft software), the length of the term of Microsoft licensing agreements

and the "minimum commitment" clauses contained in these contracts, would effectively close the European market for this type of software to competition. Concurrently, U.S. Antitrust Authorities carried out a similar investigation. Microsoft gave its formal consent to the exchange of information between the Commission and the U.S. Department of Justice, foregoing its right to confidentiality in relation to these two proceedings. Subsequently, numerous discussions took place between DG-IV and the Justice Department, leading to adoption of a joint approach. This joint action was not carried out using the framework set up by the co-operation agreement signed by the European Commission and the U.S. Government in 1991, as this agreement did not provide for exchanges of information on this scale without the consent of the parties. While the Commission was drafting a statement of objections, Microsoft communicated its desire to reach a settlement with the authorities concerned. The Commission and the Justice Department agreed to negotiate jointly with Microsoft, and meetings took place in Brussels and Washington, DC. Following these discussions, Microsoft gave an undertaking to both the Commission and the American authorities. The undertaking obtained by the Commission provides that Microsoft will enter into no further licensing contracts with a term of more than one year, will no longer demand minimum commitments from its licensees and will abandon "per processor" licensing arrangements. In the future, "per system" licensing agreements will only be valid if Microsoft makes it clear that licensees are free to purchase competing products. This undertaking will open the market for operating systems to competition from existing suppliers and potential newcomers to the market

ii) HOV-SVZ/MCN[16]: following an investigation prompted by a complaint, the Commission found that Deutsche Bahn (DB) had fixed lower prices for rail transport services through German ports than for equivalent services through Belgian or Dutch ports. The Commission also found that DB held a dominant position (because of its monopoly on rail services in Germany) and that it had abused this position through its discriminatory policy. This policy artificially encouraged companies to use German ports and, consequently, to use DB's services for the entire rail segment of transport towards "German" destinations, even in cases where it would normally have been more economical, given the distances, to pass through Belgian or Dutch ports and use a combination of the services offered by the Belgian, Dutch and German national railway companies. The Commission imposed a fine of ECU eleven million on DB. This decision does not question the right of DB to operate as the sole provider of rail transport services in Germany, but it does establish the principle that a legal monopoly cannot be used to support the activities of associated companies at the expense of their competitors.

iii) Carlsberg/Interbrew[17]: in 1989, Carlsberg, the largest Danish brewing firm, entered into an exclusive distribution agreement with Interbrew, the largest Belgian brewing firm, granting Interbrew the exclusive right to sell "Carlsberg" and "Tuborg" beer in Belgium and Luxembourg. The Commission objected to this agreement on the ground that it effectively eliminated all competition between these two major European brewing firms for pilsener beer in a country where the licensee occupied a dominant position. The action taken by the Commission against this exclusive distribution agreement is a clear application of the conclusions of the 1991 study on beer production in the EC, which stated that the Commission would examine licensing agreements between major brewing firms to ensure that brewers did not use these agreements to divide the market up among themselves or control exports. The Commission does acknowledge that production and distribution agreements between brewing firms operating in different Member States can be of benefit to the public. These agreements can allow small specialised brewers to sell their products

outside national markets, or provide a springboard for a major brewer to start up independent activities in another geographical market. However, the negative effects on competition must not be allowed to outweigh the potential benefits, which is the case when an exclusive right is granted to a brewing firm which, like Interbrew, occupies a clearly dominant position in its national market. Co-operation between the brewing firms in question then becomes a means to divide up the market and strengthen a dominant position (in this case, in Belgium) at the expense of other brewers, which are mostly small producers and suppliers of independent beers. During the proceedings, the two firms amended their agreement to bring it into line with competition regulations. Carlsberg agreed to set up a new joint venture in association with a Belgian beer wholesaler, authorising it to distribute Carlsberg's products and act as a competitor to Interbrew, which would retain a non-exclusive licence. Through its intervention, the Commission was able to guarantee that Belgian beer consumers would be able to choose from among different suppliers of pilsener beer, and that there would be active competition for sale of these products, resulting in lower prices.

Authorisations

It is obvious that when firms co-operate in an area where they were formerly in competition, this constitutes a restriction on competition between these firms. Nevertheless, the Commission is aware that such co-operation can be of vital importance to the firms in question, especially in markets which are opening up to global trade, as it allows them to achieve the economies of scale which they need to remain competitive. By co-operating, the firms can improve the efficiency of their R&D projects and reduce their production and distribution costs, making them more competitive. Taking all this into account, the Commission generally rules in favour of R&D or joint production agreements between firms, provided, of course, that these agreements do not bring about the disappearance of effective competition within the Community, which is one of the criteria which must be met to qualify for an exemption under Article 85(1).

The decisions issued by the Commission this year illustrate this approach, which was also adopted in numerous other cases of less legal, economic and political significance that were settled by the Council with a comfort letter and have been intentionally omitted from this summary.

Strategic alliances

In markets such as telecommunications that are rapidly opening up to global competition under the twin effects of technological progress and trade liberalisation, companies can choose to co-operate in a number of areas. This co-operation is usually accompanied by a unilateral or mutual acquisition of equity. Such transactions raise special problems for competition authorities. Even though the future effect of the collaboration is unclear, the quasi-structural nature of the transaction obliges competition authorities not only to analyse the known effects of the transaction at the time the agreement is notified, but also to predict what the probable structural effects will be over the long term. Nevertheless, at least with regard to markets which are opening up to global competition, the Commission is, as a rule, in favour of such agreements. This was the position adopted in the BT/MCI and Olivetti/Digital cases.

i) BT/MCI[18]: British Telecommunications (United Kingdom) acquired a 20 per cent holding in MCI (United States), and the two companies decided to form a joint venture company, Concert, to provide improved, high value-added global telecommunications services to multinational or major regional companies. The two companies transferred most of their activities in this area to the joint venture company. Although finding that the operation brought about a restriction of competition (BT and MCI being, at least potentially, competitors not only in the global telecommunications market, but also in the specific market segment in which Concert was to operate), the Commission ruled that an exemption could be granted, as the advantages flowing from the operation outweighed the negative aspects. In particular, the Commission took into account the fact that Concert was going to develop a complete range of sophisticated global services, and would do so more rapidly than BT or MCI could have done independently. Further, by creating Concert, each of the parent companies would considerably reduce the costs and risks inevitably involved in providing services on the scale and in the special conditions required by multinationals. However, the Commission only granted the exemption after securing an undertaking that, despite the appointment of BT as exclusive distributor in the EEA, any customer operating within this area would also be able to access the services provided by Concert through MCI, and after the parties had amended a clause which was intended to discourage MCI from entering certain segments of the telecommunications market within the EEA

ii) Olivetti/Digital[19]: these two computer companies entered into an agreement under which Digital was to provide Olivetti with its "Alpha AXP" technology (which is used in computers to increase processing speed). In return, Olivetti was to use the Digital technology only in certain of its products and, in addition, purchase various AXP components from Digital. For its part, Digital agreed to continue purchasing Olivetti PCs using Intel processors for its sales in Europe. This technological co-operation agreement also originally included the acquisition by Digital of eight per cent of Olivetti's equity, but these shares were ultimately sold. Following its examination of the case, the Commission ruled that any restrictions on competition were more than made up for by the advantages flowing from wider distribution of Digital's state-of-the-art Alpha AXP technology. It also noted that several other technologies were available on the market. Accordingly, an exemption was granted for the operation.

R&D and production joint ventures

i) Fujitsu/AMD[20]: Fujitsu (Japan) and Advanced Micro Devices (AMD) (United States) formed a joint venture, Fujitsu AMD, to manufacture advanced microchips to be used in the high technology products of the future. This market is expanding rapidly. In particular, the market segment for flash memory chips (one of the chips to be produced by the joint venture) should increase tenfold between 1992 and 1996, leading to a drop in prices and increased use of high technology products. The Commission found that the creation of this joint venture breached the provisions of Article 85(1) as it restricted competition between the parties, which are competitors in this field. The territorial restrictions contained in the two-way technology licensing agreement which, for a period of five years, granted Fujitsu the right to market the products in question in the United Kingdom and Ireland, and AMD the right to market them in the rest of the EEA, also violated the provisions of Article 85(1). However, the Commission ruled that an individual exemption could be granted, as the positive aspects of the agreement outweighed the negative effects on competition. In particular, the Commission found that the distribution of a new generation of semi-conductors would foster technological and economic progress by making possible the production of a whole range of

faster, more compact and more dependable electronic products, ranging from computers to portable telephones.

ii) International Private Satellite Partners (IPSP)[21]: nine companies (operating mainly in the telecommunications or aerospace equipment sectors) formed a joint venture to supply international satellite telecommunications services to American and European companies. It was provided that the joint venture would be the owner of the two satellites, one of which was launched in November 1994. The Commission granted a negative clearance to the operation, finding that the companies were not in competition with each other in this market, and that neither of the companies would have been able to go ahead with the project on its own. In addition, the Commission found that the operation would increase competition for these services and capacity in the satellite transmission market, as the joint venture would be in competition with powerful strategic alliances which are currently being formed, and would sell unused satellite capacity to third parties.

iii) Exxon/Shell[22]: the Commission granted an exemption to agreements between the American company Exxon and the Dutch-English company Shell setting up a manufacturing joint venture to supply the parent companies with plastic linear polyethylene. The Commission's involvement in the case prompted the companies to amend their initial agreements so as to give each of the parties greater scope to increase their initial investment in the joint venture. The amended agreements also gave more autonomy to the managers of the joint venture and allowed each of the parties to take advantage of any production capacity granted to the other party which remained unused. These measures were intended to limit the effects of this co-operative agreement on competition between the parties as far as possible. Because the market in question was found to be oligopolistic, the status of such a joint venture between two major competitors under competition regulations was far from clear. Nevertheless, a ten-year exemption was granted to the operation, mainly because the restrictions on competition flowing from the joint venture were limited to the absolute minimum necessary for the success of such a project. In addition, notice was taken of the fact that the plant would use state-of-the-art technology to produce plastic linear polyethylene, which was a guarantee of efficiency and would allow the sale of the product at very competitive prices.

iv) Pasteur Mérieux/Merck[23]: in October, the Commission granted an exemption to a joint venture between Merck (United States) and Pasteur Mérieux Sérums et Vaccins, a subsidiary of Rhône Poulenc (France). The joint venture was formed to take over all the activities of the parent companies in the area of human vaccines. One of the main goals of the operation is to discover and develop new broad-spectrum vaccines, i.e. vaccines combining various different antigens. The formation of the new joint venture, which will have at its disposal a wide range of monovalent vaccine stock, will speed up development of these broad-spectrum vaccines. This will represent an important advance in the public health field, particularly in the area of child immunisation. In the future, children will only need to be given a single injection which will immunise them against a whole range of diseases including diphtheria, tetanus, whooping cough, polio, hepatitis B and haemophilus influenza B (one of the causes of meningitis). The joint venture will also encourage competition for the discovery of new, quantitatively and qualitatively superior monovalent vaccines, and will help to significantly improve the distribution of vaccines produced by Merck now and in the future. The Commission also took into account the fact that, although the parties to the agreement are the

two largest producers of vaccines in the world, Merck's operations in the European market, although dating back to the beginning of the 1970s, are extremely limited, except in Germany. Further, the ranges of vaccines produced by the parties are largely complementary in nature in the European market, with only limited product overlap in certain clearly identified national markets. Finally, to minimise even further the anti-competitive effects of the operation, the parties agreed to amend clauses in the originally notified document concerning the French market for combination measles-rubella-mumps vaccines, the market for monovalent anti-haemophilus vaccines in France, Germany and Scandinavian countries belonging to EFTA and co-operation with Behringswerke AG, the German distributor of vaccines produced by Merck. These changes considerably reduced the negative impact of this agreement on competition.

v) Philips/Osram[24]: the Commission granted an exemption to an agreement by which Philips (Holland) and Osram, a subsidiary of Siemens (Germany), combined their production and marketing activities for lead glass used in the manufacture of lamps. The Osram factory in Berlin had become obsolete and was to be closed. Therefore, it was decided that the joint venture would be located in the current Philips factory in Lommel, Belgium, which would be enlarged, allowing the joint operation to generate major economies of scale. The joint venture was to supply its products to the parent companies and other lamp manufacturers. Although this agreement was found to restrict competition and thus violate the provisions of Article 85(1), it qualified for an individual exemption because of the gains in efficiency which the project generated and because of the existence of several other sources of supply both inside and outside the European Union. The Commission also took into account another important factor, namely the possible environmental advantages flowing from the project. First, in contrast with Osram's factory in Berlin, the Philips facilities in Lommel are equipped with state-of-the-art systems to cut down on dangerous emissions produced during lead-glass manufacture. Second, one of the main aims of the joint venture will be the development of lead-free products for use in lamp manufacture. These advances should bring about a significant reduction in atmospheric pollution.

vi) Saint-Gobain/Asahi Glass[25]: in December, the Commission granted exemptions for several agreements between Saint-Gobain Vitrage International (France) and Asahi Glass Company Ltd. (Japan) covering joint research and development of double-layered products to be used mainly in the manufacture of glass for automobiles. Reduced to its essentials, this was an agreement setting up a joint venture company, to be jointly managed by Saint-Gobain and Asahi Glass, which would pool the knowledge of the two companies and allow them to combine their research efforts into this new technology. The Commission paid special attention to the advantages that this co-operation between a Community company and a Japanese company with a specific technological advantage in the sector in question would produce in terms of consumer safety. Automobile windshields using this technology are manufactured by laminating mineral glass and polyurethane film, whose combination provides better absorption of mechanical energy. These products are thought to provide better protection for passengers riding in vehicles, superior shock resistance and lower the risks of injury in cases of collision. The parties have reached similar stages of technological progress and, in the area of double-layer technology, combining their individual research efforts would be mutually advantageous. An exemption was granted after the parties modified the term of their agreement. The agreement will now expire five years after the date on which commercial production starts in the Community, or in 2005 at the latest.

Transport sector

In 1994, the Commission handed down four decisions granting exemptions in the international rail transport sector. All four cases involved joint marketing of new international services and, in all but one, services between the United Kingdom and continental Europe following the opening of the Channel tunnel. All these cases involved agreements between companies which own the entire rail infrastructure of their respective countries or which are the sole providers of rail haulage services. Consequently, these companies own key facilities, to which access is essential in order to supply international transport services. It is important for the Commission to examine these agreements closely, as any co-operation between these companies to gain access to new markets for international transport could strengthen the dominant position which they already hold in their respective national markets and make access to these markets extremely difficult, if not impossible, for their competitors. At the same time, entry into these new markets, most of which are vital to the creation of real trans-European rail networks, requires major investment in terms of transport equipment and facilities, while the economic profitability of these new activities is not guaranteed. As a result, the rapid introduction of these new services, which benefit European industry and consumers alike, is only possible through a co-operative effort by national railway companies in some cases. In its decisions in this area in 1994, the Commission weighed these conflicting interests. At the same time, it was obliged to take into account the effect of Council Directive No. 91/440/EEC of 29 July 1991, which liberalises international rail transport services, authorising the access, under certain conditions, of any rail company in the European Union to the rail networks of all Member States. The Directive also applies to the rail infrastructure of the Channel tunnel, which is owned by Eurotunnel. The Commission must ensure that any co-operation agreements, especially those reserving a certain percentage of available infrastructure to a particular company or group of companies, do not violate competition legislation or the aims of this Directive.

i) Eurotunnel[26]: the Eurotunnel decision involved an agreement between Eurotunnel, British Rail and SNCF. The agreement reserved a percentage of the tunnel's rail capacity (scheduled "windows" during which trains can use the tunnel) for British Rail and SNCF, excluding not only Eurotunnel itself but also all other rail transport companies. This clause considerably reduced competition between the parties to the agreement and had a significant exclusionary effect on third parties. However, noting the special nature of the Channel tunnel, whose construction and management involve substantial investments and risks, the Commission granted an exemption to the agreement for a period of 30 years subject to certain conditions intended to minimise the negative effects on competition. These conditions reduce the rail capacity reserved for British Rail and SNCF and guarantee that other rail companies will have access to the tunnel rail system and will be able to offer competing international transport services.

ii) Allied Continental Intermodal Services (ACI)[27]: British Rail, SNCF and Intercontainer (a combined transport provider belonging to 24 railway companies) decided to jointly operate combined international transport services between the United Kingdom and Continental Europe through the Channel tunnel, managed by a new joint venture called ACI. The combination of modes of transport in this case included rail and road transport services. The Commission ruled that British Rail, SNCF and Intercontainer were potential competitors in this market and that the planned joint venture therefore eliminated all competition between them. In addition, it ruled that the joint venture could prevent competing transport companies from entering the market. Because of the investments that the two national railway companies had made in setting up a specialised company in the combined transport field, there was a risk that they would be less likely to grant access to their networks or rail services

to companies offering competing services. Nevertheless, the Commission took into consideration the unusual position of the company, which was offering an entirely new service involving considerable financial risk, and ruled that the joint venture was entitled to an exemption for a five-year trial period. The Commission also imposed certain conditions on the companies in order to minimise the negative effects of the agreement on competition and guarantee that other combined transport providers would have access to the market. In particular, it required British Rail and SNCF to refrain from discriminating against competing transport operators and to provide them with rail services identical to those supplied to their joint venture, ACI.

iii) Night Services[28]: four state-owned railway companies (British Rail, SNCF, Deutsche Bundesbahn and Nederlandse Spoorwegen) entered into an agreement concerning the creation of a joint venture to operate rail passenger transport by night trains along four routes between the United Kingdom and Continental Europe, passing through the Channel tunnel. This operation, which raised the same issues as the creation of ACI, was granted an exemption by the Commission for an eight-year trial period, subject to conditions similar to those placed on the ACI joint venture. The ACI and Night Services decisions illustrate the importance which the Commission places on the development of new, high-quality rail transport services associated with the opening of the Channel tunnel. These new services introduce an alternative to traditional sea or air transport services, and increase competition between the different modes of transport as a result

iv) Communautés d'Intérêt Automobiles (CIA)[29]: the Commission approved a framework co-operation agreement between 13 rail companies for the transport of new automobiles from their assembly plants to distribution centres. The goal of this agreement was to increase the use of rail transport for these operations, a goal endorsed by European Union general policy in the transport sector. This agreement provided for the fixing of a joint marketing strategy and pricing system. However, at the request of the Commission, the parties abandoned the idea of fixing their prices in common. As a result, prices are fixed for each international leg of the trip by the company directly involved. Although it was found that this agreement restricted competition among rail companies, including competition for prices, the Commission granted an exemption because of its positive effects on the quality of service and the boost it provided to rail transport.

Decentralised application of competition regulations

Following the example of national courts which are authorised to enforce Community competition regulations in cases coming before them, the Commission held discussions in 1994 with national anti-trust authorities on ways to expand their role in enforcing Community competition law. The conclusions of these discussions will be presented in a notice to be drafted jointly by the Commission and national authorities.

The aim of controlled decentralisation of Community competition law enforcement is to increase the effectiveness of competition regulations on a national level, while at the same time avoiding any increase in enforcement costs or endangering the homogenous application of these rules to industry within the Common Market. The proposed decentralisation must strike a balance between the growing use of the subsidiarity principle on the one hand, and the need to maintain a uniform system of competition regulations for all industry in the Common Market on the other (the "level playing field" principle). The

Commission has expressed the view that enforcement of a uniform body of substantive regulations by both the Commission and the 15 national authorities would represent a major step towards integration of the Common Market, leading to increased competition and enhancing the competitiveness of European industry overall.

To achieve this goal, a proposal has been made to allow decentralised enforcement of Community competition regulations when the following three conditions are satisfied:

-- the case must be centred around facts and issues involving a single Member State;

-- there must be a clear violation of Community law; and

-- there must be no possible grounds for the violation to qualify for an exemption from the Commission under Community law, as applications for exemptions fall under the exclusive authority of the Commission.

This decentralisation process will ensure that enforcement is carried out by a single antitrust authority on the most appropriate level, which is an extension of the principle contained in the regulation on community concentrations which provides for referral of concentration cases to Member States.

Statistical breakdown of Commission activities

From almost all points of view, 1994 was an excellent year for the Commission, both in terms of the number of cases handled and the efficiency with which they were processed. The first point that should be noted is the record number of formal decisions issued during the year.

These results are very encouraging and are the fruit of determined efforts to rationalise and simplify internal procedures. The figures are particularly heartening in view of the size and complexity of the cases which led to a decision. Further, the number of cases pending at the end of the year fell once more, and currently stands at 1 058.

In comparison, there were more than 3 000 cases pending at the end of the 1980s, whereas in 1993 there were only 168 cases more than the current figure. As a direct result of the drive to clear up the accumulated backlog from previous years, almost all "simple" cases (i.e. those raising few substantive issues, or none whatsoever) have been settled, bringing the current number of cases pending down to almost equal the number of cases being processed. This explains why the overall drop in the number of cases pending in 1994 was less than in previous years. In the future, it will become increasingly difficult to make any significant reductions in this figure. Nonetheless, the Commission is determined to continue working towards this goal.

III. Public enterprises and national monopolies (Article 90)

Telecommunications

One of the fundamental preconditions for liberalisation in this sector is ensuring that opening up the market to competition will not prevent telecommunications companies from continuing to carry out their legitimate public service roles. This concern partly explains why Europe lags so far behind other regions of the planet, in particular the United States and Japan, in liberalising the telecommunications sector. Over the last seven years, however, the Community has implemented a gradual programme of

liberalisation which will lead to the complete opening up of the markets for telecommunications services in 1998.

The first stage of this process dates from 1988, with the adoption of the Directive on Telecommunications Terminals. This Directive forced Member States to withdraw the monopolies that they had granted to their telecommunications companies for the sale of certain equipment, such as telephones, modems and fax machines. The second, more important, stage was initiated in 1990, when the Commission adopted a Directive requiring Member States to abolish all monopolies on the supply of telecommunications services, with four important exceptions:

-- public voice telephony;

-- satellite communications;

-- mobile telephony and radio-paging services; and

-- public radio and telephone broadcasting services.

However, the Directive specified that the Commission was to review the entire situation in 1992, in the light of intervening technological or economic developments, in order to determine to what extent certain or all of the abovementioned services could be liberalised without endangering the provision of universal services. Even at this stage, it became clear that the telecommunications sector had developed at a brisk pace. This observation, and the success of the liberalisation measures already implemented, led the Commission to table a series of proposals, one of which recommended the gradual liberalisation of previously "reserved" areas (Option Four). The report was the subject of wide debate, and extensive consultations were conducted with the business world, consumer associations and the European Parliament and Council, during which a strong consensus was established in favour of the proposal. Accordingly, the Council directed the Commission to take all necessary steps to ensure the complete liberalisation of voice telephony services in the European Union starting from 1998, subject to certain temporary exemptions granted to individual Member States. In 1994, the Commission continued its work on this liberalisation programme.

First, the Commission adopted a Directive on Satellite Communications. This Directive opens up to competition the market for the sale of equipment (satellites and ground-based stations) and the supply of satellite services. This Directive will lead to increased and more effective utilisation of business satellite communications and will help close the gap which has opened up between the quality/price ratio of services available in Europe and those offered to companies operating in the United States.

Second, the Commission published, to initiate a public debate, a draft directive which, if it is adopted, will lift all restrictions on the use of cable television networks for the provision of liberalised telecommunications services. In the future, Community citizens should be able to choose between the services of a wide number of competitors. The main aim of this draft legislation is to encourage new projects in the multimedia field throughout the entire European Union from 1 January 1996 onwards. Most of these new projects concern the transmission of moving images, which traditional telecommunications networks were not designed to accommodate, and which, in many cases, are unable to do so.

Third, the Commission proposed, following consultations centred on the Commission's Green Paper on Mobile/Personal Communications, the elimination of special and exclusive rights in the field of mobile services and their related infrastructures by 1 January 1996. This proposal should completely

transform the mobile telephony sector before the end of the decade, making what is currently only a showroom or professional service available to all current subscribers. The Commission will not adopt a final directive until it has carefully examined the comments addressed to it during the consultation phase.

Finally, a draft directive providing for the complete liberalisation of telecommunications services between now and 1998 is currently being drafted.

Energy

Electricity is far more expensive in Europe than in other countries such as the United States. This creates an obvious competitive disadvantage for the European industry. During 1994, the Commission tabled some proposals before the Council and the Parliament, under Article 100A of the Treaty, to introduce uniform rules for the electricity and gas sectors. The aim of these proposals is to open up national monopolies so that the regulations of the internal market will apply to the energy sector without compromising the provision of universal services. In order to reach these goals, access by third parties to electricity and gas networks must be authorised, and individual accounting systems must be introduced for production, transport and distribution activities. These proposals were amended to incorporate the opinion of the European Parliament. The Council has not yet come to a unified decision, and work on the project is continuing.

Postal services

In 1994, the Commission continued its work on the measures recommended by the Council in its Green Paper on Postal Services. The Commission has commissioned several studies to this effect, in particular concerning cross-border mail services.

IV. Concentrations (Council Regulation (EEC) No. 4064/89 of 21 December 1989)

General overview

1994 marked the fifth year since the adoption of the Regulation on Concentrations and the fourth year of its application. The Regulation on Concentrations was adopted by the Council in 1989 with the aim of creating an effective "one-stop shop" regulatory process for mergers, acquisitions and certain joint ventures affecting two or more Member States. The assessment procedure contained in the Regulation is divided into two phases. During an initial period of one month, the Commission determines whether there are any serious doubts raised as to the compatibility of the notified operation with the Common Market. In the absence of any such doubts, the operation is authorised at the end of this time period. However, if any serious doubts are raised, the Commission goes ahead with a detailed investigation for a further period not to exceed four months. The two phases of the assessment are subject to time restrictions with which the Commission must comply in coming to its decision. The Commission encourages notifying parties to supply all relevant information before submitting their notification, so as to reduce, whenever possible, the amount of information which will need to be requested.

In 1994, the number of operations notified to the Commission under the Regulation on Concentrations rose sharply. The figure rose from 58 cases in 1993 to 95 in 1994, i.e. an increase of 64 per cent.

In 1994, a detailed investigation was carried out in five cases where serious doubts had been raised as to the operation's compatibility with the Common Market. One of these operations, MSG Media

Service in the German market for pay television, was prohibited. Two others were significantly modified before the go-ahead was given, and two others were cleared with no changes. This is the largest number of decisions issued in cases involving the full five-month procedure since 1991. In 1994, there were six cases in which a full investigation was ordered, compared with four in 1993.

The percentage of operations cleared after an initial one-month period remained almost unchanged: 88 per cent in 1994, compared with 86 per cent in 1993, despite the major increase in the number of cases. The number of decisions (five per cent) ruling that the operation was not caught by the Regulation on Concentrations was lower than in previous years, probably due to the fact that after four years of enforcement, firms have a better understanding of the scope of its provisions, and how they are interpreted by the Commission.

The decisions involved a wide variety of sectors, leading the Commission to examine a variety of markets for industrial and consumer products during the year. Among the decisions adopted after an initial one-month period, 57 per cent concerned industrial sectors, 18 per cent consumer goods and 25 per cent service industries. Many cases involved either heavy industry or chemical products (notably manufacture of fibres), representing over 25 per cent of all cases. There were also numerous operations involving the banking and insurance sectors.

For the first time, the Commission declared that two notifications were incomplete, and demanded that additional information be provided by the parties. In three cases, the Council agreed to authorise the operations without a detailed investigation only after the parties gave undertakings that they would modify the operation to eliminate some problems with competition noted by the Commission. In two of these cases (Unilever/Ortiz Miko and Tratebel/Distrigaz), the parties abandoned their project and withdrew their notification. In both cases, a reworked version of the project was notified and was subsequently cleared by the Commission. In addition, in two further cases (Unilever/Ortiz Miko and Elf Atochem/Rütgers), the Commission agreed to undertakings by the parties aimed at resolving possible competition issues.

Operations notified under the Regulation on Concentrations are frozen for at least the first three weeks following notification, and sometimes longer, so as to avoid the Commission having to order the dismantlement of a concentration which it has just prohibited. The number of cases in which the waiting period was extended was much higher than in previous years, due to the number of cases processed and eventually approved during the first phase of the assessment procedure.

Relationships with Member States

The Regulation on Concentrations provides that a Member State can request that a notified operation be referred by the Commission to the competent authorities of the Member State, which then apply national legislation on concentrations to decide the matter in question. This constitutes a derogation from the "one-stop shop" principle enshrined in the Regulation, but the procedure is consistent with the principle of subsidiarity in cases where a Member State can clearly prove that a given concentration poses a threat to one or more national markets. This situation arose during the year in the Holdercim/Cedest case, in which the Commission granted the request of French authorities for the referral of one part of the operation, involving the ready-mixed concrete industry, which would have led to an unacceptably high concentration of market shares in several local, geographically defined markets in France. In contrast, the Commission refused to refer the MSG Media Service case to German authorities, and instead decided to launch a detailed investigation itself, judging that the effects of the operation would inevitably extend beyond the frontiers of Germany.

In addition, although the Regulation on Concentrations confers exclusive jurisdiction on the Commission to rule on concentrations falling within the scope of its provisions, it also authorises Member States to institute separate proceedings to protect legitimate interests which have not been taken into consideration. Freedom of the press is counted among these interests. This provision was applied in the Newspaper Publishing case, in which Italian, Spanish and UK groups launched a joint takeover bid to gain control of the publishers of the UK daily *The Independent*. The Commission examined the competition aspects of this operation and gave its approval. UK authorities also reviewed the operation in the light of national legislation on concentrations in the written press, designed to ensure the accuracy of published information and freedom of the press.

Article 223 of the EC Treaty authorises Member States to take measures to protect their national security interests. Prior to 1994, this provision had already been invoked in the field of concentration control, in a case where the Commission accepted the principle that an operation involving only military equipment could be exempted from notification requirements. For the first time this year, the civilian and military aspects of a concentration were considered together in a case where VSEL, the UK builder of warships and military submarines, was the subject of simultaneous takeover offers from British Aerospace and GEC. A very limited portion of VSEL's activities concerned the manufacture by a subsidiary of equipment for the oil and gas industries. The Commission examined the acquisition of these particular activities. The military aspects of the takeover were not notified in conformance with the Regulation on Concentrations, and were reviewed by UK authorities under the Fair Trading Act. The Monopolies and Mergers Commission subsequently carried out a detailed investigation of the two takeover offers.

Decisions involving detailed investigations

Privatisation of AST[30]

AST was sold off as part of the privatisation of the Italian public holding company Ilva. This privatisation had already been the subject of a decision in the field of state aid, under which the operation was to terminate before the end of 1994. The purchaser was a German/Italian consortium made up of Krupp and Thyssen in Germany, and Riva, Falck and Tadfin in Italy. The product market in question was found to be the market for stainless steel flat products and electrical plates, and the relevant geographical market Western Europe. Krupp and Thyssen had already merged their activities in the field of stainless steel and, with the acquisition of AST, their cumulative market share for stainless steel products would rise to between 35 per cent and 45 per cent. Their nearest competitor, Ugine, controlled a market share of between 15 per cent and 25 per cent, and the five remaining competitors held market shares of between five and 20 per cent. Given the drop in prices and the prevailing overcapacity in the sector, the Commission ruled that the operation was not liable to place the parties in either an individual or oligopolistic dominant position. No other competition issues were raised in relation to the other markets involved, and the operation was therefore approved.

Dalmine - Mannesmann - Vallourec[31]

This operation took place in the seamless tubular stainless steel sector and involved the formation of a joint venture regrouping the activities of Mannesmann, Ilva and Usinor in this field. The joint venture (DMV) commanded a cumulative market share of approximately 35 per cent, as did its main competitor, Sandvik. Two other minor competitors also operated in the relevant geographical market (Western Europe). The Commission conducted an investigation to determine whether the operation was

liable to create an oligopolistic dominant position, either with or without Sandvik. Following this investigation, the Commission found that although there was a possibility that the accumulation of market shares might place the parties in a dominant position, this would be prevented by the existing presence of Japanese suppliers on the market and by the appearance of Eastern European producers which were developing the capacity to offer products of similar quality, which would encourage competition with Western European producers. As a result, the operation was authorised without any conditions attached.

Procter & Gamble (P&G)/VP Schickedanz (VPS)[32]

The stated intention of P&G to acquire the German company VPS (which manufactures a range of paper products) led the Commission to carry out a detailed study of the feminine hygiene sector in the Community. The Commission found that the sanitary napkin and tampon markets should be considered distinct national product markets. Using this finding as a starting point, the Commission went on to note that the combination of P&G's Always brand and VPS's Camelia brand would lead to the creation of a dominant position in the German and Spanish markets for sanitary napkins. At an advanced stage of the proceedings, however, P&G offered to dispose of all activities involving the Camelia brand shortly after acquiring VPS. The undertakings which P&G gave in this respect allowed the Commission to authorise the entire operation. In conformance with these undertakings given to the Commission, Camelia was sold to Kimberly-Clark shortly after the operation was completed.

Shell/Montecatini[33]

This case was also settled through the giving of undertakings by parties to the Commission. The operation provided for the formation of a joint venture to which Shell Petroleum (the holding company of the Royal Dutch Shell group) and Montedison (belonging to the former Ferruzi group) would transfer all of their global activities involving polyolefins, a family of thermoplastics including polyethylene (PE) and polypropylene (PP). After examining the operation, the Commission declared that serious doubts had been raised about the compatibility of the joint venture with competition regulations, particularly in relation to the market for development and licensing of polypropylene technology. In fact, this case represented the first time that the Commission has ever defined, in the context of the Regulation on Concentrations, a distinct market in the technology field. The Commission's main concern was the fact that the operation would give Shell effective control over the two main competing world specialists in polypropylene technology: Unipol, which is owned by a subsidiary of Shell in partnership with Union Carbide Corporation, and Spheripol, which belongs to Montedison. In order to resolve this problem, the parties agreed to transfer all the technological operations of Spheripol (Montedison) to a separate company over which Shell would exercise no control, and which would continue to compete with Unipol. They also agreed that Montedison would withdraw from a joint venture operating in the polypropylene sector which had been the source of some doubts for the Commission concerning the market for the production and sale of the product in question. Ultimately, the Commission was able to authorise the operation. The case also fell within the jurisdiction of U.S. antitrust authorities, which agreed to clear the operation subject to conditions similar to those imposed by the Commission.

MSG Media Service[34]

In contrast, in this case, the undertakings suggested by the parties were insufficient to change the Commission's view that the formation of a joint venture between Bertelsmann, Deutsche Bundespost Telekom and the Kirch group would close the German market for pay television to international

competition, and would therefore place the parties in a dominant position in the German-speaking market. The main aim of the MSG joint venture was to develop the future market for decoders and administrative and technical services for pay television in Germany. In particular, the joint venture was aimed at the Premiere channel, currently the only existing pay television channel in Germany, owned by Kirch/Bertelsmann and Canal Plus. The Commission found that the range of activities carried on by Kirch/Bertelsmann in the media industry, and Deutsche Telekom's activities as the owner of most of the German cable network, made these parties the most likely initial players in this market. The appearance of other competitors was unlikely and, in any case, MSG would be in a position to limit competition from other service providers. Further, the joint venture would allow Kirch and Bertelsmann to control competition in the market for pay television in Germany and also allow Deutsche Telekom to strengthen its dominant position in the cable market. Therefore, the Commission prohibited the formation of the joint venture under the Regulation on Concentrations, citing the need to ensure that future markets in the multimedia sector remain open to competition. This was the first time that the Commission had been called upon to examine an operation involving an entirely new product, which forced it to pay particular attention to any possible barriers which the operation might create.

Increasing the transparency and effectiveness of the Regulation on Concentrations

After extensive consultations with representatives of the business world, lawyers and national authorities, the Commission adopted a series of measures aimed at reducing the administrative burden associated with obligatory notification of certain operations and making Community enforcement of concentration regulations more transparent and user-friendly for all parties involved. These measures are the result of a 1993 report by the Commission to the Council on application of the Regulation on Concentrations, in which the Commission had already given some provisional undertakings before going ahead with a formal revision of the Regulation.

The option of presenting a simplified notification in cases where a joint venture's turnover and/or the value of transferred assets does not exceed ECU 100 million represents a major change for industry. This is set out in form CO, which was also amended in light of the experience the Commission has acquired since the Regulation came into force. The form openly acknowledges the importance placed on informal contacts with the Commission prior to notification, as these contacts generally allow the Commission to reduce the amount of information which needs to be supplied in each case. In addition to the form, the Commission also took the opportunity to improve the Procedural Regulation relating to the Regulation on Concentrations, which deals with notifications, time periods and hearings.

Significantly, in its 1993 report, the Commission also promised to review its *Notice on the Distinction between Co-operative and Concentrative Joint Ventures*. The Commission's position on this subtle, yet important, legal distinction has evolved considerably on a case-by-case basis since the regulation first came into force, rendering the 1990 Notice obsolete. Consequently, a new notice has been adopted incorporating the Commission's experience and aimed at clarifying the principles used to distinguish between concentrative and co-operative joint ventures, thus minimising the need to examine substantive issues when determining the Commission's jurisdiction.

This series of measures is accompanied by three new notices dealing with other vital legal aspects defining the effective scope of the Regulation on Concentrations. The guidelines contained in these notices (covering the concept of a concentration, the definition of relevant companies and the calculation of turnover) substantially reaffirm the Commission's approach over the last four years, both in terms of decisions formally adopted under the Regulation and confidential advice provided during informal contacts prior to notification.

Monitoring and assessment

The Commission has commissioned independent economic experts to carry out two impact studies to assess recent developments in markets operating in sectors where decisions involving undertakings given by companies have been adopted. The markets in question are the French and European markets for mineral water and the European market for nylon fibres (respectively, the Nestlé/Perrier and DuPont/ICI cases). These studies are of special interest, as they will help the Commission measure the success of its initial attempts to find workable solutions and will suggest possible avenues of research for the future.

Organisation of the Concentrations Task Force

At the end of the year, the Concentrations Task Force's field of action was enlarged to include concentrations involving the European Coal and Steel Community (ECSC), which will simplify matters for all parties involved in processing concentrations involving both the EC and the ECSC (i.e. mixed cases).

V. International aspects of competition law and policy

European Economic Area

The Agreement on the European Economic Area, which came into force on 1 January 1994, is the most ambitious agreement ever concluded with third-party countries. It extends the Single European Market to all EFTA members and guarantees, in the listed sectors, the same degree of economic integration as in the Community. This prompted the decision to adopt the entire body of Community competition law and policy for enforcement throughout the EEA, which entailed the creation of structures and the implementation of procedures which, if not identical, are similar to those of the Community.

Central and Eastern Europe

In 1994, the economies of Central and Eastern European countries continued to make progress towards market-based systems. Effective competition policy is vital to ensuring the success of this transition period and indispensable in reducing the number of restrictive trade measures by gradually removing the economic needs justifying their continued existence.

The European Agreements and the Interim Agreement concluded with Central and Eastern European countries include functional competition regulations which are, in substance, those of the EC Treaty.

The co-operation procedures provided for enforcement of competition regulations applicable to companies envisage three possible situations: both sets of competition authorities have jurisdiction in the same case; a single authority has jurisdiction, but its decisions are liable to affect the interests of the other party whose competition authority does not have jurisdiction; or neither competition authority has jurisdiction over the case (for example, in cases where only the competition authorities of a Member State

have jurisdiction). These rules are currently being considered for approval by the Association Committees.

Considerable progress has been made in bringing national legislations into line with Community rules, in conformance with the political priorities set in the pre-membership strategy laid down by the European Union.

During the Council's session in Essen, the Commission was expressly charged with creating a training programme to facilitate implementation of competition regulations by Central and Eastern European countries, based on its own experience and that of Member States.

The Baltic and Newly Independent States

Negotiations for free-trade agreements with the Baltic States drew to a close in 1994. These agreements contain competition provisions similar to those contained in the European Agreements concluded with Central and Eastern European countries.

An elaborate set of less restrictive competition regulations was included in the Association and Co-operation Agreement concluded with Russia in June, which reflects the different nature of the relationship between that country and the European Union. Similar agreements were signed with Ukraine, Kazakhstan and Kirghizia in 1994. An agreement was recently signed with Moldavia and another was provisionally initialled with the Republic of Belarus.

Mediterranean countries

Negotiations are also currently underway with various Mediterranean countries working towards the conclusion of agreements which closely resemble the Central and Eastern European model.

A customs union with Turkey is also currently being negotiated. As customs restrictions and restrictive trade measures would be abolished in the event of an agreement being reached, it is essential to ensure that trade would not then be distorted by the activities of companies themselves or by state intervention granting either aid or exclusive trading rights to companies. Therefore, a full set of competition rules has been included in the draft agreement.

North America

In 1994, the European Court of Justice handed down its decision on the legality of the agreement concluded by the Commission with the United States Government on enforcement of competition laws. The Court declared the agreement null and void, ruling that the conclusion of such an agreement fell within the exclusive authority of the Council.

The agreement remains valid under international law, but several steps need to be taken to bring it into conformity with Community law. On 12 October, the Commission adopted a Notice to the Council requesting that the Council approve and conclude an agreement in the name of the European Community in the same form as the original. The agreement signed by the Commission remains valid for the European Coal and Steel Community. As the year drew to a close, the Council was still considering the Notice and should come to a positive decision in early 1995.

In 1994, the Commission also submitted a proposal to the Council requesting authorisation to enter into bilateral negotiations with Canada to conclude a co-operation agreement in the field of competition. A decision is expected in January, and negotiations will commence as soon as possible thereafter.

The Pacific Region

Starting with Japan, a second, very fruitful, European Union/Japan seminar on competition policy took place in September. This was jointly organised by Japanese competition authorities (the Japanese Fair Trade Commission) and DG-IV. High-level discussions took place on two topics: "Deregulation and Implementation of Competition Regulations" and "Vertical Restraints and Competition Policy".

The presence in Brussels of a high-level delegation from the Japanese Commission allowed bilateral contacts on issues of common interest to take place.

In addition, the Union's relationships with Australia and New Zealand were developed and exchanges of view took place, particularly concerning the extensive experience of these two countries in the field of deregulation.

Multilateral organisations

During the year, DG-IV took part in the work of multilateral organisations which are active in the competition field, including the Competition Law and Policy Committee of the OECD and the UNCTAD Intergovernmental Group of Experts on Restrictive Business Practices.

The successful conclusion of the Uruguay Round and its consequences, particularly for competition policy, were assessed throughout the year. A Commission paper on competition regulations in the international sphere was examined during a meeting of the Council's Committee on Community Trade Policy, set up under Article 113, and received wide approval from Member States. In response, Commissioner Van Miert formed a group consisting of highly qualified experts in the field, assisted by officers of the European Commission, to study the prospects for closer international co-operation between competition authorities.

The group will draw on the experience built up by the European Union in negotiating and managing bilateral and multilateral agreements containing competition provisions, and in the unilateral enforcement of Community competition law against anti-competitive practices in order to plan the negotiations for a framework which would allow competition rules to be enforced on a world-wide basis. The group will finish its work and publish a report in 1995.

NOTES

1. A complete report on the Commission's activities in 1994 in the area of competition policy is published as the "24th report on Competition Policy", Office for the Official Publications of the European Communities, L2985 Luxembourg.

2. Council Resolution dated 10 October 1994 on the freedom of action and innovative potential of small and medium-sized enterprises, including craft industries and micro-enterprises, in a competitive economy, OJ-C294, 22 October 1994, p. 6.

3. Information Office-DG-IV, C150 00/158, rue de la Loi 200, B-1049 Brussels, Tel: (322) 295-7620, Fax: (322) 295-5437. Electronic mail: X400: c=BE/a=RTT/p=CEC/ou=mhsg/s=AlevantisP, Internet:p.alevantis@mhsg.cec.be.

4. OJ-L377, 21 December 1994, p. 28.

5. OJ-C368, 23 December 1994, p. 20.

6. OJ-L330/69, 21 December 1994, p. 67.

7. OJ-C178, 30 June 1994, p. 3.

8. OJ-C379, 31 December 1994, p. 16.

9. OJ-C322, 19 November 1994.

10. OJ-L116, 6 May 1994, p. 1.

11. OJ-L243, 19 September 1994, p. 1.

12. OJ-L343, 30 December 1994, p. 1.

13. OJ-L376, 31 December 1994, p. 1.

14. OJ-L378, 31 December 1994, p. 17.

15. OJ-L378, 31 December 1994, p. 45.

16. OJ-L104, 23 April 1995, p. 34.

17. Administrative Comfort Letter.

18. OJ-L223, 27 August 1994, p. 36.

19. OJ-L309, 2 Decembre 1994, p. 24.

20. OJ-L341, 30 December 1994, p. 66.

21. OJ-L354, 31 December 1994, p. 75.

22. OJ-L144, 9 June 1994, p. 20.

23. OJ-L309, 2 December 1994, p. 1.

24. OJ-L378, 31 December 1994, p. 37.

25. OJ-L354, 31 December 1994, p. 87.

26. OJ-L354, 31 December 1994, p. 66.

27. OJ-L224, 3 August 1994, p. 28.

28. OJ-L259, 7 October 1994, p. 20.

29. Unpublished decision.

30. Unpublished decision handed down in February 1995.

31. OJ-L102, 21 April 1994, p. 15.

32. OJ-L354, 31 December 1994, p. 32.

33. OJ-L332, 22 December 1994, p. 48.

34. OJ-L364, 31 December 1994, p. 1.

CZECH REPUBLIC[*]

(1994)

Introduction

The protection of economic competition has been ensured by the Ministry of Economic Competition. With the continuing privatisation process, the growing volume of foreign capital and the gradually increasing entrepreneurial self-consciousness of domestic companies, the importance of protecting the competitive environment has grown steadily. The tasks of the Ministry of Economic Competition are realised on the basis of the Act on the Protection of Economic Competition,, which allows it to grant authorisations to mergers and to restrict certain activities, where anti-competitive agreements (cartels), abuse of dominant position or monopoly positions are detected.

The Ministry plays an important role in the process of privatisation, in particular because it actively influences the creation and development of a competitive environment, by abolishing or at least weakening the former monopoly or dominant position of certain companies. The presence of the Ministry in the privatisation process is also a preventive measure against the rise of new monopolies.

The Ministry of Economic Competition also supervises the activities of the municipal authorities and the state administration, whose decisions may violate the Act on the Protection of Economic Competition. The Ministry is responsible for detecting these incorrect courses of action and insisting on their remedy.

Last but not least, the Ministry is also active in the legislative sector, where it ensures the protection of economic competition in draft bills or amendments of laws.

I. Changes to competition laws and policies adopted or envisaged

Legislative changes

The protection of economic competition in the Czech Republic is stipulated by Act No. 63/1991 Coll. on the Protection of Economic Competition, and in subsequent regulations. The origin of this act is related to the transformation of the central planning system into a market economy. Two amendments to the Act on the Protection of Economic Competition were passed as a result of experience drawn from the practical application of the Act.

The first amendment focussed mainly on the distribution of the jurisdictions of the then Office for Economic Competition and the national offices. These changes were realised within the framework of

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[*] The original language of this report is English.

Act No. 495/1992 Coll. In this case, however, changes of a formal nature had to suffice, as the very structure of the act and its institutions were not touched.

As a result of economic changes and changes in the legal system in general, Act No. 286/1993 Coll., led to profound legislative changes. The purpose of this amendment was to make the terminology of the Act on the Protection of Economic Competition consistent with the terminology of the Commercial Code, which governs industrial and commercial relations in the Czech Republic. Further, it was also necessary to clarify the purpose of the Act on the Protection of Economic Competition and its scope of application. The amended text states that the purpose of the Act on the Protection of Economic Competition is to ensure the protection of competition, and not the protection of competitors.

Another important change in the Act was the definition and extension of personal liabilities. Practice showed that the Act should apply to a variety of associations and chambers of entrepreneurs and enterprising professionals, which often violate the Act on the Protection of Economic Competition, but the Ministry of Economic Competition was unable to bring them to justice, because of the lack of a precise legal definition of personal liabilities.

The amendment introduced a new formulation of the general prohibition of anti-competitive agreements. The prohibition now applies not only to agreements between competitors, but also to their concerted activities. The amendment now makes it possible to provide both individual and general (block) exemptions.

The amendment changed the legal arrangements and the overall philosophy with respect to mergers. Instead of approving merger agreements, the Ministry of Economic Competition (MEC) either authorises them or prohibits them. Finally, changes were made concerning fines and sanctions applied in the event of infringement of the Act on the Protection of Economic Competition, thus making the Act more effective.

Changes in the jurisdiction of the Ministry

As of 1 January 1995, significant changes have been introduced to the jurisdiction of the Ministry. According to the terms of Act No. 199/1994 Coll. On Allocating Contracts for Public Works, the Ministry of Economic Competition is responsible for ensuring the respect of this Act. In this respect, the Ministry must:

-- review the objectives of the tenderers against the practices of the persons inviting to competitive tender

-- verify the procedure followed by each company in allocating public works contracts covered by the Act on Allocating Contracts for Public Works;

-- ensure the participation of representatives from supervisory bodies at the opening of the envelopes containing the offers from the tenderers;

-- provide statistical data on the allocation of public works; and

-- impose sanctions for infringement of the Act.

A special department has been set up at the Ministry to supervise the allocation of public works. Thus, the conditions for complying with the obligations associated with the Act have been met, but the structure of the ministerial departments dealing with competition problems has remained unchanged.

Development prospects of legislative activities with regards to the task of incorporating EC legislation into Czech law

The efforts of the Czech Republic to integrate into the structures of the European Community are reflected in the sector of legislation. In September 1994, the Ministry presented a departmental report to the government on the status of the incorporation of EC legal regulations into Czech legislation. With the report, the government was provided with a flow chart of departmental measures on the gradual incorporation of EC competition law in Czech competition law. According to the flow chart, in order to make the Act on the Protection of Economic Competition consistent with EC law, its amendment is envisaged for the second half of 1996. The new Act on the Protection of Economic Competition should thus comprise all the institutions accepted by the EC, and should be fully compatible with EC competition law.

II. The present state and development of the competitive environment

The conditions for the existence of a competitive environment are created within the framework of the transformation of the economy, namely through extensive privatisation of state property. In November 1989, the private sector produced 4.1 per cent of the GNP and employed 1.2 per cent of the workforce, and only two per cent of property was privately owned. After four years of privatisation efforts, the private sector produces 50 per cent of the GNP, and, of the more than one million registered undertakings, 84 per cent belong to private entrepreneurs, possessing approximately 40 per cent of the registered property.

The Czech economy is steadily acquiring a market character. The competitive environment is greatly influenced by the degree of concentration in the individual markets and branches. During the privatisation process, monopolies or companies with a dominant position in a markets have only been partly restructured. This situation can only be progressively modified, with the participation of the recently founded undertakings and international competition.

The Ministry assesses the quality of the competitive environment in individual markets or branches with the use of the COMP methodology, which is based on the quantification of the following five criteria:

-- degree of concentration in the market;

-- residual component of the relevant market;

-- resources required to enter the relevant market;

-- innovation dynamics; and

-- vertical integration.

After assessing the current state and the development of the market structures according to the COMP methodology, from the viewpoint of competition, the following can be regarded as markets that offer satisfactory conditions:

-- electrical engineering;

-- textile products;

-- manufacture and processing of glass;

-- meat and dairy products;

-- leatherworking;

-- construction; and

-- haulage.

According to the Ministry, the following branches rank among the industries with a medium degree of concentration:

-- medium-class passenger cars;

-- paper and printing;

-- banking;

-- manufacture and distribution of pharmaceutical products; and

-- long-distance coach transport.

The competitive environment remains relatively undeveloped in the markets dominated primarily by natural monopolies, such as power generation and distribution, natural gas processing and distribution, heat generation and supply, waterworks, telecommunications and certain types of mail services, as well as in the oil refineries and the petrochemical industry in general, metallurgy, transport, tobacco products (particularly cigarettes) and insurance.

Power generation and distribution

The initial state of the industry can be characterised as a state monopoly with almost all power generation, transmission and distribution concentrated in a single company. At present, roughly 80 per cent of power generation is concentrated in a single company, Czech Energy Plants (CEZ), which also owns the entire transmission system, including the switching stations and central power dispatching. Eight public limited companies are in charge of power distribution; the eight companies have local monopoly positions in their respective regional markets.

The State is the majority holder of the shares in both CEZ and the distribution companies. CEZ integrates two different features of the electric power industry:

-- CEZ is a dominant producer of electric power in the region (in which it is possible to create a competitive environment); and

-- CEZ operates as a natural monopoly in the transmission system (which includes the dispatching centre), further strengthening the dominant position of CEZ, with respect to both the distribution companies and the rest of the independent power generating or importing companies.

The Ministry has suggested that the transmission system be separated from CEZ and that the central dispatching be assigned to an independent company, with CEZ remaining a producer of electric power only, before being split up into several smaller competing companies.

Natural gas processing and distribution

The situation in the natural gas industry is similar to that in the power generation and distribution sector. For the future, the Ministry has envisaged a commercial gas transport company that would import natural gas, the creation of an independent system of high pressure distribution networks and the preservation of the present regional gas companies. For the transport of natural gas, it would be necessary to introduce a "right of way", to allow gas dealers to use the pipelines for a fee, without owning them.

Telecommunications

The SPT Telecom Public Limited Company, the majority of which is owned by the State, has a monopoly position in the telecommunications market. With regard to international and trunk networks, the government has decided to leave SPT Telecom in its monopoly position temporarily (until 2000). At the same time, the government decided to invite foreign capital to a competition of tenders (to sell 27 per cent of the shares) to acquire access to new investments and know-how. The local networks are further open to participation by private entrepreneurs in ten per cent of the Czech Republic. At present, the area has five per cent of the total number of subscribers.

The Ministry takes an active role in developing telecommunications policy, including the selection of SPT Telecom's strategic partner and the preparation of legislation applicable in sector. The Ministry also participated in the preparation of regulations for private enterprises joining the local networks.

Rail transport

The new Act on Rail Transport was adopted in December 1994. It separates the operation of the rail lines from transport on these lines, and applies completely independent legal regimes. The creation of these two independent legal regimes enables the abolition of the state monopoly in rail transport, while at the same time opening rail traffic to any company that complies with the conditions set forth by the Act.

Oil refineries and the petrochemical industry

In 1994, the government approved the plans for privatising and restructuring the oil refineries and the petrochemical complex. The plans envisage the merger of Chemopetrol Litvinov a.s. and Kaucuk

Kralupy a.s. to form the new Unipetrol a.s., and the subsequent creation of the subsidiaries (New) Kaucuk, (New) Chemopetrol, Benzina and Ceska Rafinerska a.s..

The creation of the Ceska Rafinerska a.s. subsidiary, which will entail the depositing of Unipetrol a.s. refineries and the increasing of capital stock through financial contributions from the foreign partners, will make fuel production fully monopolised. However, from the viewpoint of economic competition, this fact will not have any negative impact, as fuel imports from neighbouring countries will continue to create a sufficiently strong competitive environment.

Electrical engineering and electronics

In this industry, the positive moving force of competition is the intensity of imports. These imports cover consumer electronics, instrumentation, electrical installation materials, electric motors and other heavy-current electrical engineering products. In the sectors of this industry with the most prospects, new companies often undertake the assembly or finishing operations. A new structure of electrical engineering production is now emerging, especially in the light-current and electronics sectors.

In the electrical engineering and electronics market, good competitive conditions exist, with the exception of certain groups of products (such as cables and conductors, installation material for a more resistant environment, etc.), where the respective markets are regarded as presenting a medium level of concentration.

Construction

In the course of the privatisation process, most of the companies in the so-called big building that were active throughout the national territory, were split up into smaller legal entities. All companies in this sector have been transformed into public limited companies. Several large companies (with more than 500 employees -- 4.4 per cent) still exist, catering mostly to the power generating and chemical industries. Companies with a workforce of up to 50 people make up 35.9 per cent of the building industry. The market of small- and medium-sized construction companies consists of hundreds of companies of local importance, i.e. the market is well structured and can be considered as presenting the best competitive conditions in the country. Foreign construction companies attempt to penetrate the Czech market (or to maintain their existing positions), particularly Polish companies. Some Czech companies also do construction work in Western Europe.

Medium-class passenger cars

The Ministry carefully followed the situation in the passenger car market in 1994. Two new foreign representations started their operation in the Czech market: KIA (South Korea) and SAAB (Sweden). In view of the fact that KIA is an unknown brand in this market and that SAAB offers expensive upmarket cars, the entrance of the above automobile factories to the Czech market did not influence sales for medium-class passenger cars. The latter segment is still dominated by the Skoda factory in Mlada Boleslav, in spite of a slight drop in sales in 1994, due to the launching of a new model. The Ministry of Economic Competition believes that to improve the quality of competition, it would suffice to strengthen competitive pressure on domestic car makers.

Foodstuffs, coffee, tea, spices, etc.

Dairy products

The dairy industry is one of the main branches of the food processing industry. Privatisation has brought about considerable changes in the size and structure of the dairy companies to the benefit of smaller and medium-sized units. The seven large regional dairy companies that dominated the market have been split up into 100 independent firms. Some large foreign dairy companies have also appeared in the Czech market (such as Dannon, Bongrain and Nutricia). A portion of domestic dairy product consumption, especially in frozen cream products, is covered by imports from companies such as Unilever, Algida and Scholler.

In 1994, deep structural changes occurred in the dairy product market, especially in the purchase and sale of milk. A new link appeared between milk producers and the dairy industry, with dairy co-operatives buying raw milk from dairy farmers. The dairy co-operatives have specialised in buying milk produced by their members, and selling it to the dairy industry on the basis of equal rights among partners. Some co-operatives attempt to acquire all or part of the capital stock of the dairies, but thus far no dairy co-operative has succeeded in interconnecting primary milk production with milk processing.

The Ministry does not regard the existence of dairy co-operatives as anti-competitive. It is the common right of everybody to associate, and co-operatives are one form of association. Some co-operative documents acquired by the Ministry last year showed characteristics of anti-competitive agreements , e.g. the provision regarding the exclusive purchase of the entire production of milk by one co-operative. The administrative proceedings carried out by the Ministry last year did not confirm the existence of these arrangements. Dairy co-operatives are new legal entities in the market, and their effect on the competitive environment can only be determined after a certain period of time.

The market for dairy products has continued to be affected by the difficulty that small producers have to sell their milk to a dairy other than that which traditionally covers their region. In 1994, the dairies maintained a dominant position in the market for dairy products.

In the Czech Republic, unlike in the EU, farming is open to competition. Farming is not exempt from the Act on the Protection of Economic Competition, and thus the MEC must treat agriculture like any other economic branch, since it is subject to the same rules of competition. With its large number of producers, the structure of the agricultural sector is very similar to the model of perfect competition. The Ministry must resist the efforts of the associations of farmers fighting for conditions similar to those enjoyed by their counterparts in the EU (such as quotas and minimum prices), based on the valid legal arrangement, according to which the provisions of the Act on the Protection of Economic Competition apply to all sectors of the economy, and the provisions on prices must be respected by all.

Beer

After 1993, the beer market truly opened to competition. The slight deterioration of the competitive environment has been caused by the increase of the share of the largest brewery in the total volume of beer production in the Czech Republic. However, none of the breweries acquired dominant positions in 1994.

In 1994, the minor breweries attempted to push through (and lobbied for) lower consumer taxes. They succeeded in seeing through Act No. 260/1994 Coll., which established a lower consumer tax rate

for small breweries, in effect since 1 January 1995 (with the exception of the tax rate applicable to small independent breweries which is to come into effect on 1 July 1995).

The Ministry reacted unfavourably to the above act since it provides an advantage to one group of competitors over another and is a non-systemic element. The Ministry has supported the motion to amend the Act so as to abolish the above tax advantage.

Cigarettes

This market is one of the most concentrated in the country. The number of competitors has gradually expanded due to Act No. 303/1993 Coll. on the abolishment of the state tobacco monopoly. Tabak a.s. Praha still occupies a dominant position in the market. The cigarettes are made of imported processed tobacco, of the "make-pack" type. This type of production, which requires less investment, is gradually being introduced by other companies. Their deliveries to the Czech market will gradually improve the competitive environment.

Banking

In 1994, 56 commercial banks and building savings banks operated in the Czech Republic, i.e. the number of banking institutions increased by four, compared with 1993. The level of concentration in the market is slowly decreasing, in proportion to the increasing range of services offered. Last year, Kommercni Banka fell just below the limit determined by law to be considered as benefitting from a dominant position in the credit sector. On the other hand, Ceska Sporitelna continues to dominate the deposit sector, although its market share fell by four per cent, compared with 1993. The third largest bank is Investicni a Postovni Banka, which arose from the merger of Investicni Banka and Postovni Banka in 1993. The position of this new entity has not changed, i.e. it is still far from being considered dominant.

A market analysis of the Czech banking market has shown that it still lacks a satisfactory competitive environment, since it consists of several large banking institutions and a large number of minor banks, but no medium-sized banks. The competitive situation could improve through the merger of small banks.

Insurance industry

An analysis of changes in the Czech market for insurance services in 1994 indicates that new insurance companies have gradually extended and specialised the range of services offered, and that, even though Ceská Pojistovna, a.s. continues to dominate the market, its dominant position has decreased further.

The Department of State Supervision of the Insurance Industry of the Ministry of Finance approved the activities of 28 insurance companies.

The competitive environment in the sector of basic insurance services remains markedly concentrated.

III. Enforcement of competition laws and policies

The Ministry of Economic Competition is responsible for penalising anti-competitive agreements and abuse of dominant position and for approving company mergers. In 1994, the Ministry examined a total of 601 initiatives of various kinds, 77 of which resulted in administrative proceedings. Fifteen of the rulings concerned anti-competitive agreements, 16 cases dealt with abuse of dominant position and 36 cases concerned company mergers (see Table 1 below).

Table 1

Initiatives

	1991	1992	1993	1994
Total	72	169	312	601

Table 2

Administrative proceedings

	1991	1992	1993	1994
Anti-competitive agreements (cartels)		15	9	15
Abuse of dominant position		20	20	16
Mergers		27	83	36
Others		14	13	6
Total		76	125	73
Number of representations		12	36	31
Amount of fines in thousands of CZK		2401 (1991-1993)		33 705
Number of suits submitted to the Supreme Court			5	3

Anti-competitive agreements

In 1994, the MEC issued 15 rulings against anti-competitive agreements within the scope of Article 3 of the Act. The most frequent, and the most serious, anti-competitive practices are price cartels or price-fixing within the scope of Article 3(2)(a) of the Act, and agreements to limit market access within the scope of Article 3(2)(f) of the Act.

In cases of anti-competitive agreements, the Act distinguishes between agreements which are prohibited and invalid within the scope of Articles 3(1) and 3(2) of the Act, unless the Ministry granted an

exemption pursuant to the provisions of Article 5 of the Act, and agreements which are perhaps valid within the scope of Article 3(4) of the Act, but which require ministerial approval to become effective according to Article 3(5) of the Act (these are agreements dealing with uniform use of commercial, delivery or payment conditions, with the exception of price agreements, streamlining agreements and "bagatelle" agreements, in which the market share of the competitors in the given commodity does not exceed five per cent of the national market volume or 30 per cent of the local market).

In 1994, the MEC initiated two administrative proceedings, one involving the approval of an exemption for an anti-competitive agreement according to Article 5(2) of the Act (between ZOD Brniste and Safari Holding regarding the production of dog and cat food) and one involving the approval of an agreement according to Article 3(5) of the Act to set up a Hysus consortium to produce a new breed of hogs.

Significant cases of anti-competitive agreements

Administrative proceeding regarding an agreement concluded between Taxicech Karlovy Vary and the municipal office of Karlovy Vary for the operation of taxi services

The Ministry issued a ruling declaring the agreement between Taxicech Karlovy Vary and the municipal office of Karlovy Vary, which fixed uniform rates for the operation of taxi services and required members of Taxicech to observe these uniform rates in the city of Karlovy Vary, as anti-competitive within the scope of Article 3(2)(a) of the Act on the Protection of Economic Competition. The Ministry prohibited the agreement and imposed a fine of CZK one million on Taxicech Karlovy Vary.

This ruling was appealed. In its recommendation, the Minister of Economic Competition ruled that it was not an agreement among competitors, but a decision taken by an association of entrepreneurs according to Article 3(1) of the Act, leading to the infringement of economic competition in the market for taxi services in Karlovy Vary. The Minister of Economic Competition prohibited the application of the above decision and reduced the fine to CZK 100 000.

Administrative proceeding regarding an agreement concluded between Cesky Kavovy Svaz, Balirny (packers), Tchibo, Tchibo Praha and Balirny Douwe Egberts on coffee prices

The MEC ruled in an administrative proceeding against Cesky Kavovy Svaz, Balirny (packers), Tchibo, Tchibo Praha and Balirny Douwe Egberts that the parties had increased coffee prices in the Czech Republic through concerted practices. The administrative proceeding was initiated by the Ministry on the basis of a notice published by Cesky Kavovy Svaz in the press in July 1994, inviting all coffee producers to increase their prices gradually by ten per cent monthly because of a sharp increase of prices for green coffee beans on world markets. For having applied concerted practices to increase coffee prices on the Czech market in July and August 1994, Cesky Kavovy Svaz was fined CZK 50 000, and Tchibo, Balirny Douwe Egberts and Tchibo were each fined CZK seven million. All parties to the proceeding submitted their representations against the ruling. The Minister changed the terms so that Balirny Douwe Egberts and Balirny, Tchibo were imposed a fine of CZK five million each for concluding an anti-competitive agreement.

The parties to the proceeding submitted representations against this ruling as well. In the course of further investigations, Cesky Kavovy Svaz documented that the notice was published without the

consent of its representative. The Minister of Economic Competition changed the ruling so that a fine of CZK seven million was imposed on Balirny, Tchibo and Balirny Douwe Egberts.

Administrative proceeding regarding the conclusion of an agreement on the exclusive sale of Scholler ice-cream products at petrol stations

The Ministry of Economic Competition initiated an administrative proceeding because it suspected the illegal conclusion of an anti-competitive agreement concerning the exclusive sale of SLG products at Tamoil, Benzina and RB petrol stations. The MEC issued a ruling according to which the exclusive contract signed between Scholler (ice-cream and frozen products) and the owners of the above petrol stations infringed economic competition within the scope of the provisions of Article 3(4) of the Act requiring ministerial approval for its activities. The relevant companies had violated the Act by not having been approved by the Ministry. The MEC prohibited the fulfilment of the above agreements and imposed fines ranging from CZK 100 000 to CZK 600 000 on the parties. The affected companies submitted representations against the ministerial ruling, but no decision has been taken so far.

Administrative proceeding concerning an anti-competitive agreement and the television transmission of soccer matches

The Ministry of Economic Competition examined the question of recording and broadcasting television sports news of the first and second soccer divisions. In July 1994, the Ministry issued a ruling qualifying the activities of Ceskomoravsky Fotbalovy Svaz (Czech-Moravian Soccer Association), which consisted of requiring the soccer clubs in the division to keep the Czech TV Co. from making audio-visual recordings of soccer matches, as an anti-competitive agreement because it applied different conditions to parties acquiring information. Such a differentiated approach is prohibited and invalid according to the Act. The Ministry also prohibited the fulfilment of the above agreement.

On the basis of the above ruling, any television station is entitled to record the matches of the first and second soccer divisions, which, in the view of the MEC, are a well-defined market for audio-visual reporting, provided that the conditions of accrediting are fulfilled. The duration of the shot should not, however, exceed 90 seconds. Representations have been submitted against the ministerial ruling. The minister still has not taken a final decision.

Administrative proceeding regarding the limiting of market access by the Czech Chamber of Pharmacists

One of the most significant cases faced by the Ministry of Economic Competition was the case involving the Czech Chamber of Pharmacists (CCP). The CCP charged a fee of CZK 1 000 to issue a two-year licence to open a pharmacy, provided that it was run by a pharmacist. If the pharmacy was run by someone without a pharmaceutical background (or a legal entity comprising a pharmacist and a non-pharmacist, such as a physician), the CCP charged a fee of CZK one million. The Czech Chamber of Pharmacists thus limited the access of possible competitors to the market of pharmaceutical services.

The Czech Chamber of Pharmacists took this decision prior to the amendment of the Act on the Protection of Economic Competition, and the legal arrangement prior to the amendment did not make it possible to prohibit similar decisions by chambers, associations and societies. The case could only be resolved when the amendment came into effect and when Article II of the Final Provisions rendered

ex lege invalid all decisions infringing competition by associations of entrepreneurs taken before the amendment came into force, unless the Ministry had made an exception.

Abuse of dominant position

In 1994, the MEC issued 15 rulings in cases of abuse of dominant or monopoly position within the scope of the provisions of Article 9 of the Act. Most cases dealt with the application of different conditions when identical or comparable services were provided, thus placing competitors at a disadvantage according to Article 9(3)(c) of the Act. They concerned the direct or indirect application of inconsistent conditions in contracts signed with other competitors within the scope of Article 9 (3)(a) of the Act.

Significant cases of abuse of dominant position

Administrative proceeding concerning abuse of monopoly position by Zapadoceska Energetika, a.s. and Vychodoceska Energetika, a.s.

In September 1994, the Ministry initiated two administrative proceedings against the power distribution companies Zapadoceska Energetika, a.s. and Vychodoceska Energetika, a.s., both suspected of abusing their monopoly position by refusing to supply electric power to two clients which refused to repay the debts of previous power consumers.

The power distribution companies (which at present face the problem of a large number of bad debtors) interrupted power supply. But they refused to renew the power supply even when the debtor abandoned the premises, which where later leased by their owner to a new legal entity. The new lessees had no legal connection whatsoever to the previous occupants. Nevertheless, they were called upon by the power distribution companies to assume the liabilities of the former lessees and to repay the debts, otherwise the conclusion of the power supply contract would be refused.

The Ministry issued a ruling declaring that with these actions, the power distribution companies had abused their monopoly position in the market of electric power supplies, within the scope of Article 9(3) of the Act, prohibiting such practices and imposing on each company a fine of CZK 250 000. One of the rulings has become legally valid, while in the other case representations have been made against, and the Minister has not yet given the final ruling.

Administrative proceeding concerning abuse of monopoly position by Brno Trade Fairs and Exhibitions, a.s.

The MEC initiated an administrative proceeding against Brno Trade Fairs and Exhibitions, a.s. (BVV Co.), which was suspected of having abused its monopoly position by applying different conditions towards competing entrepreneurs active in the field of erection of exhibition stands.

By comparing the time allotted for the assembly and disassembly of stands used at the individual events staged at the exhibition grounds of the BVV, the Ministry found that the company applied different conditions. BVV did not allot the same time periods to all companies as it allotted to companies contractually linked with BVV (BVV subcontractors and the erection group of the BVV Co.).

The Ministry concluded that this approach constituted abuse of monopoly position by BVV in its relevant market within the scope of Article 9(3)(c) of the Act and prohibited this type of behaviour. For having violated competition law, the Ministry ordered BVV to pay a fine of CZK one million. The company submitted representations against the ruling in the first instance, and the Minister still has not rendered a final decision.

Mergers of competing companies

In 1994, the MEC authorised 36 mergers of competing companies. The Ministry approves mergers of companies if the parties to the merger (i.e. competitors) prove that the negative impact that may be caused by the infringement of competition will be outweighed by the economic advantages resulting from the merger. The Ministry can, at the same time, if there is a danger of restricting competition, set certain limits and liabilities required for the protection of economic competition.

In 1994, all petitions for merger were approved without limitation, except in one case where the Ministry set certain time limits and prevented personal interlinking of the owners (Jihoceska keramika, a.s. and Drevojas, v.d.). One administrative proceeding was interrupted.

Most mergers took place on the basis of the transfer of shares within the scope of Article 8(2)(a) of the Act, agreements on the transfer of a company or of its substantial part according to Article 8(1)(a) of the Act or on the basis of a joint venture contract or other realities covered by Article 8(2)(b) of the Act.

Significant merger cases handled by the Ministry

PAL, a.s., Praha - VDO Instruments, spol. s.r.o., Praha - VDO Adolf Schindling AD, Germany

The Ministry of Economic Competition (MEC) permitted the direct sale of part of PAL, a.s. (the Kbely plant and the Adrspach plant). Before the merger, PAL, a.s. covered almost 100 per cent of the relevant national market for electrical car accessories. The merger will not change this situation as the other partner of the merger until now did not operate in the Czech Republic. The MEC approved the merger with a view to the plans of the merging companies to improve the quality and range of its products, so as to be able to enter foreign markets and to improve the competitive edge of their products. The ruling has come into force.

Karosa, a.s., Vysoké Myto - Renault V.I. SA, France - EBRD, London

The MEC granted permission for the merger through the purchase of shares of Karosa, a.s., Vysoké Myto from the Fund of National Property. The merger will not change the competitive environment in the sector of the manufacture and delivery of buses and coaches to the Czech market. The Vysoké Myto-based Karosa, a.s. had a highly dominant position in the Czech market before the merger. The positive feature of the merger is that Karosa will be able to increase its competitive edge on the world market. The ruling has come into force.

MEZ Mohelnice, MEZ Frenstat p. R., MEZ Drasov - Siemens electromotory, spol s.r.o., Praha - Siemens AG, Germany

The merger has been realised through the purchase of parts of the company from the Fund of National Property. Before the merger, the market shares of the MEZ plants amounted to almost 90 per cent (according to the type of electric motors). Until now, Siemens was not present in the market of electric motors in the Czech Republic. Consequently, the position of the new legal entity in the market will not change. The MEC found out during the pre-merger proceedings that the individual enterprises of MEZ combine the manufacture of electric motors of completely different applications, i.e. they are used in different markets. The MEC also investigated the possibility of potential competition between the merging entities (namely the possible introduction of the manufacture of interchangeable products). The studies have proved that the costs of the introduction of such products would be prohibitively high.

In view of the above facts, the Ministry of Economic Competition has granted permission for the merger of the companies. On the basis of a prospectus and investment plan, which formed integral parts of the contract, the foreign partner committed itself to significant volumes of investment and reinvestment of its profits, to be used in complementing and improving the range of products for foreign markets. The parties to the contract are firmly convinced that the adaptation of their products to international standards, the use of acquired know-how and the upgrading of the production technology and sales techniques will give MEZ products a considerable additional competitive edge. The ruling has come into force.

Rekord, a.s., Ceské Budéjovice - Nutricia Int. B.V., the Netherlands

The MEC has granted permission for the merger in the form a joint venture of the two companies. The project will not change the competitive environment in the Czech Republic in the sector of child and baby food not based on milk products. Rekord, a.s. has a dominant position in the market. The advantages of a joint venture are the improvement of quality and the extension of the range of products. The prospects for improving the products made from local raw material outweigh the possible negative effects in the restricting of economic competition. The positive contribution for consumers is above all in the launching of new types of child and baby food under the Hami brand name, on the basis of formulas provided by the Nutricia Co., thus substantially enriching the range of products sold in the respective market. The ruling has come into force.

Measures taken by the State and municipal administrations

Article 18 of the Act on the Protection of Economic Competition stipulates the powers of the Ministry of Economic Competition as a body supervising the observance of duties by State and municipal administrations lest they should exclude or limit economic competition with their own measures. On the basis of evidence and the analysis of results, the Ministry has the right to ask State and municipal administrations to take the necessary remedies.

Taxi services

The MEC found that the municipal authorities of some of the large cities interfere with taxi services in a manner that is contrary to the principles of economic competition, namely by issuing regulations or conditions limiting market access, without any positive contribution to customers or to the environment or other positive effects. In some concrete cases, the MEC found that taxi drivers were

denied market access, depending on the volume of the boot of the taxi, place of residence of the taxi operator or his membership in a professional association. The MEC turned to the municipal bodies to remove all those unacceptable conditions attached to the operation of taxi services.

IV. The role of the Ministry in the privatisation process

The privatisation process, i.e. the transfer of property from the State to private owners, is one of the largest changes in property holding in the history of the Czech Republic. Energetic and quick privatisation can in some cases bring about a market structure that is not ideal. These cases are dealt with by the Act on the Protection of Economic Competition and by its provisions, and by proceedings ruled on by the State administration, lest competitors should acquire monopoly positions through the transfer of State property.

The State administration is obliged to determine the concrete conditions for the transfer of State property (including the transfer of property to State-owned joint stock companies), so that a company's monopoly position will be abolished or new competitors will not be able to benefit from a monopoly position. The situation of new competitors likely to acquire dominant positions will be subjected to an analysis by the State administration. The analysis should include:

-- an assessment of the possible risks new competitors present, according to their shares in the relevant market in the period of two years;

-- an assessment of the competitive capabilities of new competitors on the basis of their presence on the world market and expected foreign competition in the domestic market, and also with regards to the expected development of foreign competition within the coming two years, namely from the viewpoint of technical standards, size of competitors and other parameters of the sector; and

-- a comparison of the new competitors according to the conditions used for evaluating dominant positions, following a preliminary consultation, or on the basis of information obtained from the Ministry.

The bodies and agencies of the State administration are obliged by the Act on the Protection of Economic Competition to carry out analyses and to submit them to the Ministry of Economic Competition, to hear its opinion. In the event of disagreement between the representatives of the State administration and the Ministry of Economic Competition, the issue shall be decided on by the government at the proposal of the Ministry.

At present, the privatisation process is nearing its end. During the period of privatisation, the Ministry issued a series of opinions regarding the competitive environment in the individual branches of Czech industries, including the food industry and services. It is expected that after concluding the second wave of coupon privatisation, 85 per cent of the GNP will be produced by the private sector, and its share in the property will amount to 80 per cent.

V. The sphere of international relations

Relations linked to the fulfilment of obligations associated with the Europe Agreement

Competition rules form an important part of the Europe Agreement, which provides for the association of the Czech Republic to the European Community and its member countries (the Europe Agreement).

On the basis of Resolution No. 631/1994 of the government of the Czech Republic on ensuring the integration of the Czech Republic into the European Union, including the harmonisation of the legal order of the Czech Republic with the legal order of the European Union, the Ministry of Economic Competition has been put in charge of the realisation of certain spheres of the Europe Agreement.

Article 64 of the Europe Agreement,"Competition and other economic provisions", with the exception of Article 1(iii) and Article 4(a)

These provisions declare incompatible with the Europe Agreement all agreements concluded by undertakings, decisions taken by entrepreneurial associations and concerted practices of undertakings, whose purpose is to restrict, limit or infringe competition, as well as abuse of dominant position in the territory of the Czech Republic and the European Community by one or more undertaking unit, to the degree they can affect trade between the Czech Republic and the Community.

An important aspect of the Europe Agreement is the obligation contained in Article 64(3) for the approval of the implementation rules for the provisions related to competition. This obligation ensures that competition rules cannot be degraded to formality and the rules can be effectively implemented.

The wording of the implementation rules was discussed in 1994, namely within the negotiations of the Joint Sub-Committee for Economic Competition of the Czech Republic and the European Union. The implementation rules were signed by the Minister of Economic Competition of the Czech Republic and by the Director General of DG IV of the European Commission in February 1995. The implementation rules are still subject to approval by the Association Council.

According to the implementation rules, both competition offices, that is the European Commission represented by its Director General, on behalf of the EU, and the Ministry of Economic Competition, on behalf of the Czech Republic, will apply their own regulations for cases covered by the Europe Agreement, and in certain specified cases they will co-operate on discussing them. For this purpose, the implementation rules envisage mutual obligations concerning notification, requests for information and consultations.

According to the principles covered by the implementation rules, no proceedings will be started in the case of anti-competitive practices whose impact on competition is negligible. The case is regarded as negligible if the volume of the annual turnover of the parties restricting competition does not exceed ECU 200 million and the volume of the goods and services subject to the agreement does not exceed five per cent of the total market for goods and services in the EU negatively affected by the agreement, and of the Czech market affected by the agreement.

Article 69 of the Europe Agreement, containing the obligation for approximating the legislations, further specified by Article 70, mentioning competition law as one of the priorities of harmonisation

The competition provisions contained in Articles 85 and 86 of the Treaty of Rome were already reflected in the original text of the Act on the Protection of Economic Competition. One of the reasons for amending the Act, made public in the Collection of Acts under No. 286/1993 Coll., was the approximation to the legislation of the European Community.

Resolution No. 237/1994 of the government of the Czech Republic prompted the Ministry of Economic Competition to work out in 1994 a departmental report on the approximation of the legal regulations of the Czech Republic to the legislation of the European Community. By comparing the present legal arrangement with the legislative acts of the EC, the Act on the Protection of Economic Competition, the only legal regulation of the Ministry of Economic Competition, can be regarded as partly compatible with EC legislation.

The Ministry of Economic Competition and the Ministry of Industry and Trade have been put in charge of state monopolies of commercial character (Article 33 of the Europe Agreement), public utilities and undertakings provided with special or exclusive rights (Article 66 of the Europe Agreement)

The Ministry of Economic Competition will focus in these parts of the Europe Agreement on its further activities, within the framework of the Joint Sub-Committee for Economic Competition.

Presentation of competition policy at the level of international agencies

In connection with the submission of the official application of the Czech Republic to become a member of the OECD on 18 January 1994 and the admission procedure, the Ministry focused its attention last year on the session of the Committee for Competition Law and Policy of the OECD. The session of the Committee was attended by the Ministerial and by the Vice-Minister as well as by other representatives. The Minister of Economic Competition read his first annual report on competition policy in the Czech Republic at the session of the Committee on 10 October 1994. The discussions showed that the report was positively accepted by the Committee. Representatives of the Ministry regularly attend the international seminars organised by the OECD for the staff of anti-monopoly offices, and they also represent the individual spheres of competition policy.

A representative of the Ministry also attended the joint session of EFTA-Czech Republic in March 1994 in Geneva, and presented a report of state monopolies of commercial character.

As regards CEFTA, a motion was presented at the session of the Joint Committee for setting up a competition sub-committee, in accordance with the conclusions of the representatives of the anti-monopoly offices.

Relations with other competition offices

In connection with the continuing process of the association of the Czech Republic to the EU, great attention is paid to co-operation with the Directorate General for Competition (DG-IV) in Brussels.

Direct contacts have been established with DG-IV, and these contacts are of great importance for the fulfilment of obligations relating to the Europe Agreement, and also for the routine activities of the Ministry. Institutionally, the co-operation is realised within the framework for the Joint Sub-Committee for Economic Competition.

The Ministry also maintains relations with the anti-monopoly offices of Slovakia, Poland and Hungary. Its co-operation with the German Bundeskartellamt is also very important.

Last year, the Czech Republic established close contacts with the Ukrainian Anti-monopoly Committee. One of the first results has been the signing of a co-operation agreement between the Committee and between the Ministry of Economic Competition of the Czech Republic. A similar agreement has also been signed with our Bulgarian partners.

Conclusion

The Czech Republic is gradually removing the barriers hindering market access (in accordance with the Europe Agreement). In certain sectors requiring more capital, with lower rates of return, higher risk factors, sometimes combined with administrative barriers, the number of undertakings is still very low, and thus there is a higher concentration of economic strength.

If the Czech economy is to become dynamic and competitive, it must be exposed to the effects of foreign competition. At the same time, it is necessary to remove all obstacles hindering the penetration of Czech products to foreign markets (antidumping procedures, acceptance of our certificates, demanding certificates, etc.). In some cases, it is necessary to regard as harmful for the development of a market economy the practices of some of the "chambers", associations of entrepreneurs and professionals, invested with legal powers to provide market access, to grant or to refuse licences to new (or existing) entrepreneurs and to try to set at least minimum standards. In the view of the Ministry, the only solution to this situation is the introduction of a fundamental legal arrangement.

In 1994, there were repeated cases of appeals to co-ordinated price increases. The Ministry systematically explained that it was unacceptable, and at the same time took the necessary steps for their prevention. In some cases, it sufficed to explain the case. Other cases resulted in administrative proceedings and penalties.

The sector of natural monopolies represents a specific problem. The Ministry is solving these problems through administrative measures, and has also prepared certain measures of a systemic nature (e.g. the proposal to separate the 220 and 400 kV transmission system from the power generating company and a proposal of two-component water rate).

Although the MEC has been improved its decision making process as well as its expert knowledge, it must continue to familiarise the public with the principals of economic competition and to deal with negative phenomena in competition policy.

HUNGARY*

(1995)

I. Changes to Competition Law and Policy Adopted or Envisaged

The Present Competition Act and Its Amendments by Other Acts

Hungary's competition law is the "Act No. LXXXVI/1990 on the Prohibition of Unfair Market Practices". The most important elements of the Act are reviewed below.

The Act's Blanket Clause (Art. 3) declares that the freedom and fairness of economic competition must be respected and prohibits unfair market practices. Its primary function is the protection of the freedom and fairness of competition in cases where the Act has no specific governing provisions.

Articles 4 to 10 of the Act prohibit unfair market practices, such as abusing trade secrets, brand misrepresentation, injuring reputation, boycotts, speculative withholding of goods and tied selling, as well as fraudulent tendering and auctions, and dishonest dealing at the Stock Exchange.

On the basis of Articles 11 to 13 of the Act, it is prohibited to deceive consumers in order to improve the marketability of goods or services. (There may be many kinds of deceit, including false statements related to the essential characteristics of the goods, deceptive comparisons and advertisements, concealing of essential defects, etc.).

Agreements between competitors which may restrict or exclude competition are prohibited. Therefore purchasing and selling cartels cartels are banned, and market allocation is unlawful. Out of vertical restrictions it is only resale price maintenance which is prohibited.

A dominant position on the market is a special status on the basis of which any abuse is prohibited. It can be regarded as an abuse if an entreprise in a dominant position enforces conditions on its counterpart which would not be possible but for the first party's dominant position (Arts. 20-22).

To avoid the creation of circumstances leading to the restriction of competition, the Act controls market concentration. A preliminary authorisation is required for all mergers when the joint share of the involved parties would exceed 30 per cent of the market, or their aggregate annual sales would exceed 10 billion HUF (72 million USD, 57 million ECU). Enterprises must also apply for an approval if one of them gains decisive control of the other, provided their joint market share exceeds 30 per cent (Art 23-27).

Cases investigated by the experts of the Office of Economic Competition (OEC) are decided by the Office's Competition Council, a decision-making body comprised of seven staff members (five lawyers and two economists). Each case is decided by a minimum group of three out of the seven members with a lawyer as

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* The original language of this report is English.

chairman. Decisions of the Competition Council may be appealed to the Metropolitan Court of Budapest, with possible subsequent appeal to the Supreme Court.

The total staff of the OEC numbered 104 persons at the end of 1995. The OEC has no regional offices.

Three acts enacted by the Hungarian Parliament in the last few years amended the Competition Act:

-- Act No. XVI/1994 on the Chambers of Commerce extended the obligation of the OEC to hear the opinion of the Chamber(s) of Commerce to which the parties concerned belong. This Act also requires the Chambers of Commerce to release information and documents requested by an OEC investigator. In addition, the Act extended the right of the Chambers of Commerce to commence civil court action against any person who, by illegal activity, significantly prejudices consumers or affects a broad range of them (whether or not the identity of the injured consumers can be established);

-- Act No. XXXIX/1994 on Commodity Exchange and Commodity Exchange Transactions limited the competition surveillance competence of the State Securities Supervision to activities carried out on the Stock and Commodity Exchanges. The jurisdiction for other competition aspects of the securities markets is now the province of the OEC;

-- Act No. XCVI/1995 on Insurance Institutions and Insurance Activities amended the Competition Act in November of 1995 by extending the supervision of the OEC to the insurance sector. An additional provision of the Act declared certain types of agreements by insurance institutions automatically exempted from the Competition Act's prohibition of agreements and concerted practices. The principles of the exemption are similar to those of the block exemption of the European Communities (EC) [based on Article 85(3)]. In addition, while making no distinction between foreign and domestic undertakings, the Act decreased entry barriers, and abolished the product licensing system in the field of non-life insurance.

Plan for Amendments

Enforcement experiences during the past four years have proven that the Act LXXXVI of 1990 on the Prohibition of Unfair Market Practices has met its basic objectives.

Modification of the Competition Act is nevertheless justified by demands for correction that have arisen during the course of enforcement, comments received from foreign experts, knowledge gained through observer status in the OECD Competition Law and Policy Committee, post-1991 changes in economic conditions, and demands for law harmonisation arising out of the association agreement with the EC. Work on preparing amendments to the Competition Act has now reached an advanced stage. In accordance with the work program of the Government, a draft should be submitted to Parliament this year. The main proposed changes are as follows:

-- unlike today's approach, an effects based assessment should be applied to all anticompetitive practices (this will extend the subjective scope of the Act);

-- three fundamental alterations to the chapter dealing with agreements. The first is the extension of the cartel prohibition to vertical agreements. The second, designed to reduce legal uncertainty, is that parties to restrictive agreements would be required to apply for an exemption from the cartel

prohibition. The third important change is a broader acceptance of the owner's right to shape his business policy, i.e. concerted practices between enterprises belonging to the same owner as well as between a subsidiary and its parent company would not be prohibited;

-- the prohibition of vertical restrictions raises the necessity of revising the exemption system. This is a very important question since the Hungarian economy still needs the creation of more market arrangements of a vertical character than are required in countries with longer market economy traditions. For this reason, as well as to approximate European legal rules, creation of an automatic exemption system is no doubt justified;

-- the establishment of a system of automatic exemptions for specific types of agreements (e.g. exclusive dealing, certain intellectual property rights, insurance, specialisation agreements) is also planned;

-- a change in the definition of "dominant position" can be expected. Instead of the present formulation based fundamentally on market share, the new approach will focus on the market player's potential for acting independently of other market players;

-- changes in the rules governing the concentration of undertakings are expected to increase legal certainty. The provision relating to the market share threshold above which application for authorisation is compulsory will likely be omitted leaving turnover as the sole remaining trigger. In addition, concentrations in which the purchaser is a foreign firm previously not doing business in Hungary will, for the first time, be subject to Hungary's merger review provisions;

-- several EC-conforming procedural modifications can also be expected. Among the most important is the establishment of a remedial forum to review procedural decisions made in the course of investigations.

The main proposals for amendments summarised above, and further unmentioned proposals of lesser importance, essentially change neither the basic aims set by the 1990 legislation, nor the fundamental elements of the relevant legal instruments. However, these amendments are very important from the standpoint of clarification and transparency, effective enforcement and legal approximation.

The Role of the OEC in Contributing to Forming an Appropriate Legal Framework for a Market Economy

Pursuant to Article 60 of the Hungarian Competition Act, ministers are obliged to solicit the opinion of the OEC on draft regulations that would have a restrictive effect on competition, grant exclusive rights, or regulate prices or markets. To this end the OEC gave its opinion on about two hundred drafts a year (of which only a smaller part actually concerned competition conditions) and has striven to protect freedom and fairness of competition, equality of opportunity, transparency of regulation, and enforcement of consumers' interests. It has also sought to advance the competition law harmonisation called for in Hungary's international obligations. The results have been encouraging but some important competition-related regulations (in the areas of advertising and consumer protection) are still missing, while others are unreasonably hindering competition. The inner consistency of the legal system still requires improvement.

The preparation in the first half of 1995 of the Act on Public Procurement deserves special mention. In shaping its comments to the draft bill, the OEC took advantage of relevant OECD studies and recommendations, European Union directives in force, as well as the basic principles formulated in the Europe Agreement. During

the drafting process an issue arose as to whether economic organisations performing public services and enjoying certain exclusive rights should fall under the scope of the Act. Referring to the lack of competition in this field, the OEC successfully argued that they should be covered by the Act.

The Government is carrying out a broad revision of legal regulations in order to reduce bureaucracy. Following an OEC proposal, the Government has agreed that an examination of barriers to market entry be a necessary component of any deregulation analysis.

II. Alteration of competitive conditions during the past few years

To continuously follow the development of competitive conditions in various sectors of the economy, the OEC has created an annually applied monitoring system. The methodology and detailed results of the first examination of this kind are described in the annex to this report.

Structural changes of the market

The past years have bought a considerable change in the structure and concentration of individual markets. Beside the effects of import liberalisation, changes in concentration were determined basically by two factors: dramatic increases in the creation of new enterprises; and privatisation. (See chart below.)

Development of the number of economic organisations in Hungary

1	1990	1991	1992	1993	1994	June 1995
Economic organisations with legal personality	29 470	52 756	69 386	85 638	101 247	109 399
Consisting of:						
- Enterprise	2 363	2 233	1 733	1 130	821	798
- Limited Liability Co.	18 317	41 204	57 262	72 897	87 957	95 393
- Public Limited Co.	646	1 072	1 712	2 375	2 896	3 041
- Co-operative	7 641	7 766	8 229	8 668	8 252	8 323
Economic organisations without legal personality	34 095	52 136	70 597	98 036	121 128	131 542
Natural persons as entrepreneurs	393 450	510 459	606 207	688 843	778 036	816 433

Source: Central Statistical Agency

The foundation of many new enterprises after 1990 has had a deconcentrating effect in all sectors and an uneven but generally favourable influence on competitive conditions. Considering its small size however, the Hungarian market probably cannot support the existing number of firms and only a small group of them will have the possibility of decisively basing their activity on foreign markets. Many enterprises will inevitably go bankrupt and many others will probably be involved in mergers.

In some fields privatisation resulted in deconcentration. In others, the pre-privatisation levels of concentration were maintained or even increased through new groupings of firms under common ownership. It is a very complicated issue to determine whether inherited or newly created dominant positions or strict oligopolies are necessary in any given field. In many manufacturing sectors the small size of the Hungarian market probably demands a concentrated domestic production structure if the economies of scale required to be internationally competitive are to be attained. Where that is the case it is especially important that protectionism be kept at the minimum level necessary to ensure sufficient competitive and efficiency pressures.

Many relatively concentrated markets are dominated by predominantly foreign-owned multinational firms. These undertakings entered the Hungarian market primarily due to privatisation, and their appearance considerably transformed competitive conditions. Their capital allocation and credit connections are stable and well-settled, and in some cases these firms considerably enhanced the privatised enterprise's production efficiency and marketing methods. They have also introduced forms of vertical integration new to Hungary. Unfortunately these firms often actively lobby for decreased competition.

Changes have been observed in the behaviour of undertakings as a consequence of privatisation, foreign direct investments, and considerable changes in economic conditions and institutions. A natural selection of undertakings has been and is taking place, accompanied by state efforts to diminish the negative effects of this process. Firms unable to adapt themselves to market challenges are going bankrupt while successful enterprises are expanding. The net result is that resources are being allocated more and more efficiently.

Import liberalisation

As a result of import liberalisation, the ratio of imports divided by GDP in 1994 was practically the same as in certain other economies with similar resource endowments, who are generally considered to be open (e.g. Portugal). The Hungarian economy could be even more open however, and it should be noted that administrative obstacles are not the main import limiting factors.

To some extent the increase in the degree of openness of the Hungarian economy is due to international agreements (GATT, with the EC, etc.). These agreements provide for a gradual reduction of the parties' customs tariffs while restricting, somewhat, non-tariff protectionist measures. The GATT and EC agreements promote at the same time greater future openness in the Hungarian market.

Import liberalisation is forcing the players in the Hungarian economy to face a challenge of historical significance. Over time the situation of the non-privatised firms will become progressively more difficult in branches exposed to competition. For such firms even their present, considerably reduced market share is in danger because they lack the resources needed to match their competitors' improvements in productivity, quality and marketing. Although Hungary avoided a shock therapy approach, the speed of market opening considerably increased business uncertainty, especially since there was no accompanying significant devaluation of the Hungarian currency. Moreover, phased out quantitative limits were not counterbalanced by increased tariffs or other additional barriers. As could be expected the effects of this policy were extremely mixed. On the one hand it enabled firms to obtain lower priced inputs and undoubtedly improved resource allocation and increased the welfare of a small part of the society. On the other hand, the change was so rapid that some players lacked sufficient time to adjust and the whole of the society suffered considerable welfare losses.

Regulated Sectors

What remains of state owned productive assets in Hungary is vested in the State Privatisation and Holding Company Ltd (SPHCo). This company and other state owned companies are subject to the Competition Act in the same way as privately owned firms. Irrespective of the progress of privatisation, in

Hungary it is basically the impartiality of company and competition law which assures that the state exercises its proprietary rights in a non-discriminatory fashion.

Nevertheless, there are some fields where the state, not as an owner but as a regulator, interferes with economic processes. In the case of natural monopolies special regulation is necessary to advance Hungarian competition policy objectives. In the last five years considerable changes have taken place in this area. The Hungarian Parliament passed acts regarding concessions, postal services, telecommunications, management of broadcasting frequencies, railways, gas supply, mining, and the generation, transmission and supply of electricity. These acts have put the regulation of natural monopolies on a new footing.

For each of the above listed concessions certain generalisations apply:

-- compared to the previous set up, exclusive rights are restricted, i.e. as much as possible markets were opened up for competition so that real deregulation in fact took place;

-- market participants enjoying monopolies or exclusive rights are regulated by statutes and also themselves entitled to issue certain types of regulations. Both sets of regulations are enforced by independent regulators;

-- various consumer protection rules have been enacted into law.

The postal services monopoly is restricted to the issuance, trade and withdrawal from trade of postage stamps, postal valuables, and international traffic of postal consignments. The collection, forwarding and delivery of mail items and money transfers may be provided on the basis of concession agreements. Other activities, e.g. the collection and delivery of parcels, sale of valuable articles and special services related to mail items are liberalised, and can be performed, subject to permission, by any economic operator. Newspaper distribution, previously a postal monopoly, is also liberalised, with no permission being required to carry out this activity. Concessions are required for international telephone service, public telephone service, public mobile phone service, national paging service as well as for national and regional distribution and broadcasting of public radio and television programmes, together with the related frequencies.

The Telecommunications Act and a government decree on the rules regulating network contracts guarantee non-discriminatory free access to the basic network for concession holders, and regulate co-operation between the various concessionaires so that the telecommunications network forms a single, harmonized system. The regulations in force make it possible for any entrepreneur to participate in enhancing and extending Hungary's telecommunications infrastructure. Any entrepreneur is also permitted to render services, e.g. data transmission on public telecommunication networks (except those of sound-phones), provided it obtains permission from the Communications Authority of Hungary. That office authorises the creation of telecommunicative connections, the development, winding up or interconnection of networks, as well as marketing, implementation and operation of terminal equipment. Manufacturers, distributors and equipment operators are obliged to apply for this type of authorisation. Price regulation in this field is of a price cap nature.

The Communications Authority of Hungary also regulates postal services and broadcasting.

The operation of railway lines is a monopoly but transportation services can be performed by means of concession. Regulation ensures free access to tracks. The Act on Railways has reduced the obligation to provide regular passenger services.

At the end of 1995 the Hungarian Parliament passed a Radio and Television Act. This contains important competition-related provisions as it restricts the creation of dominant positions in the media sector. It separates, with some insignificant exceptions, broadcasting and reception services within the same geographic area and forbids the same entrepreneur from supplying both types of services. Additionally it restricts an individual entrepreneur to either one nation-wide, or one or two regional plus a maximum of four local, or up to twelve local broadcasting activities. Detailed ownership rules restrict the owner or publisher of a nation-wide weekly periodical or newspaper from acquiring a majority interest in a national broadcasting company. At the same time the Act largely opens up the market to private entrepreneurs, not only for unused frequencies but also for privatisation of the nation-wide TV-2 channel.

As regards gas, crude oil and electricity, new statutes define the elements of the vertical organisations considered to be natural monopolies. For electricity and gas this applies only to transmission and distribution. Open access to the network is a guiding principle, but prices of services are set by the regulatory authorities. The principle behind price-setting is that service fees should cover the costs of an efficient operator plus a limited amount of profit. According to the new regulations, prices have to reach world market levels by the end of 1996. From 1st of January 1997 they will be regulated by a mixed (price cap and rate of return) system. The authority dealing with this field is the Hungarian Energy Office which will be responsible for the entire regulatory activity from 1997. Regulation applies to market entry, licence authorisation, security and consumer protection issues (with the latter still requiring some improvements). Local distribution companies are also subject to comprehensive self-regulation which assures a measure of consumer protection. It should be noted that some new governmental or ministerial decrees have to be prepared in order to implement these regulatory concepts.

On the basis of the above it can be concluded that in Hungary the principles of regulation relating to natural monopolies satisfy competition policy requirements.

Significant steps have been taken towards the privatisation of natural monopolies. The state wants to keep only part ownership plus minimally necessary proprietary intervention rights. This means state retention of a 25 per cent plus one share. Privatisation has gone furthest in the telecommunications sector where 30 per cent of MATÁV, the Hungarian Telecommunications Company has been privatised since 1993.

Invitations for privatisation tenders in the gas and electricity sector were issued in autumn of 1995. They contained certain procompetitive restrictions concerning the purchase of companies in related sectors. The majority of deals were closed in mid-December 1995. The results were that majority shares in the five gas supply companies and 25 per cent of the shares of the remaining municipally owned gas company (in Budapest) were sold to private interests. In addition all six local electricity distribution companies and two out of eight generating companies were sold to foreign investors. The privatisation of the firms not sold in the first round will continue.

The scope of state granted exclusive rights outside natural monopoly sectors has decreased considerably during the last five years, and it is to be stressed that exclusive rights connected with the trade of "inland revenue products" (alcohol, tobacco, petrol) have been withdrawn. The Inland Revenue Act accepted the regulatory method usually applied in Western Europe, i.e. revenue seals, so the financial interests of the Treasury are well protected. Companies operating in this field have practically been privatised but entry into the market is subject to permission which is granted in a transparent, non-discriminatory manner.

The range of exclusive rights not yet mentioned is limited to things like: certain kinds of gambling; dealing in nuclear energy sector materials, equipment and instruments; psychotropic manufacturing, processing,

trade and warehousing; drug production and distribution; certain training and examination activities; and certain authority activities. The range of these exclusive rights will become narrower in the future.

Fairness of competition

The OEC has addressed only those issues of competition ethics it had competence to deal with during the enforcement of the Competition Act. During the past four years nearly half of the files opened dealt with consumer fraud. This is evidence that aggressive marketing methods, such as deceptive lottery or bonus-driven sales have spread very quickly. Infringing quality control and other costly consumer protection provisions is also regrettably frequent. Entrepreneurs observe each other's market conduct and are increasingly likely to turn to the Office if they suspect that their competitors have used unfair competitive practices to gain an advantage in the market.

III. Enforcement of Competition Law and Policy

The Implementation of the Competition Act

General Implementation Experience

Number of decisions on the merits of the cases passed by the Competition Council

from 1991 to 1995

	1991	1992	1993	1994	1995	Total
Blanket Clause	11	24	35	23	23	116
Consumer Fraud	6	24	29	50	56	165
Agreements	5	3	3	1	5	17
Abuse of Dominant Position	28	32	26	28	44	158
M&A	5	8	3	3	24	43
Total	55	91	96	105	152	499

i) Application of the Blanket Clause

The intention of the legislature in enacting the Blanket Clause was to facilitate the application of the Competition Act in cases where the public interest in competition was injured but no specific proscription can be found in the Act.

These cases belong primarily to two sub-groups. The first contains cases relating to infringement of other legal rules, e.g. cases in connection with prohibited advertising activities, unauthorised activities, distribution deficiencies. The second sub-group contains cases qualified as unfair conduct that appear together with additional practices not nominated in the Act.

The wording of the Domestic Trade Act's prohibitions of certain advertising activities has become obsolete. It is necessary to repeal them and to introduce new norms backed up by effective sanctions. The OEC has so far been unsuccessful in getting such changes adopted.

There have been two instances where the Blanket Clause was applied as a "supplement" to the cartel rules. They both involved vertical agreements which though not prohibited (see above), nevertheless infringed

the freedom and fairness of competition and contained ethically objectionable elements harming both consumers and competitors.

In applying the Blanket Clause, the OEC has consciously avoided giving it an overly flexible character since that would have unduly undermined legal certainty.

ii) The Prohibition of Unfair Competition

Unfair market practices (injuring competitors' reputation, infringing trade secrets, boycotts etc.) prohibited by Articles 4 to 10 of the Competition Act are referred to the courts. Based on an inadequate understanding of the Competition Act, applicants have occasionally submitted related complaints to the OEC. The Office lacks the authority to proceed in such cases, but is entitled to put them before the courts. It has so far done this only once, in a case alleging unlawful withdrawal of goods.

iii) The Prohibition against Consumer Fraud

This group of case decisions continues to grow. As a sign of sharpening competition in some consumer goods, the majority of proceedings was launched not by consumers but by competitors.

Cases reflecting the spreading anomalies of mail order trade have also increased in number. Since mail order trade is a relatively new phenomenon on the Hungarian market, deceptive practices of some trading firms may be particularly harmful. The OEC has imposed fines to discourage this behaviour. In addition it has been active in trying to suppress deceptive practices gaining ground in certain gambling activities.

There have been other cases involving deceptive advertising and concealing defects in goods.

"Tooth-paste advertising war" cases

During 1994 there were three cases related to misleading advertising of toothpastes. In each case the proceedings were launched by competitors and not by consumers. All three involved Colgate Palmolive Hungary Ltd. (CP) and Procter & Gamble Hungary Ltd (P&G), which have both been running comprehensive advertising campaigns.

On two occasions CP initiated proceedings against P&G because of the latter's advertising claims concerning fluoride content and usage in its "Blend-a-med" toothpaste. In the third case P&G objected to CP's advertising slogans relating to toothpastes containing calcium. In all the three cases the Competition Council established that the advertisers used exaggerated, scientifically unsubstantiated claims to create a false impression of product superiority. This has been disputed at the international level by the companies who are in the process of conducting further tests. The scientific discussion is by no means closed. Meanwhile, the Competition Council has ruled that the defendents misled consumers by stating as scientific fact something as yet unproven, and has both prohibited such practices and imposed a fine amounting to HUF 30 million (USD 280 000 ECU 220 000) on CP and also HUF 30 (20 plus 10) million on P&G.

"Pyramid Game" Case

Mikroker Ltd. has regularly launched a series of complex but basically similar computerized pyramid schemes. The participants' only involvement is to join and to pay a sum of money. In Hungary organising pyramid schemes was not prohibited in the past.

Upon request of the National Consumer Protection Association, the OEC initiated proceedings in connection with one of the schemes organised by Mikroker, which had been marketed as an investment possibility. The company had promised participants a high return free from risk on their invested money, and pledged to reimburse invested sums if the project were not successful. In addition, Mikroker did not furnish applicants with coherent and logical information regarding its offer.

Based on the rules of the scheme and mathematical demonstration that Mikroker's promises can be fulfilled neither practically nor theoretically, the Competition Council held that Mikroker deceived consumers and infringed the Competition Act. The Competition Council imposed a fine amounting to HUF 400 million (approx. USD 3.3 million, ECU 2.7 million). Pyramid schemes were subsequently banned by an amendment to the Act on Financial Institutions in June of 1995.

iv) The Application of the Cartel Provisions

It is not perfectly clear at present whether the explanation for the small number of cartel cases rests on the lack of such agreements or the fact that they remain hidden from the OEC. The Hungarian cartellization experience suggests that as a consequence of in-depth structural transformation of the economy, undertakings may increasingly believe they can survive in competitive markets only by eliminating one another and this may be reducing cartel-forming tendencies. It can be assumed that as markets become more stable, cartel attempts will increase in frequency.

The OEC performs regular analyses of markets considered vulnerable to cartellization and dominant position situations, and where necessary it launches proceedings on its own initiative.

Investigations were launched ex officio in 1992/93 and 1994 regarding, sugar industry companies and large coffee distributors, respectively. Both ended with finding an infringement of the competition statute. It is noteworthy that though there was scarcely any difficulty in proving co-ordination in the sugar case which primarily involved domestic entrepreneurs, in the case of the coffee cartel featuring participation by big international companies, collecting evidence required a much greater effort.

There have been only three applications for exemption or negative clearance and all three were permitted by the OEC.

"Coffee cartel" Case

Charging Douwe Egberts Compack Ltd., Eduscho Trade Ltd., Kraft Jacobs Suchard Hungaria Ltd., Tchibo Budapest Ltd. and Nestle Hungaria Ltd with concerted price fixing, the Competition Council rejected the arguments of the five internationally well-known coffee distributors. During the period from mid-June to October 1994 the producer prices of coffee products were increased three times by these distributors which together accounted for 97 per cent of the Hungarian coffee market.

The parties involved claimed that the considerable increase of commodity exchange coffee prices and the devaluation of the Hungarian currency explained their similar (in some cases identical) responses in size and timing of price increases. The Competition Council agreed that coffee distributors on the Hungarian coffee market were influenced by the same external circumstances, but doubted that these events would have justified such uniform reactions. The individual internal circumstances of the five defendants - such as the importance of coffee sales within the overall activities of the given undertakings; the proportion of costs accounted for by raw

bean purchases; the ratio of cheaper to more expensive (i.e. Robusta resp. Arabica) coffee beans; the extent of capacity utilisation, etc. - were so heterogeneous that, absent an agreement, greater differences in individual reactions would have been rationally expected.

The Competition Council ruled that the producer prices of the parties involved were increased in a co-ordinated manner and imposed a total fine of HUF 388 million (USD 3.5 million, ECU 2.8 million).

v) Abuse of Dominant Position

In the category `abuse of dominant position' the number of cases developed relatively uniformly in the past few years. A large proportion of the requests to investigate, many of them unjustified, was connected with local public services (funeral services, removing and depositing solid wastes, chimney-sweeping, water, gas and electricity supply, etc.).

In some cases, however, though the conduct was not objectionable from the viewpoint of competition law, the complaints raised problems which are still awaiting solution. Cases involving local public utilities (e.g. operating cemeteries or waste disposal sites) are a recurrent problem. Typically, the firm rendering these services is in a monopolistic position and enjoys exclusive rights, while in respect of related services the firm faces competitors. Sometimes local governments fail to regulate the prices of the monopolistic activity but do regulate fees charged for competitively rendered services. This naturally creates distortions in the competitive sector. In some instances, these situations are further complicated by the local government being both a regulator and an owner.

A particular problem arises if local governmental aid is granted to the firm rendering public services and it uses this aid to obtain market share in competitive markets. There is no doubt that such subsidies injure the interests of competitors. They may also constitute artificial barriers to entry and offend the principle of competition impartiality on behalf of the municipalities. There are still very slim possibilities for injured parties to take legal action against such irregularities. This means that in cases where exclusivity is ensured by a legal regulation the only real possibility is to challenge the regulation in the Constitutional Court.

"Disposal of communal waste"

Pursuant to current legislation the disposal of communal waste is the responsibility of local governments.

In Dunaújváros the local government of the town discharged its waste disposal responsibility through its 99.9 per cent owned Dunaújváros Town Administration plc (hereinafter called DTA). DTA operated in a competitive environment for the collection and transport of communal waste but enjoyed exclusive rights in the domain of local waste disposal. DTA's waste transportation tariffs were approved by the local government, but DTA itself set waste disposal fees.

The Housing Co-operative INTERCISA, running 4500 flats in Dunaújváros, launched a proceeding against DTA's activity. The INTERCISA concluded an agreement effective from 1 July 1994 for waste transportation with another entrepreneur which offered a more favourable fee than DTA. Subsequently DTA raised the waste disposal fee by 67 per cent, and a month later reduced its waste collection fee by 17 per cent. The tariff reduction was made possible by local government aid granted to DTA.

The Housing Co-operative complained that the contract it had concluded with the new entrepreneur became unfavourable as a consequence of DTA's tariff alterations. The Competition Council acknowledged that the changes had such an effect and, in general, tended to harm DTA's competitors. DTA responded by proving that raising the waste disposal fee had been motivated by objective cost factors and thereby undermined the case

brought against it. Since it could also not be demonstrated that the reduced collection fee violated competition law because it remained above production cost levels, the Competition Council dismissed the complaint.

The Competition Council nevertheless deemed it necessary to draw the lesson of the DTA case to the attention of the local government: current governmental regulation and the existing market structure do not necessarily promote competition. It proposed that the local government regulate waste disposal fees and take cognizance of the competition-distorting character of local government aid practices.

"Dunapack vs ERECO" *Case*

In this case the supplier, Ereco East-European Waste Proceeding and Environment Protecting Co. enjoyed a dominant position on the market for waste paper collecting. As a condition for renewing a contract, it required one of its buyers, Dunapack Paper and Packing Material Co., to refrain from suing for damages arising out of Ereco's earlier delays in making contractual deliveries.

The Competition Council declared this practice to be an abuse of dominant position based on a provision of the Competiton Act, which prohibits refusing "...without justification to conclude a contract". ERECO was fined HUF two million (about USD 18 000, ECU 15 000).

"Prodax vs Kontavill" Case

Kontavill Kontakta Ltd. manufactured a complete range of complex electrical spare parts. Prodax produced an incomplete range of competitive electrical spare parts and was practically forced to buy some essential components from the sole manufacturer Kontavill.

Kontavill tried to exploit this situation by attempting to block Prodax's technical development activity through forcing it to enter an exclusive purchasing obligation and by threatening it with a cutoff in supplies. When Prodax rejected Kontavill's conditions the latter terminated their contractual relationship.

Considering Kontavill's dominant position (with no possible substitution from any other sources because of the special construction and design of the components), the Competition Council condemned its activity as an abuse of dominant position and imposed a fine amounting to HUF 20 million (cca. USD 180 000, ECU 150 000).

"Alkali War" Case

In this case the Competition Council stated that a price reduction to the level of production costs is in most cases compatible with the rules of fair competition. The case was initiated by the Budapest Chemical Works (BCW) against the Borsod Chem Company. The applicant claimed that the defendant party committed an abuse of dominant position when it offered its products at unreasonably low prices which the applicant could only have matched by suffering considerable losses.

Both parties are engaged in producing and domestically marketing caustic soda and chlorine. Except for sales to the paper industry (accounting for only 2.5 per cent of annual sales), technological considerations block the use of substitutes for their products. In the relevant geographic market, i.e. Hungary, the market share of the defendant was nearly 70 per cent. According to the Hungarian Competition Act such a market share is deemed to be a dominant position.

In the caustic soda market during the past three years demand fell sharply and the sales of the parties decreased to the same extent. Liberalised trade conditions made it possible for caustic soda from Romania, the Czech and Slovak Republics, and Poland to flood the Hungarian market at an unreasonably low price. In several

cases the price offered by importers did not exceed two-thirds of the production cost of the defendant. During this period the price of caustic soda decreased steadily in Western Europe as well.

On the basis of the investigation the Competition Council found a lack of evidence establishing that the defendant party offered its product below its own production cost, so predatory pricing was not proved. It concluded that Borsod Chem was able to produce the relevant product at a lower cost level than the applicant, hence could charge a lower price which was still above its own production costs. This could not be regarded as anticompetitive even if it disadvantaged a competitor because it contributed to the purpose of economic competition, i.e. the improvement of economic efficiency. The Competition Council dismissed the case.

vi) Supervision of Mergers and Acquisitions

During nearly five years of enforcing the Hungarian Competition Act some 30 requests for authorizing concentrations were submitted to the OEC. The majority of them were concerned with acquisition of decisive influence. On only one occasion was a request concerning concentration of undertakings dismissed by the Competition Council, i.e. the case of the catering chain Gasztrolánc Junior. In many cases foreign investors participating in a privatisation transaction did not previously carry out any economic activity in Hungary. The current Hungarian Competition Act does not apply to such cases which are considered to be changes in ownership rather than concentrations.

"PICK/HERZ" Case

The Competition Council qualified the purchase of HERZ Salami Factory from Budapest Meat Industry plc (hereinafter BMI) by PICK Szeged plc as a concentration subject to authorisation despite the fact that the Competition Act does not declare that the purchases of parts of an entity require official approval. In reaching this view, decisive importance was given to the fact that HERZ was an independent BMI factory unit producing a separate range of products, and had earlier been leased by PICK.

In the relevant market, defined in the broadest sense, the joint market share of both entrepreneurs was nearly 60 per cent. Each of the two entrepreneurs produced its own special branded salami. In the salami market they jointly had practically a 100 per cent market share, and due to brand protection, market entry by any other manufacturer could not reasonably have been expected. The two factories were operating with approximately 50 per cent excess capacity.

Pursuant to the Competition Act, mergers or acquisitions of decisive influence should not be authorised if they impede development or continuation of competition. However, a transaction may be authorised if, inter alia, it is beneficial to the national economy. Considering that the replacement of HERZ's out-of-date equipment would become possible through the merger, and this would maintain the product line's international competitiveness, the Competition Council did not object to acquisition of the decisive influence.

"Zalakeramia/Rekeramia" Case

The Competition Council authorised ZALAKERAMIA Co. to acquire a 75 per cent ownership initially and 100 per cent ownership later in the stock capital of the Company REKERAMIA. Both companies are engaged in manufacturing products of fine ceramics and covering materials, including glazed tiles and wall-tiles. Regarding the latter two products, taking Hungary as the relevant geographical market, the two firms' post-acquisition aggregate market share exceeded the 30 per cent threshold specified in the Competition Act. Glazed tiles were produced only by ZALAKERAMIA. Wall-tiles were produced by both companies, but both parties emphasized that after ZALAKERAMIA had acquired its decisive influence, REKERAMIA would abandon its traditional wall-tile production, and produce modern frost-proof floor coverings instead. Imports of these goods

are considerable and they have been increasing in recent years. In the course of forming its view the Competition Council considered that REKERAMIA's production structure would be modernised, its product range increased, and its quality improved as a result of the merger. The advantages of the acquisition were judged to exceed its anticompetitive effects (i.e. the market share exceeded 30 per cent). After taking into account the opinion of the Ministry of Industry and Trade, the Hungarian Association of Building Industry, the competitors and the buyers, the Competition Council authorised the merger.

"Mergers of beer distributors"

The Competition Council did not oppose the mergers of "Kobanya beer" distributors. Beer produced within Hungary by Kobanya Brewery was distributed by 33 independent economic entities which decided to combine regionally into six limited liability companies. Although all 33 economic entities were more than 90 per cent owned by Kobanya Brewery, pursuant to the Competition Act their structural transformation (concentration affecting their legal status) required OEC authorisation since the thresholds of the Act were exceeded.

Since Kobanya Brewery's share of the relevant geographic market (i.e. all of Hungary) exceeded 30 per cent the proposed combinations were subject to OEC authorisation.

In its decision the Competition Council considered that on the given market the applicants had not previously competed with each other. But they had been independent mainly in a legal sense, with essential elements of their business policy being determined by their owner, Kobanya Brewery. The objective of the merger was to increase efficiency by means of better marketing and management which has a positive effect on strengthening inter-brand competition. Accepting this reasoning, the Competition Council did not block the transaction.

'Gasztrolanc Merger'

Pest-Buda Gasztrolanc Ltd intended to buy 50.1 per cent of the shares of the company Junior Catering from the State Property Agency in the framework of privatization. The parties (Gasztrolanc and Junior) applied to the OEC for authorisation to merge.

In the course of examining the deal an indirect participant had to be taken into consideration as well (Zona Ltd controlled by Gasztrolanc). Gasztrolanc as well as Junior are engaged in public catering. The Competition Council found a specific part of that business, student catering (i.e. catering of nurseries, primary and secondary schools, high schools, and universities), was the relevant product market in this case. It is characteristic of a major part of the student catering business that food delivery is made from central kitchens located far from the catering location. This tends to limit market entry and create rather small geographical markets as in this case where the Competition Council held that Budapest was the relevant geographic market. The joint market share of Gasztrolanc, Junior and Zona amounted to 66 per cent on the Budapest market.

The Competition Council found that the proposed merger would have dramatically reduced competition in the Budapest student catering market and would have produced insufficient offsetting advantages. Accordingly, it did not authorise the transaction.

vii) Experience related to court reviews

Pursuant to Article 41 of the Competition Act, interested parties may request the court to review on the merits decisions made by the Competition Council.

Nearly two-thirds of the cases which end in some infringement of the Act being found by the OEC result in requests for review, but this drops to only 30 per cent for cases dismissed by the OEC.

The overwhelming majority of binding decisions resulting from court review have upheld the Competition Council's rulings. Out of 44 such court decisions, there were only two instances where the Competition Council was reversed on legal grounds. In seven further cases the court reduced the Competition Council's fine, on average to about two-thirds of the original level.

There is a flaw in the present review procedure, namely that a request for review defers payment of assessed fines. Considering that the court procedure is rather lengthy, fine deferral is probably responsible for many of the requests for review. Current proposed amendments would do away with the deferral.

Annex

Assessment of the conditions of competition in Hungary

Methology of the survey

The survey is intended to monitor progress in adopting a market economy and involves analysis of 56 product markets or industrial branches, including all the more important sectors and covering about three quarters of the GDP.

Every industry was judged by the same criteria, namely:

-- the structure and concentration of the market;

-- height and characteristics of barriers to entry;

-- strength of competition.

Progress towards a market economy was measured by:

-- the degree of privatisation;

-- the extent to which private property has gained ground;

-- the quantity and quality of state regulation and intervention;

-- the degree of resemblance between the structure of the Hungarian industry (i.e. level and types of vertical integration, degree of co-ordination among enterprises, etc.) and its counterparts in developed market economics;

-- ethics of the market players.

Applying the above criteria and measurements, the selected branches or markets were assessed and placed on a three-degree scale to express different stages of development.

Negative assessments were made in sectors where governmental measures in the interest of competition are lacking, although some of those could have been expected on the basis of experiences in developed market economies. No negative assessments were recorded however where, to the best of our knowledge, Hungarian policy was similar to the practice of OECD countries (e.g. agricultural policy). Competitiveness was not analysed as the exclusive aim of the survey was to monitor the conditions of competition and the progress of transformation. This explains why certain sectors received positive assessments despite their potentially facing serious crises. Progress in the area of competitive conditions does not necessarily connote market success and/or an optimal situation from the viewpoint of industrial policy or competitiveness.

It should also be noted that in the case of natural monopolies a different approach was applied. Here the main market characterisation measure rigorously applied was "degree of privatisation". On the other hand, "quality and quantity of state regulation" was given great weight. In assessing state regulation the following factors were explored: whether any exclusive rights remain economically justified; whether there is an open access to networks; and whether or not there is an up-to-date price regulation. In sum, the intention was to determine whether regulation encourages efficiency and performs important consumer protection functions.

Analysed branches were divided into four groups. The first group covered branches graded high in the majority of aspects. The second group comprises branches with mixed but generally positive ratings. Branches classed in the third group had roughly balanced positive and negative qualifications. The worst performers were placed in the fourth group.

Some concrete reasons for the classifications given to certain branches are explained below in the characterisation of the individual groups, but some general explanation is warranted. Because every branch was qualified according to all aspects, `aggregated points' brought together branches of clearly different character which are facing entirely different problems. This is especially true of the second and third groups.

Survey results

Fields to be qualified as positive from the viewpoint of the competitive conditions and transition to market economy (general characteristics are as follows: competitive market structure; free market entry is ensured; competition has strengthened during the past years; dismantling state property is completed or nearly completed; there are no state measures or they are not more prevalent, to the best of our knowledge, than in OECD countries):

-- furniture, building materials, paint, printing, motor cars, cosmetics, cigarettes, coffee, wine, beer, alcohol, sweets, deep-frozen products, advertising, and house-hold appliance markets;

-- clothing, textile, pharmaceuticals, meat processing, and baking industries;

-- hotels, food distribution, industrial services, computer services, road transport of goods, computer services, tourism, industrial services, and foreign trade.

101. Fields with non-uniform qualifications but generally positive from the viewpoint of competitive conditions and the transition to market economy (this group generally differs from the preceding one in its: lower degree of privatisation and greater incidence of free entry being hindered by lack of proper regulation, high capital requirements, or high customs tariffs, but competition has nevertheless strengthened and market economy features prevail):

-- aluminium metallurgy, electricity, tinned foods, tyres, and crude oil industries;

-- insurance, taxi, banking, and air transport services;

-- sugar, milk, and consumer goods distribution

Fields to be qualified as mixed from the viewpoint of the competitive conditions and the transition to market economy (the general feature of this group is the absence of decisive change either in market structure, or in degree of privatisation compared to the 1990-91 period):

-- production of vegetable oil, raw materials for plastics, and corn;

-- crude oil refining, health services, and newspaper distribution;

-- road transport of persons, post, telecommunication, drug trade;

-- natural gas and poultry processing industry.

Fields to be qualified as uniformly negative from the viewpoint of the competitive conditions and the transition to market economy (this group contains industrial branches facing a crisis situation where nearly continuous state intervention is succeeding only in maintaining current stagnant conditions thus making privatisation difficult):

-- coal mining, ferrous metallurgy, railways.

On the basis of individual sector characteristics it can be concluded that the majority of the sectors have a good chance of reaching the norms of a market economy. Half of the sectors have already evolved to a market economy level where private ownership and freedom of entrepreneurship are well established as the decisive moulding influences.

KOREA*

(1994-1995)

Summary

The Korean Fair Trade Commission (KFTC) drastically revised the Monopoly Regulation and Fair Trade Act (MRFTA) in December 22, 1994. The major changes were as follows. First, to effectively cope with the distinct problems arising from "Chaebol" (major conglomerates), the regulations on excessive concentration of economic power have been strengthened. Second, to facilitate the conclusion of international contracts, the regulations on international contracts have been eased. Third, the surcharge has been increased to allow for the effective enforcement of the MRFTA.

The KFTC has actively been engaged in the prevention of restrictive trade practices through the enforcement of competition laws and policies.

Article 63 of the MRFTA stipulates that the related ministries should hold prior consultations with the KFTC before enacting or revising the laws, enforcement decrees, etc. that are anti-competitive in nature. In accordance with the above provision, the KFTC requested that the related ministries revise the anti-competitive elements contained in 24 specific laws.

In 1994, the KFTC took corrective measures and imposed surcharges on 122 cases after investigating 22 large business groups that were suspected of unfair internal trade, such as discriminatory trade between affiliated and non-affiliated companies, etc. In January 1994, the KFTC designated and notified the 332 enterprises encompassing 140 specific goods and services, as market-dominating enterprises. Among them, the KFTC reviewed the agency contracts of the 48 enterprises which were newly designated. The KFTC also ordered 12 enterprises suspected of illegal contracts to follow its recommendations for correction.

The KFTC exerted great efforts to stamp out cartel and bid-rigging. For the 16 large construction companies charged with bid-rigging in the Paekjae Bridge construction project, the KFTC has ordered the companies to discontinue their collaborative activities and make their illegal actions known to the public through the newspapers. The KFTC also issued complaints to the prosecutor against those corporations and their staffs.

The status of the KFTC has been upgraded to an independent administrative agency. Due to the overall reorganization of the Korean government on December 23, 1994, the government has been streamlined, but considering the importance of a free and fair competitive environment in the Korean economy, the KFTC has been expanded to include two more bureaus, eight more divisions and 65 more employees.

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* The original language of this report is English.

I. Changes to competition laws and policies

Amendment of the Monopoly Regulation and Fair Trade Act

The Korean Fair Trade Commission (KFTC) drastically revised the Fair Trade Act in December 1994. The key aspects of the revisions were as follows: First, the regulation on excessive concentration of economic power have been strengthened in order to resolve the unique problems arising from "Chaebols"(major conglomerates). Second, with the objective of facilitating the conclusion of international contracts, including those for technology transfer between domestic and foreign companies, the regulations on international contracts have been eased. Third, the surcharge was increased to enforce the Fair Trade Act more effectively.

Strengthening regulations on excessive concentration of economic power

Reduction of equity investment ceiling

In the past, a company belonging to a large business group could make an investment in other domestic companies only up to 40 per cent of that company's net assets. However, considering the changes in the business environment and the fact that the average investment ratio of companies in large business groups was only 26.8 per cent as of 1 April 1994, the maximum investment ceiling has been reduced to 25 per cent (Article 10(1)). This drastic policy change was also attributed to the fact that excessive concentration of economic power is more likely as investments for SOC and business specialisation are exempted from maximum investment ceiling. Considering the limited capacity of the firms to divest the huge amount of excess equity, however, a grace period of three years is allowed.

Curbing the expansion of affiliated companies into non-specialised sectors, this revision was intended to prevent excessive concentration of economic power by major conglomerates. However, as lack of private capital into SOC emerged recently as an obstacle in economic activities, a maximum grace period for divestment of 30 years has been established for the investment in companies related to SOC such as railways, roads, ports, etc. (Article 10(2) of the Act).

In order to promote the investment of individual companies into specialised lines of business which aims at enhancing competitiveness and efficiency, a grace period for divestment of seven years is allowed if a company engaged in non-specialised lines of business makes an investment in a company which is engaged in a specialised line of business (Subparagraph 5 of Article 10(1) of the Act).

Expanded exemption from the Equity Investment Regulation

The Fair Trade Commission formerly designated large business groups according to the total sum of their assets and applied the maximum investment amount regulation to all the affiliated companies without exception. Therefore, there was no mechanism by which dispersion of assets was actively induced. In order to mitigate concentration of economic power through dispersion of assets, the KFTC has taken measures to exempt those companies and business groups with dispersed assets and solid financial structures from compliance with the maximum investment amount regulation (newly enacted Article 10(3) of the Act). The detailed standard for healthy companies with dispersed assets is prescribed in the Enforcement Decree.

Improvement of the International Contract Report System

According to the former Fair Trade Act, parties to international contracts, such as technology transfer contracts, copyright contracts and import agency contracts, were obligated to notify the KFTC for an examination. This obligation, however, proved to be an undue burden on those companies that formed contracts containing no elements of unfair practices, as the number of contracts reported was increased by over 1 000 per year and the ratio of unfair contract cases were reduced to less than five per cent in the 1990s.

This report obligation was therefore abolished in order to remove the unnecessary burden on companies, as well as to facilitate technology exchanges between domestic and foreign companies. In its place, the KFTC introduced a voluntary request system whereby companies can freely make requests for examinations as to whether or not the contract under consideration is in violation of the Fair Trade Act (Article 33 of the Act).

However, as the abolition could possibly encourage a greater number of parties to avoid requesting an examination even though they think the contract is unfair, the KFTC also introduced a surcharge system by which surcharges of less than two per cent of the total amount of sales can be imposed against parties to unfair international contracts (Article 34-2 of the Act). The KFTC is, furthermore, planning to improve the transparency of the application of articles related to international contracts by stipulating the examination standards and the types of unfair and fair contracts separately in the Notice revised in April 1994 (the revised Guideline on the Types and Standards of Unfair Trade Practices etc. in International Contracts).

Increase of surcharges for effective enforcement of the Act

In order to effectively deter unfair collaborative activities, the KFTC has increased the surcharges to be imposed against the companies in question from less than one per cent of the total amount of sales to just under five per cent. Formerly, the surcharge against unfair trade practices was less than 30 million won. This proved to be an insufficient deterrent, however, to dissuade large companies and repetitive offenders from violating the Act. Accordingly, the KFTC has increased the surcharge from less than 30 million won to two per cent of the total amount of sales.

In the former Act, market-dominating companies charged with abusive practices in pricing were forced to pay a surcharge of the total amount of income earned by the price increase. However, there were no stipulations with regard to imposition of surcharges against market-dominating companies engaged in abusive acts which were indirectly related to price, such as curtailing output, hindering business activities of other enterprises, etc. Therefore, equity problems were raised concerning the application of the Act.

This being the case, the related article was also revised so that surcharges of just under three per cent of the total amount of sales can also be imposed against market-dominating companies' abusive acts which are not directly related to price (Article 6(3) of the Act).

It has been found that unfair resale price maintenance practices have the same anti-competitive effect as other types of general unfair trade practices. Nevertheless, the former Act contained no stipulations on the imposition of surcharges against companies engaged in unfair resale price maintenance practices. The revised Act, therefore, includes articles on imposition of surcharges of the same amount with regard to resale price maintenance practices as those surcharges imposed against companies engaged in general types of unfair trade practices (Article 32-2 of the Act).

Other changes in the application of the MRFTA

With respect to alleged violations which occurred a long time ago, there might not be sufficient evidence or documentation available to prove that the act of violation in fact took place. In addition, the corrective measures that were taken might not prove to have been of any practical advantage. Moreover, there were, in reality, hardly any cases in which a five-year old case was brought for examination and even if it is, too much time and workforce is needed to prove the act of violation. Therefore, according to the new Act, neither corrective measures shall be taken nor surcharges be imposed against cases in which five years have elapsed since the act of alleged violation was discontinued.

Amendment of the Fair Sub-Contract Act

The KFTC has expanded the scope of application of the Fair Sub-Contract Trade Act to include sub-contracted technological services such as computer programming or engineering and design of machinery. In the past, the Act only applied to sub-contracted construction, manufacturing or repair.

Formerly, in the case of sub-contracted manufacturing between small- and medium-sized companies, designation of the contracting company and the sub-contracted company was established according to the number of employees employed by each. The Fair Sub-Contract Trade Act was applied in cases where companies with over 100 employees commissioned companies with less than 100 employees. However, the application of the Act has been expanded to include those cases where companies commission other companies that have less than half as much in annual total sales or half as many employees.

The KFTC has also established a framework by which it can make requests to the related ministry to suspend repetitive offenders' business operations, in addition to notifying the public of the offences and the measures taken.

II. Enforcement of competition laws and policies

In addition to these amendments, the KFTC has actively been engaged in the prevention of restrictive business practices through the enforcement of competition law and policies.

Improvement of anti-competitive regulations

Article 63 of the Fair Trade Act stipulates that the related ministries should have prior consultations with the KFTC before enacting or revising laws, enforcement decrees, etc. that are anti-competitive in nature. In accordance with this provision, the KFTC requested, in 1994, that the relevant ministries revise or omit the anti-competitive elements found in 24 specific laws and enforcement decrees, including the Act on Visiting Sales and the Enforcement Decree of the Act on Road Vehicle Transportation, etc. This request was accepted.

This year, the KFTC is also planning to remove the anti-competitive elements contained in laws and administrative procedures, thereby allowing firms to freely carry out business activities in a more competitive environment.

Fifty laws and their enforcement decrees and other notices, guidelines, etc. alleged to be anti-competitive will be reviewed and revised after consultations with related ministries. Moreover, the introduction of any new regulations which are found to be anti-competitive will be prohibited after close consultations with the related ministries.

The new system under which the Chairman of the KFTC attends the cabinet and economic ministers' meetings will prove meaningful towards forestalling the introduction of anti-competitive regulations.

This year, the KFTC will also continue to take corrective measures against an additional 60 trade associations which have a direct impact on the general public if these associations are found engaging in anti-competitive regulations and practices.

Mitigating excessive economic power concentration and prohibition of the abuse of dominant positions

Measures to combat economic power

The Fair Trade Act prohibits direct cross-shareholding between the affiliated companies of large business groups in order to curb excessive concentration of economic power, and restricts the amount of equity investment of those firms in other companies to less than 25 per cent of the investing company's net assets. Loan guarantees between the affiliated companies are also restricted. Since 1 April 1993, such loan guarantees have not been permitted to exceed 200 per cent of the guaranteeing company's own capital. With the enforcement of these regulations, the average ratio of equity investment to net assets of the subsidiaries of large business groups has decreased from 44.8 per cent in April 1987 to 26.8 per cent in April 1994, and average in-group ownership held by the subsidiaries has fallen from 56.2 per cent in April 1987 to 42.7 per cent in April 1994. The number of subsidiaries that exceeded the ceiling on mutual loan guarantees has fallen to 106 companies in 1 April 1994 from 170 companies in 1 April 1993. Further efforts will also be made to reduce the ceiling on mutual loan guarantees to less than 200 per cent of the guaranteeing company's own capital as the three-year interim period ends in March 1996.

Regulation of unfair in-group transactions of large business groups

In 1994, the KFTC took corrective measures or imposed surcharges in 122 cases after investigating 22 large business groups that were suspected of unfair trade practices based upon in-group transactions, such as discriminatory practices between affiliated and non-affiliated companies, etc. In the first half of 1994, the KFTC took corrective measures and imposed a total surcharge of 360 million won in 76 cases involving 24 companies after investigations of ten large business groups. In the latter half of 1994, the KFTC took corrective measures and imposed a total of 340 million won in surcharges in 46 cases involving 24 companies, after investigations of 12 large business groups.

In the first half of 1995, the KFTC is trying to determine whether or not the eight large business groups that were ordered in 1993 to make necessary corrections are in fact doing so. At the same time, the KFTC will expand the scope of its investigations by targeting 20 companies of the 30-50 largest business groups with the high in-group transaction ratios. New investigations into their unfair trade practices based upon in-group transactions will then be initiated.

Strengthened monitoring of market dominating firms

The KFTC annually designates the market dominating firms and commodities under the criteria given in the Fair Trade Act, and imposes stricter regulations against any abusive pricing behaviour and other non-price abusive practices, such as restricting the availability of goods or services. In January 1994, the KFTC designated 332 market dominating firms in 140 commodity markets. Of these, the KFTC reviewed the agency contracts of 48 newly designated firms and ordered 12 firms with illegal contracts to follow recommendations for correction.

The KFTC also took corrective measures against the restrictive business practices of the Korea Broadcasting Advertisement Corporation. The company had been unduly discriminating the fees for advertising agencies (seven per cent for affiliated companies and eleven per cent for the non-affiliated companies), and it had also restricted the number of advertising agencies that each advertiser could employ.

In January 1995, the KFTC designated 316 market dominating firms in 138 commodity markets. In addition, the KFTC will investigate the distribution system and the business practices of five trade associations, including the Bathhouse Industry Association, and will monitor 15 specific markets in which market dominant positions have long been present. Markets for daily necessities, such as processed milk, beer and instant noodles, will also be closely monitored.

Correction of unfair trade practices

Regulations against bid-rigging in government procurement

In 1994, the KFTC exerted great efforts to stamp out price-fixing and bid-rigging in government procurement. In a bid-rigging case involving 16 large construction companies in the Paekjae Bridge construction project, the KFTC ordered the respondents to discontinue their collusive activities and make their illegal actions known to the public in newspapers. The KFTC also filed a complaint to the prosecutor against these companies and their staffs.

In another bid-rigging case involving a local road expansion project by the Pusan Land Management Administration (at a construction cost of 63.6 billion won), the KFTC filed a complaint to the prosecutor against the 42 companies and their staffs.

The KFTC issued a correction order and imposed a surcharge of 385 million won against five PC manufacturers which were charged with bid-rigging in the purchase of PCs by the Office of Supply.

This year, the KFTC will strengthen its enforcement efforts against bid-rigging practices. Companies found to engage in bid-rigging will face strict enforcement measures involving surcharges, suspension and criminal prosecution.

Correction of unfair trade practices in distribution

The KFTC has issued a correction order in a number of cases involving false advertising, disparaging competitors' products and unfair inducement of customers (through cash rebates and other gifts). The following are the main cases :

-- the KFTC imposed a surcharge of 50 million won on four department stores for falsely representing the processing date of food items, and one department store for misrepresenting the origin of foreign meat products;

-- corrective measures were also ordered against leading beer brewers for false representation;

-- a surcharge of 360 million won was imposed on 14 pharmaceutical companies which were found to give cash and other gifts in supplying pharmeceutical products to 67 general hospitals;

-- the KFTC ordered oil companies, which were found to illegally provide cash and other gifts to gas stations, to run apologetic advertisement in newspapers. In addition, a surcharge of 20 million won was imposed;

-- this year, the KFTC will continue active enforcement activities against unfair trade practices and take preventive measures in an effort to protect consumers. Furthermore, the KFTC will also take stricter measures against such unfair trade practices as tying sales, discriminatory trade and false or exaggerated advertising. It will file a complaint against repetitive offenders.

Correction of unfair sub-contract trade

The abusive acts of contractors against sub-contractors, which are the main cause of shoddy construction, hinder the development of small- and medium-sized companies. In order to eliminate such practices, the KFTC investigated 131 production and construction companies on the amount of payments to sub-contractors. Those companies which were found to delay or withhold payments to sub-contractors were ordered to pay the unpaid amounts by 30 November 1994.

In co-operation with the Ministry of Construction (now the Ministry of Construction and Transportation), the KFTC also investigated payments to sub-contractors by 20 construction companies that built public facilities such as subways, bridges and tunnels. All of these are facilities which must be built properly for the safety of the public. The KFTC ordered corrective measures against violators of the Fair Sub-Contract Trade Act, and has notified the Ministry of Construction and Transportation of the companies which were found in violation of the Act on Construction Business.

This year, the KFTC is planning to conduct investigations of companies participating in 100 major construction projects, including subways, bridges and tunnels. Toward that end, in co-operation with the Ministry of Construction and Transportation, the KFTC plans to conduct on-the-spot investigations of 27 companies involved in 45 construction projects. Relevant ministries will be notified if violations of the Act on Construction Business and other laws are found. The KFTC's investigation will also cover businesses in such industries as electronics, automobiles, textiles, etc. in order to protect small- and medium-sized companies.

Correction of unfair stipulations

The KFTC, in an effort to increase protection for consumers and small- and medium-sized companies, actively revised and corrected unfair contract terms considered to be an abuse of dominant position. Fifty-three unfair contract terms were corrected in banking, insurance, sports, real estate transactions etc.

The following are the major cases:

-- terms in business loan contracts of 80 banks on debt payment prior to the deadline;

-- terms in consumer loan contracts of 40 insurance companies on debt payment prior to the deadline; and

-- terms on excessive charging of fees in the transfer of membership rights at golf and country clubs.

In 1995, the KFTC will strive to protect consumers' rights by continuing to correct the unfair contract terms in banking, insurance and real estate. The KFTC will correct unfair contract terms through individual investigations of reported cases and will encourage business associations to devise and adopt standardised contract terms. In addition, the KFTC intends to amend the Law Concerning Standards Terms of Agreement to strengthen sanctions against non-compliance with corrective measures.

Introduction of voluntary compliance programme

In November 1994, the Korea Fair Competition Association, sponsored by the Korea Chamber of Commerce and Industry was established in order to support voluntary efforts to comply with the MRFTA and related statutes. The Association will lay the groundwork for the fair trade system in the following manner:

-- education and promotion of the voluntary compliance programme;

-- publication and distribution of various materials on competition; and

-- recommendations to the government on improvements to the fair trade system.

Educational and promotional activities on voluntary compliance will be strengthened this year.

In an effort to prevent violations and to encourage voluntary compliance with the fair trade statutes, the KFTC will offer guidance to trade associations and companies in drawing up their own voluntary rules. The KFTC will also endeavour to judge the degree of compliance by objective standards, granting lenient treatment to those companies which prove exemplary in their behaviour.

III. Changes in the status of the Fair Trade Commission

The status of the Fair Trade Commission was upgraded with the reorganisation of the Korean government on 23 December 1994. Before the reorganisation, the KFTC was part of the Economic Planning Board; now, the KFTC is an independent administrative agency and has been considerably expanded. In many cases, the reorganisation resulted in a streamlined government, but due to the importance of a free and fair competitive environment in the Korean economy, the KFTC has been actually expanded to include two more bureaus, eight more divisions and 65 more employees.

With the revision of rules for both cabinet and economic ministers' meetings, institutional arrangements were made such that the Chairman of the KFTC can now attend both of those meetings and put forward the KFTC's independent views. This expanded function of the KFTC is due to the realisation that establishing a free and fair competitive environment is of the utmost importance in order to effectively cope with the fierce competition of the 21st century. In other words, the direction in the economic policy of the government has shifted to emphasise policies that best promote the creativity, initiative and freedom of the private sector. This is a major break with the past, when the economic policy involved heavy regulation, protection and preferential support of particular industries and companies. Today, competition policy is no longer merely part of economic policy, but has become the fundamental core that lies at the heart of all economic policies.

Table 1

Corrective measures against violations (1981-1994)

Type	1981-84	85	86	87	88	89	90	91	92	93	94	**Total**
Abuse of dominant position	3	1	1	4	-	-	2	-	6	2	1	**20**
Corporate mergers[1]	140	27	22	35	37	32	12	22	19	24	13	**383**
Violations concerning curbing of concentration of economic power	-	-	-	1	27	11	21	3	37	5	12	**117**
Unfair collaborative activities	7	10	4	6	15	11	12	20	9	16	20	**130**
Anti-competitive activities by industry associations	30	8	37	16	41	24	23	31	45	50	52	**357**
Acts of unfair trade	269	138	264	240	275	320	177	336	292	397	430	**3 138**
(Internal trade of large business groups)	-	-	-	-	-	-	-	-	-	(26)	(50)	**(76)**
(Market-dominating enterprises)	(61)	(32)	(31)	(29)	(8)	(55)	(23)	(19)	(46)	(38)	(18)	**(360)**
Unfair contract terms	-	-	-	2	8	7	10	8	8	34	83	**160**
Unfair subcontract terms[2]	89	114	153	141	144	144	97	199	149	223	220	**1 700**
Unfair international contracts[3]	703	234	273	242	70	39	288	235	57	65	55	**2 261**
Total	**1 241**	**559**	**754**	**687**	**617**	**588**	**642**	**854**	**622**	**816**	**886**	**8 266**

Notes:
1. Mainly measures taken against the violation of corporate merger report period.
2. Includes the adjustments made by the Sub-Contract Dispute Adjustment Association.
3. Includes the cases related to the revision of international contracts.

Table 2

Corrective measures by types of cases and measures taken (1981-1994)

Measures Type	Complaint	Imposition of surcharge	Corrective order	Request for correction	Recommendation for correction	Warning	Total
Abuse of dominant position	-	-	12 (1)	-	3 (-)	5 (-)	20 (1)
Corporate mergers	1 (-)	-	2 (-)	-	-	380 (13)	383 (13)
Violations concerning curbing of concentration of economic power	2 (-)	18 (3)	39 (5)	-	8 (-)	68 (7)	117 (12)
Unfair collaborative activities	3 (2)	12 (10)	34 (6)	-	28 (1)	65 (11)	130 (20)
Anti-competitive activities by industry associations	9 (-)	-	138 (15)	-	32 (1)	178 (36)	357 (52)
Acts of unfair trade	17 (4)	123 (90)	916 (179)	-	607 (57)	1 598 (190)	3 138 (430)
Unfair contract terms	-	-	41 (32)	19 (7)	98 (42)	2 (2)	160 (83)
Unfair subcontract terms[1]	30 (7)	-	423 (23)	-	60 (1)	1 181 (189)	1 700 (220)
Unfair international contracts[2]	-	-	-	-	68 (-)	2 193 (55)	2 261 (55)
Total	**62** **(13)**	**153** **(103)**	**1 605** **(261)**	**19** **(7)**	**910** **(102)**	**5 670** **(503)**	**8 266** **(886)**

Footnotes:

1. Includes the adjustments made by the Sub-Contract Dispute Adjustment Association.
2. Includes the cases related to the revision of international contracts.

References:

1. ( ) is the number of corrective measures taken in 1994.
2. Both complaint and corrective measures are by the date of decision.
3. The cases where two kinds of corrective measures were taken against one enterprise (e.g. corrective measures, recommendations for correction and warnings) are considered separately.
4. The cases where two or more types of violations were involved (e.g. abuse of dominant position and resale price maintenance acts) are considered separately.

POLAND*

(1995)

I. Position of the Antimonopoly Office within the structure of State administration bodies and its new organisational structure

The Antimonopoly Office (AMO) is a Central State Institution, acting on the basis of the Law of 4 July 1995 on Counteracting Monopolistic Practices (Antimonopoly Law).

The President of the AMO is appointed by the Prime Minister who, on the advice of the AMO President, also appoints the vice-president and Director General. The President participates in meetings of the Council of Ministers, and its constituent Economic Committees. The AMO also participates in specialised Government Committees and Commissions, and in Inter-ministerial Teams.

The AMO is composed of the Head Office located in Warsaw and eight regional branches in Cracow, Katowice, Wroc³aw, Lublin, £ódŸ, Poznañ, Gdañsk, Bydgoszcz (established in the 2nd half of 1994) and Warsaw (established in July 1995).

The Head Office is responsible for addressing and analysing nation-wide issues.

AMO branches are authorised to undertake administrative proceedings either on their own initiative (since 1994) or on request by legal and economic entities. They are also empowered to conduct preventive control proceedings as regards changes in local economies. In addition, they co-operate with Head Office monitoring and data collection activities.

As of 31 October 1995 the Head Office comprised the following departments:

-- Department of Antimonopoly Jurisdiction - combats monopolistic practices;

-- Department of Consumer Protection in Monopolised Markets - counters abuses in postal services, power sector, telecommunications, and water and sewerage sectors;

-- Department of Antimonopoly Policy, Analyses and Control (including the Informatics Technology Team) - promotes competitive market structures paying special attention to transition period ownership transformations;

-- Legal Department - represents the AMO before the Antimonopoly Court and issues legal opinions on draft laws and regulations plus matters under AMO investigation;

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* The original language of this document is English.

-- International Co-operation and European Integration Section - collaborates with foreign agencies, negotiates competition related treaties and manages PHARE funds; and

-- AMO Spokesman Section - handles public relations.

The above structure was altered at the end of 1995 in order to deal with new responsibilities arising from amendments to the Antimonopoly Law, to speed adjustments required by relationships with the European Union, OECD and WTO, and generally to promote a more internationally open economy. New sector-based departments and an International Competition Department established. The AMO's structure at the end of 1995 was as follows:

The President's Office:

-- co-operation with state authorities and administrative organisations;

-- organisation of internal operations.

Legal department

-- legal services, including;

-- issuing opinions, in consultation with concerned departments, on draft legislation submitted to the AMO by Ministers;

-- representing the AMO before the Antimonopoly Court, Supreme Court of Administration and legislative bodies;

-- representing the AMO in the Legal Committee of the Council of Ministers.

Department of Monopolistic Practices and Consumer Protection - Industrial Products Market:

-- issues related to construction and processing industries.

Department of Monopolistic Practices and Consumer Protection - Services and Agricultural Products Markets:

-- issues related to forestry, agricultural and food processing industry, trade and related services;

-- issues related to the financial sector (banking, insurance, securities sector);

-- maintaining a list of stock exchange investors owning more than five percent of the shares of an enterprise,

Department of Monopolistic Practices and Consumer Protection - Utility Services

-- issues of network (natural) monopolies, as well as municipal utility related questions (country-wide), transport, media, publishing.

International Competition Department

-- participation in work on convergence of the Antimonopoly Law with European competition rules in accordance with Poland's Europe Agreement, and handling issues related to activities of the Competition Sub-committee;

-- state aids issues (applying European Union standards);

-- AMO co-operation with international organisations like the OECD, WTO, UNCTAD, and with foreign competition agencies, plus dealing with issues related to the CEFTA and EFTA free trade zones;

-- issuing opinions on draft international trade laws;

-- participation in work of inter-ministerial teams on tariff policies, foreign commodities trading and antidumping proceedings.

Furthermore, the AMO comprises:

-- a team of advisors to the AMO's President;

-- a Press Team;

-- an Informatics Technology Team.

The Departments fulfil their tasks through:

As regards monopolistic practices - conducting proceedings and issuing decisions on monopolistic arrangements, abuses of dominant position and monopolistic practices in relation to consumers.

As regards business restructuring - conducting proceedings and preparing decisions on merger applications and on compulsory division of business entities as provided for by the Law of 24 February 1990.

In 1995 the AMO installed a computer network and connected individual workstations to the system. This allows documents to be distributed throughout the office. New software for maintaining computer inventories of AMO cases and decisions has been in operation since June 1995. Co-operation with Telbank S.A. has enabled the AMO to create its own Internet address (i.e. uanty@telbank.pl).

Under proposed legislation for reform of the Economic Centre of the Government, it is assumed that AMO responsibilities will be significantly expanded. In particular, the AMO expects to play a leading role in developing and implementing a consumer protection system including its harmonisation with European standards. The system will require a specific legal and formal basis, methods for incorporating appropriate EU directives into national legislation, and a means for processing consumer complaints. The independence and inter-ministerial nature of the AMO makes it well-suited to formulate effective consumer policies.

II. Role of the AMO in Setting Economic Policy Promoting Competition, and Developing the Legal System and Market Economy Institutions

The intensity of the transformation process, both in legal and institutional terms, is driven by two factors: the internal needs of a market economy in a democratic society; and the requirements of international institutions which Poland intends to join.

Legislative work related to the activities and organisation of the AMO

Following approval by the legislature, amendments to the Antimonopoly Law were signed by the President on 3 February 1995, and the new Law took effect on 19 May 1995.

All sections of the Antimonopoly Law were affected by the changes. Special attention should be paid to amendments introduced to Chapter Three covering merger review and business restructuring.

Within the scope of monopolistic practices

The listed practices remained unchanged but those applying to agreements between firms were re-cast as illustrative only.

Other monopolistic practices

Imposing unfavourable contract terms and extreme forms of tied selling are the most frequently reported monopolistic practices. Other practices are outlawed only if the entity enjoys a dominant position.

Within the scope of merger review and restructuring business entities

AMO merger review activities have been greatly expanded and previous weaknesses in issuing binding provisions have been addressed. These changes help to bring our antimonopoly regulations closer to those of the EU.

New regulations extend AMO supervision beyond organisational mergers to cover asset acquisitions, share purchases, and interlocking directorates between or among competing enterprises. Financial institutions, including banks, were made subject to the same controls. Threshold limits were introduced to eliminate *de minimis* transactions.

Within the scope of antimonopoly proceedings (procedures)

Investigative and evidentiary procedures were harmonized to facilitate appeal of AMO decisions to the Antimonopoly Court.

To protect trade secrets coming to its attention in the course of investigations, the AMO may restrict disclosure of information regarding competing businesses.

The Antimonopoly Law was published in 1995 in the Journal of Laws No. 80, item 405, and this was publicized by an announcement issued by the Prime Minister on 4 July 1995. In addition work on executive proclamations supplementing the Antimonopoly Law were carried out by the AMO. These included:

-- Ordinance of the Council of Ministers specifying detailed notification requirements for merging enterprises; the Ordinance was approved by the Council of Ministers on 13 July 1995 and published in Journal of Laws No.87, item 438;

-- Ordinance of the AMO President establishing nine regional branches and specifying their geographical and substantive jurisdiction. At the same time competence was divided between the Head Office and regional branches. The Ordinance was signed on 27 July 1995 and published in Monitor Polski No. 42, item. 491.

New AMO Statutes were drafted and approved by the Council of Ministers through the Ordinance of 17 October 1995, published in Journal of Laws No.123, item 598.

Work related to legislative activity of the Government and Parliament and operations of market economy institutions

The AMO permanently participates in the legislative process by issuing opinions on draft laws submitted by the following bodies:

-- Inter-ministry Affairs;

-- Economic Committee of the Council of Ministers;

-- Council of Ministers;

-- Seym (Lower Chamber of Parliament) Committees.

AMO representatives participate in inter-ministry committees and task forces and is permanently represented on certain teams established in 1994 for implementation of the "Strategy for Poland" programme, such as:

-- Team XII (Development and Reform of the Financial System);

-- Team IX (Consumer Protection);

-- Team X (International Competitiveness of Polish Economy)

An AMO representative is a member of the State Securities Commission, allowing the AMO to influence the structural policy of the Commission relating to the securities market.

A representative of the AMO participates, on a permanent basis, in meetings of the Privatisation Council.

In 1995 representatives of the AMO took part in the work of *inter alia* the following Teams and Commissions:

-- Agricultural and Food Industry Privatisation and Restructuring;

-- Polish State Railways Restructuring ;

-- Development of "Assumptions for State Policy in respect to Energy Saving in the Municipal Sector";

-- for negotiations on Poland's acceding the "Agreement on Observing Fair Competition Conditions in the Shipbuilding and Ship Repair Industry within OECD";

-- Legal Commission of the Bureau of the Council of Ministers.

Conducting legislative work related to draft legal acts submitted by other state bodies.

The AMO issued opinions on all draft laws submitted for consideration to the Council of Ministers and to its Economic Committee to ensure conformity with the objectives of the Antimonopoly Law.

The general review procedure is as follows: Ministers draft laws and send them to other Ministers and Presidents of Government Agencies and follow up by organising reconciliation conferences. After reconciliation, drafts are submitted for discussion to either the Economic Committee or the Social Policy Committee of the Council of Ministers. Drafts are then passed to the full Council of Ministers for further debate and resolution of previously raised issues. Finally, drafts are submitted to the Seym. AMO representatives often advance suggestions at Seym Commission meetings. The AMO pays particular attention to legislation that may restrict competition.

During the transformation of the political system, the AMO submitted comments and opinions on proposed legislation especially that related to:

-- industrial ownership rights (the AMO pointed out that provisions of the draft which allowed for geographically confined licences may result in undesirable market division);

-- tariffs (the AMO cited Poland's obligations resulting from international treaties, as well as the role of international competition in fostering modernisation of Polish production);

-- economic self-regulation (the AMO questioned the compulsory membership principle);

-- tax Advisors - the AMO was opposed to restricting shareholdings in tax advice companies to licensed tax advisors, but agreed that they should hold a minimum of 30 percent of the shares;

-- Notary Public activities - the AMO opposed restricting establishment of new Notary Public Offices;

-- merging and grouping certain state-owned banks - the AMO did not oppose the mergers, but commented that such legislation should contain a specified time frame.

Opinions were issued on the various draft private member bills and on government reactions to the same, including:

-- draft law initiated by MPs on a consumer protection system (all the AMO's comments were accepted);

-- on change of the Law of 26 August 1994 on sugar market regulations;

-- on restructuring of co-operative banks and the Bank for Food Economy;

-- on the National Bank of Poland and bank supervision;

-- three draft laws on the State Spirits Monopoly (in this case, comment was requested by the Seym Committee).

Recommended solutions for maintaining the State monopoly in spirits production and trade were not acceptable to the AMO.

Comments on a number of drafts of Ordinances of the Council of Ministers were submitted:

-- on general conditions for provision of telecommunication services;

-- on conditions for using Post Office services;

-- on general conditions for connecting telecommunication networks and rules for settlements between operators;

-- on claims related to public telecommunication services;

-- on public transport by automobile;

-- on charges for special usage of water and water equipment and for economic use and alteration of natural environments;

-- on changing exemption levels applying to customs duty surcharges;

-- on detailed rules for granting special allowances for interest on agricultural loans.

The AMO issued opinions on draft laws related to operations and development of the securities market, including:

-- Ordinance of the Council of Ministers on rules for the operation of the National Securities Depository;

-- Ordinance of the Council of Ministers on forms of secondary trading in securities outside the stock exchange;

-- Resolution of the President of the Securities Commission on methods for conducting transactions and settlements by brokers organisations.

The AMO paid special attention to formulating comments and conclusions related to draft ordinances of the Council of Ministers on financial-organisational rules for the sugar production sector. The AMO eventually sent a memorandum to the Prime Minister opposing a draft ordinance of the Council of Ministers grouping together sugar producers into four holding companies which, the AMO felt, would decrease competition in sugar beets and final sugar markets. The AMO did not believe there were compelling technical or economic arguments to support such an organisation and advanced an alternative

plan which allowed for regional overlap, thereby restricting dominance in local markets. It was also observed that thirteen sugar factories opposed their incorporation into the proposed holding companies. Remarks and objections submitted by the AMO were considered in formulating the final rules for allocating sugar factories to individual holdings.

The AMO also pointed out to the Ministry of Agriculture that extra benefits paid to sugar exporters are reflected in increased sugar prices in the retail domestic market, and suggested abandonment or restriction of any regulatory mechanism tending to increase retail prices.

The AMO expressed its opinion on a draft document prepared in accordance with a decision of the Council of Ministers entitled "Black Coal Mining - State and Sector policy for the years 1996 -2000", and recommended:

-- rigorous analysis of domestic and export requirements as a basis for determination of the level of coal mining in 1996-2000;

-- adopting deadlines for closure of unprofitable mines;

-- clear specification of rules for sector subsidies and administration of budgetary resources assigned for that purpose.

The draft's most significant deficiency lay in the absence of either a short- or long-term timetable for introducing market economy rules into the mining sector.

The AMO prepared its analysis during the coal mining restructuring program in 1992 - 1994. Its study was distributed to interested ministries and institutions and was examined by the Economic Committee of the Council of Ministers. AMO comments concerned *inter alia*:

-- inability to reach planned gross and net profitability by black coal mining;

-- an inappropriate relationship between increases in pay and productivity;

-- prolonging mine liquidation processes without economic justification.

The AMO's comments were complied with in decisions by the Economic Committee of the Council of Ministers, submitted to the Ministry of Industry and Trade.

Proposals contained in "Thesis of Poland's Power Policy by the Year 2000" were found to be in accordance with the AMO's policies, particularly:

-- introduction of competition mechanisms wherever justified and possible;

-- network accessibility for other entities, a basic condition for competition in network gas and electricity sub-sectors;

-- splitting regulatory and ownership functions;

-- sanctioning the principle of economic pricing, which should facilitate implementation of market economy rules and privatisation in the sector.

The AMO advocated rapid decentralisation of price regulation in conformity with the new Energy Law.

Comments were also submitted on various economic policy studies:

-- problems in sugar markets;

-- assessment of the banking system;

-- Economic and financial state of agriculture and food industry restructuring and privatisation;

-- objectives and rules for privatisation of the tobacco industry;

-- evaluation of offers by the Daewoo corporation to privatise FSO (automobile manufacturer) in Warsaw and FSL (truck manufacturer) in Lublin;

-- organisational and legal structure and responsibilities of the State Foreign Investments Agency;

-- report on regional policy;

-- government position on state policy promoting competitiveness in the shipbuilding industry;

-- government position on acceding to "OECD Agreement on observing normal conditions of competitions in commercial shipbuilding and repair industry."

The AMO presented an opinion to the Economic Committee of the Council of Ministers entitled "Objectives and rules for privatisation of the tobacco industry." It advocated privatisation of the sector without restricting involvement of a strategic investor to 49 percent of share capital, but allowing the State Treasury to hold a "golden share".

It was considered justifiable to protect the interests of domestic tobacco growers by requiring strategic investors to use a certain percentage of Polish tobacco in domestic cigarette production.

Since it appeared to entail no danger to competition, the AMO supported an application from the Economic Committee of the Council of Ministers for EFSAL budgetary resources to support protecting or restructuring over 20 liquidated enterprises.

Representing the AMO in Antimonopoly Court.

The AMO received sixty-six requests to review decisions in 1995. Fifty-six of those were forwarded on appeal to the Antimonopoly Court and eight were returned to the appropriate Department or regional branch for amendment.

The Antimonopoly Court dealt with 34 of the 56 appeals submitted to it in 1995. In 16 cases the Court dismissed the appeal; in five it refused to consider the appeal; in five it set aside and in six more amended the AMO's decision; and in the remaining two cases, the appeal was withdrawn.

Further, in 1995 the Antimonopoly Court disposed of 31 cases filed in 1994. In 17 of those, the appeal was dismissed; in one the Antimonopoly Court refused to consider the appeal; in seven it set aside and in 11 more amended the AMO's decision; and in the remaining case, the appeal was withdrawn

Hence, in the course of the 1995 reporting period, the Antimonopoly Court dealt with a total of 65 cases. Thirty-three were dismissed; six appeals were refused consideration; 12 AMO decisions were set aside and 11 amended; and three saw the appeal withdrawn.

In two cases serious legal issues arose and resulted in references to the Supreme Court.

One of the Supreme Court references concerned whether people constructing houses for their own use were entitled to a particularly favourable municipal water rate charge.

The second Supreme Court reference required interpretation of Article 16(1) of the Antimonpoly Law. In particular, the question was whether fines should be levied against the Presidium of a regional Pharmacists' Board or against individual members of the Presidium.

III. Implementation of consumer protection policy

Antimonopoly Jurisdiction

Both the Central AMO and its regional branches issue administrative prohibition orders concerning monopolistic practices. Issues of Antimonopoly Jurisdiction are managed by the AMO's Department of Antimonopoly Jurisdiction (DO), Representative AMOs (Del.), and the Department of Consumer Protection on Monopolised Markets (DOK). A summary of cases handled is presented in the following table.

Result	Procedures initiated									Total
	Ex officio			On application			Overall			
	DO	Del.	DOK	DO	Del.	DOK	DO	Del.	DOK	
Monopolistic practice ascertained	6	3	-	5	41	23	11	44	23	78
Monopolistic practice not found	3	-	1	8	29	13	11	29	14	54
Dismissed	1	-	1	4	16	8	5	16	9	30
Exploratory	12	5	-	101	176	139	113	181	139	433
Approving an agreement	-	-	-	1	6	-	1	6	-	7
Overall	22	8	2	119	268	185	141	276	185	602

This table shows a number of significant trends:

-- cases of major transformational significance are initiated ex officio, mainly by the Central AMO;

-- a major role is played by exploratory investigations, initiated *ex officio*, which proves that the AMO monitors markets and reacts to public concerns (in newspapers, by consumers, etc.).

The statutory duties of the AMO include conducting administrative and exploratory proceedings involving, *inter alia*, cases of restricting market access to national distribution networks. Examples:

Proceedings against Sony Poland Sp. z o.o. regarding onerous contractual conditions, restriction or elimination of market access to independent importers of Sony audio and video equipment, and introduction of a ban on parallel imports of Sony equipment. The application was filed by Niku Products Sp. z o.o. which imported Sony audio and video equipment from Asia. The parties eventually presented a settlement to the AMO for approval together with an application for dismissal of the proceedings. The AMO reviewed the settlement application in light of art. 105 § 2 of the Code of Administrative Procedure, which provides for dismissal of proceedings upon receipt of an uncontested plaintiff's application provided dismissal is not against the public interest. The settlement's proposed modifications to the authorised partner and dealer agreements continued to contain clauses banning parallel imports, thereby eliminating the development of real competition within the market. It was therefore not in the public interest. After notification by the AMO, the parties agreed to modify their settlement proposal. Upon reviewing the modified settlement proposal the AMO found it eliminated parallel import restrictions, so it dismissed the proceedings.

Application for review by "Chio Lilly Chips" Sp. z o.o. against "E. Wedel" S.A. concerning dominant position through exclusive dealing agreements in the market for salted-snack products manufactured by Wedel. Chio Lilly maintained that Wedel earned excessive profits by restricting the sale of non-Wedel products in its 77 franchised shops. The AMO reviewed Wedel's franchise agreements and other sales contracts for compliance with art. 4 sec. 1 para. 1 of the Antimonopoly Law. No evidence of monopolistic practices was found. The decision is final.

Proceedings against Wytwórnia Sprzêtu Komunikacyjnego "WZK - Gorzyce" [Transportation Equipment Manufacturing Company] concerning price discrimination on the basis of sales targets for spare parts for engine for domestic automobiles. The conduct was condemned based on art. 5 sec. 1 para. 3 of Antimonopoly Law.

Proceedings based on application by General Partnership "Zajazd Galicja" against Euro American Consortium "Autotak" in Bielsko Bia³a concerning the abuse of dominant position through onerous contractual conditions in instalment sales agreements for automobiles. The AMO rejected the application because Autotak did not have a dominant market position as specified by art. 2 para. 7 of the Antimonopoly Law. The AMO review noted that Autotak had only 14.86 percent of the market and a wide range of alternative financing existed.

The following cases from other areas are noteworthy:

Cases concerning dumping

Proceedings based on the application by Przedsiêbiorstwo Produkcji i Zbytu Gazów Technicznych [Enterprise for Production and Sales of Technical Gases] "Technogaz" Sp. z o.o. in Bielsko Bia³a against Linde Gaz Polska Sp. z o.o. in Cracow. It was established that Linde Gaz company, using its dominant position in the local market for acetylene, priced below cost to eliminate competitors. Based on art. 5 sec. 1 para. 2 and art. 5 sec. 1 para. 5 of the Antimonopoly Law which forbid predatory pricing and price discrimination, the AMO ordered Linde Gaz to cease its pricing practices. The decision is final.

Proceedings based on the application by a private road transport services provider against PKS Bia³a Podlaska claiming abuse of a dominant position in the market for passenger bus transport through

predatory pricing. In its final decision the AMO determined that PKS Bia³a Podlaska had indeed illegally employed predatory pricing.

Pricing agreements

Proceedings concerning an agreement relative to prices of sunflower and rape seed oil**.** No use of monopolistic practice was found in the case.

Proceedings concerning agreements among producers of artificial fertilisers**.** Nitrogen Fertiliser Enterprises of Pu³awy, W³oc³awek and Tarnów-Moœcice were found to have engaged in concerted price fixing agreements in violation of art. 4 para. 2 of the Antimonopoly Law. The AMO ordered the firms to cease these agreements, and imposed fines of PLZ 16 billion on the Nitrogen Fertiliser Enterprise of Pu³awy, PLZ 9 billion on the Enterprise of W³oc³awek and PLZ 300 million on the Enterprise of Tarnów - Moœcice.

Another interesting case concerned the acquisition of a 55 percent interest in Gypsum Industry Company "Stawiany" Sp. z o.o. by Gypsum Industry Company "Dolina Nidy" in Gacki (previously owned by "Capital Finance"). As a result of the administrative proceedings initiated by the AMO, it was established that the Gacki company's acquisition constituted a monopolistic practices (art. 4 section 1 point 3 of the Antimonpoly Law) because it would significantly weaken competition.

In network infrastructure industries there have been many similar local cases including:

In telecommunications sector

The AMO initiated proceedings on application by Lublin Telekom Sp. z o.o. against Telekomunikacja Polska S.A. (TP SA) regarding the refusal by the TP SA plant in Lublin to provide access to underground telephone lines in Œwidnik. Access was made contingent on co-financing by Lublin Telekom of the local TP SA network.

Following detailed investigation, the AMO confirmed that the delaying actions had the purpose of preventing development of a public telecommunication service market, and violated art. 5, sec. 1, para. 1 of the Antimonopoly Law. The AMO ordered TP SA to desist in the delays and assessed a punitive fine of PLN 500. TP SA has appealed the decision.

In the energy sector

Proceeding initiated on application by "Batory" Housing Co-operative against Heating Utility Enterprise (HUC) in Katowice**.** The case concerned imposition of onerous contractual conditions by HUC, i.e. refusal to help pay for heating equipment built at the expense of the Co-operative but owned by HUC; and abuse of a dominant position through imposing discriminatory conditions. The AMO decided that there had indeed been a violation of the Antimonopoly Law.

It is noteworthy that the Antimonopoly Court has developed a relevant body of jurisprudence over the past few years for application in such cases. In addition, the Constitutional Tribunal presented its opinion in this case.

Proceedings initiated *ex officio* against the Lower Silesia Regional Gas Utility Company in Wroc³aw concerning tying provision of energy services to unrelated financing of technical improvements. The AMO determined that Lower Silesia was engaged in the following objectionable practices:

-- forcing gas consumers to pay a compulsory, non-refundable participation fee;

-- conditioning an agreement to supply heating gas on agreement to partially finance heating system installation costs;

-- price discrimination resulting in preferential treatment of some gas consumers.

A decision confirming the objections was issued subject to art. 4 sec. 1 para. 1, art. 4 sec. 1 para. 2, and art. 5 sec. 1.

In water and sewage utility sectors

A significant decrease in the number of complaints concerning imposition of onerous contractual terms was recorded following the introduction by the AMO of a standard agreement with consumers.

Proceeding based on application by Gminna Spó³dzielnia "Samopomoc Ch³opska" in Bychawa against Municipal Utility Company Sp. z o.o. in Bychawa (PGK) concerning price discrimination in the market for water supply and sewage. The applicant accused PGK of charging entities other than households 100 percent more for water and 112 percent more for sewage disposal services. The AMO confirmed that there had been various acts of discrimination and an abuse of dominance in violation of the Antimonopoly Law.

Funeral services sector

The most characteristic of the proceedings in this sector arose from the application by Cracow Club of Consumer Federation regarding excessive cemetery fees and an artificial restriction in the supply of masonry graves by the Cracow Municipal Cemetery Administration. A comparison of fees charged in the ten largest towns in Poland disclosed that Cracow's were the highest, and had been rapidly increasing.

The AMO confirmed the existence of the following anticompetitive practices in violation of arts. 4.1.1, 7.1.2, and 7.1.3 of the Antimonopoly Law:

Imposing onerous contractual terms which conferred unwarranted benefits by way of:

-- charging excessively high cemetery fees for the purpose of ensuring funds for cemetery related investments;

-- inclusion in grave contracts provisions allowing for future disposal of rights to such graves by the owner only upon payment of a fee to the Municipal Cemetery Administration in the amount of PLN 2,250 to 2,850.

Discontinuance of sales of goods in order to increase prices by:

-- ceasing to issue permits related to masonry grave building and closing lease agreements related to places allocated for masonry graves, followed by re-commencement of sales after introduction of price increase on 19 May 1994;

Charging excessive cemetery fees:

The Municipal Cemetery Administration appealed the AMO decision, and the case is pending for hearing by the Antimonopoly Court.

Market research

The AMO conducted market research primarily in the context of ongoing administrative proceedings and in order to assess the market situation in sectors where the use of monopolistic practice was alleged. Market research was also used for comparing individual local markets.

In 1995 surveys were undertaken in 12 nation-wide markets including:

-- audio-video equipment, including TV sets (the market survey covered primarily producers and importers);

-- chocolate products;

-- "salty snacks" (chips etc.);

-- plaster stone and raw plaster;

-- crude oil, including Bright Stock types - the survey covered all refineries in Poland;

-- coffee beans (the survey focused on the largest importers);

-- large and medium size timber, including lumber, scaleboard and pulpwood;

-- individual and group life insurance;

-- textiles (a questionnaire sent to 19 textile producers);

-- margarine market (seven margarine producers were surveyed);

-- edible oils;

-- NMT - 450 cellular phone and related equipment, including portable and mobile phone sets.

Regional offices have also conducted various local market research to support their current work or to assist Head Office or other regional offices. Most often the surveys were conducted in the municipal service sectors e.g. water, sewerage, waste disposal, and power services. Regional surveys have also examined transportation, property leases, cemeteries, telecommunications, regional press publishers and commodity markets.

IV. Influence exerted by the Antimonopoly AMO on the organisational structures of businesses

In the earlier described amendments to the Antimonopoly Law, a wide range of merger activity and business restructuring became subject to AMO supervision. The range and frequency of this work is illustrated by the table below:

	Head Office	Representative Offices
Cases considered prior to 30 November 1995.	130	203
Positive opinions issued on:		
- transformations	32	95
- establishment	32	81
- division	-	-
- mergers**	66	68
including:		
- mergers of economic entities	13	15
- acquisition or take-over of an organised portion of assets of another business entity	10	17
- taking up or purchase of equity in another business entity	37	36
- taking up or purchase of shares by financial institutions, conducting the business of securities trading	2	-
- mergers of banks	4	-

The AMO in 1995 did not prohibit any mergers. A number of cases resulted in modified mergers after negotiation with the parties or with the Ministry of Privatisation or the Ministry of Industry and Trade. These mergers were subsequently approved by the AMO.

In the second half of 1995 the AMO answered a number of enquiries submitted by enterprise managements regarding interpretation of provisions of the amended Antimonopoly Law. These enquiries covered both procedural and substantive matters. Applicants were informed that certain cases did not require AMO approval because the transaction fell below the size threshold specified in the amended Antimonopoly Law.

In March 1993, pursuant to art. 12 of the Antimonopoly Law, the AMO ordered the forced division of the P.P. Polskie Górnictwo Naftowe i Gazownictwo (state enterprise PGNiG, an oil and gas excavation and engineering enterprise) to be concluded by the end of 1995, because of the firm's restrictive impact on competition. The Minister of Industry and Trade in 1995 presented a new "PGNiG Organisational Restructuring Programme" approved by the Economic Committee of the Council of Ministers (KERM) which included an extension of the deadlines for implementation of the AMO's 1993 decision.

** Pursuant to the requirement of the Executive decision of the Council of Ministers of 13 July 1995 on specifying detailed terms and conditions of submission of intent regarding merger and transformation of economic entities.

In the timber sector, the AMO changed the deadline for implementation of a forced division of an enterprise and issued a positive opinion (following consultations with interested local administrations) on a proposed segmentation.

In 1995 the AMO continued its co-operation with the National Investment Fund Department of the Ministry of Privatisation. This included issuing opinions on lists of firms chosen for distribution to the various National Investment Funds. In total, the AMO reviewed the market positions of 514 companies which had been slated for such distribution. In effect the AMO submitted to the Ministry of Privatisation, recommendations designed to ensure that groups of firms with similar product mixes were not assigned to the same National Investment Fund thus creating problematical dominant positions

The AMO considered applications submitted by more than ten large foreign companies which decided to invest in Poland in 1995. Under the capital privatisation process these companies acquired shares in various Polish businesses. The following cases where an AMO opinion was called for are particularly noteworthy:

-- David S.Smith Group (Great Britain) acquiring a portfolio of shares of the Kieleckie Zak³ady Wyrobów Papierowych S.A. (Kielce paper factory);

-- Lafarge Company (France) acquiring shares in Kombinat Celulozowo - Papierniczy "Kujawy" S.A.;

-- Nestle (Switzerland) acquiring shares of the Kaliskie Zak³ady Koncentratów Spo¿ywczych "Winiary" S.A. (food concentrate plant "Winiary" located in Kalisz);

-- Philips Lighting Holding B.V. Eindhoven acquiring shares in Zak³ady Sprzêtu Oœwietleniowego "Polam-Farel" w Kêtrzynie (lighting equipment plant "Polam-Farel" located in Kêtrzyn);

-- Michelin Group company (France) acquiring shares of Zak³ady Opon Samochodowych "Stomil" S.A. w Olsztynie (automobile tyre producer "Stomil" located in Olsztyn);

-- Goodyear Group company (US) acquiring shares of Firma Oponiarska "Dêbica" S.A. w Dêbicy" (tyre producer "Dêbica" S.A.);

-- Quartzwerke GmbH Frenchel (Germany) acquiring shares of Kopalnia i Zak³ady Przeróbcze Piasków Szklarskich "Osiecznica" (glassworks sand producer and processor "Osiecznica");

-- Akiiebolaget SKF (Sweden) acquiring shares in Fabryka £o¿ysk Tocznych SA Poznañ (bearing producer located in Poznañ).

Survey on concentration and pricing under conditions of limited competition.

Press distribution sector**.** Despite recommendations issued by the AMO in 1991 concerning the transformation of the state-owned enterprise "Ruch" into a joint stock company held by the State Treasury, Ruch's directors neglected to undertake any restructuring processes "designed to increase competition". This was confirmed by an AMO assessment of the organisation and operations of Ruch conducted during 1992 - 1994. Ruch's directors responded to the AMO by noting that the market situation had changed since conclusion of the restructuring process, and many new press distribution services had appeared on the market. Due to the proposed sale of Ruch to a foreign investor, the AMO submitted an

enquiry to the Minister of Privatisation to determine whether the proposed sale would extend earlier restructuring agreements concluded with the AMO, or whether the Minister expects the AMO to submit an amended position concerning Ruch's status.

Hotel management sector**.** Information was collected and a review conducted of the operations and organisation of the "Orbis" Joint Stock Company during 1992 - 1994. The AMO had submitted a positive decision in 1991 on the transformation of Orbis into a Joint Stock Company held by the State Treasury subject to partial forced division and restructuring of Orbis' operations.

The review concluded that the forced division did little to ensure competition in the market for medium and luxury quality hotels and catering. On the other hand, it also found that rapid growth in investments in the hotel and tourism sector by Polish and foreign investors would effectively increase competition in local markets. In light of the intent to privatise the Orbis, the AMO expects to submit a recommendation to the Minister of Privatisation on further measures to ensure competition in this sector.

Other selected sectors**.** Due to important new investments, the AMO performed a review of concentration in the furniture, tyres and paper producing sectors. The conclusions of the review will be used to elaborate the AMO's opinion regarding all other structural cases submitted to it. In response to enquiries and information presented in the press concerning increasing concentration in certain industries, the following sectors were also reviewed:

-- foreign trade, involving review of 51 entities;

-- press publishers, involving review of 41 entities;

-- movie distributors, involving review of ten entities.

The review disclosed no structural threats to competition. However, the examination provided an opportunity for analysing structural changes previously ordered by the AMO.

The Act on Public Trading in Securities and Trust Funds requires the AMO to maintain a register of owners of more than five percent of voting rights in companies listed on the Stock Exchange. The AMO prepares a quarterly summary facilitating examination of activities of large investors, and issues opinions on proposed acquisitions exceeding of a firm's equity. The AMO examines all draft prospectuses prior to their consideration by the Securities Commission.

One of the AMO's primary duties is maintaining and updating a register of enterprises with market shares exceeding 80 percent. (art. 19, sec. 1, para. 1 of the Antimonopoly Law). The AMO also provides its opinion on individual draft decisions of the Minister of Finance regarding waiving the obligation of an enterprise to notify the Revenue Office of an intent to increase a deregulated price. In 1995 the AMO issued six positive opinions justified on the basis of the enterprises' small market shares.

Situation regarding concentration on the local markets

The most important surveys conducted on commodity markets included the following sectors:

Sugar beet growing (seven entities examined)

The sugar beet seed production market was defined, and the information was used to prepare the AMO opinion on transformation of Przedsiêbiorstwo Hodowli Buraka Cukrowego w Ostrowcu Œwiêtokrzyskim (sugar beet growing enterprise located in Ostrowiec Œwiêtokrzyski).

Production of ceramic construction materials (the survey included 39 entities)

A list of producers holding monopolistic positions in production of certain ceramic construction materials was compiled, and was used to formulate opinions regarding transformation of individual entities.

Comprehensive audit followed by analysis of the timber market in Wielkopolska Region

Commencement, *ex officio*, of proceedings against the Regional Directorate of the State Forests in Poznañ regarding abuse of dominant position in the timber market through favouring certain regional customers. The case is still underway.

Automobile parts producer and product market survey

An AMO examination of the market position of Fabryka Osprzêtu Samochodowego "POLMO" w £odzi (automobile parts factory "POLMO" located in £ódŸ, specializing in the production of carburetors) confirmed that the firm held a monopolistic position in the carburettor production market.

Survey of business entities enjoying dominant market positions in the distribution sector

The survey concerned the various tariff discounts, exclusive sales arrangements and other sales network development techniques, and price discrimination for co-operating parties. It encompassed 30 business entities under the jurisdiction of £ódŸ Regional Office. The results will be used to develop the 1996 compliance inspection plan, and support application of the principles of distribution of goods and services by the AMO and the Antimonopoly Court. This information will be distributed among business entities holding dominant positions in the £ódŸ region.

Survey of prices in an environment of limited competition

The survey focuses on pricing dynamics and financial results of enterprises possessing a dominant position position within the jurisdiction of the £ódŸ Regional Office. The survey is in progress, and the results will be used in the development of an inspection plan.

Survey enterprise behaviour in local markets

The following market surveys were conducted:

-- fruit and vegetables markets within 12 municipal areas in the provinces of Poznañ and Kalisz. The survey encompassed both the producers of agricultural products (area under cultivation and volume of production of different varieties) as well as fruit and vegetable processors operating within the area. The analysis did not confirm suspicions of antimonopoly law violations by the processors;

-- a questionnaire was developed and analysis conducted concerning the timber market within two forest districts (Babki and Gniezno) forming units within the State Forests Enterprise - Regional Directorate in Poznañ. The survey indicated that statutory regulation in the area does not guaranty protection and development of competition and requires amendment.

As regards municipal services, numerous surveys were completed examining the degree of concentration in local markets:

-- Analysis of the market for solid and liquid wastes in the jurisdiction of Katowice Local Office, encompassing 91 municipalities;

-- survey of the urban transportation services market within the jurisdiction of £ódŸ Local Office, encompassing 17 enterprises;

-- survey of the heat production and distribution market within the jurisdiction of Local Office in £ódŸ. The survey is in progress.

Exercising law enforcement functions to ensure enterprise compliance with the law on preventing monopolistic practices

The AMO's enforcement function significantly contributes to an effective antimonopoly policy. Law enforcement authority is vested in both the Central Office and Regional Offices within the limits of their jurisdiction.

In the course of enforcement, the AMO has inspected the following business enterprises:

-- AEG "Mefta" S.A. in Mikolów,

-- ABB "Elta" S.A. in £ódŸ,

-- Railway Car Factory "Pafawag" in Wroclaw

-- Thomson S.A. in Piaseczno.

Additionally, information was collected and summaries prepared:

-- comparative analysis of the effects of operation of enterprises in the electrical energy sector acquired by ABB;

-- comparative analysis of the operational strategy in the Polish market of ABB, Thompson and Pilkington;

-- comparative analysis of operational results of companies that belong to ABB and AEG;

-- Analysis of operation of waste removal companies in Bia³ystok, Radom and Warszawa.

Following proclamation in force of the amended version of the Antimonopoly Law, information was gathered concerning companies which registered with the District Court in Warszawa after 19 May 1995. The purpose is to monitor compliance with art. 11 of the Antimonopoly Law (mandatory notification of certain prospective mergers to the AMO).

Review of offers by Daewoo for privatisation of FSO in Warsaw and FSL in Lublin was accomplished.

In 1995 several analyses were made of companies dealing with heat production and distribution within the jurisdiction of the Poznañ regional office. These continued an analysis undertaken during the previous year and were aimed at examining ensuing changes in the market. Resulting from a change in the area of jurisdiction of the regional office, the number of entities included in the analysis decreased from 41 to 26. The 1995 analysis confirmed the following conclusions reached the year before:

As a consequence of freezing the "initial" price structure, the current tariff structure, including differentiated treatment, was strengthened,

The index of permitted price increases determined by the Minister of Finance continues to be treated by heat suppliers as automatic permission for price increases, regardless of external economic factors.

Regional Offices conducted inspections to determine the degree to which previously issued decisions of the AMO were implemented in the following industries: fruit and vegetable industry (agricultural production and processing), timber industry (forestry districts, including sawmills), energy industry, heat production and distribution, water and sewerage networks, urban transport, town cleaning, municipal utilities, water and sewerage utilities, chemicals, road transport, press distribution of press, and Chambers of Pharmacists.

The results of inspections indicate that AMO decrees are generally executed. Additionally, it was observed that decrees based on proceedings initiated by individual enterprises are usually monitored by these enterprises.

VI. Foreign co-operation

In 1995 the AMO co-operated with foreign agencies in numerous fields.

Work related to competition aspects of the Europe Agreement between Poland and the European Union

Representatives of the AMO, Polish ministries and experts from DG IV of the EU Commission participate in meetings of the European Union's Sub-Committee on Competition (Sub-Committee).

The third session of the Sub-committee dealing with implementation of provisions of Art. 63.1.i, 1.ii and 2 of the Europe Agreement relating to the development of competition implementing rules was held on 15 and 16 March 1995. The proposed text was filed with the Association Council for approval.

The Sub-Committee also participates in development of the rules for state aids in Poland, based upon the EU standards. This work plays a role not just in harmonising Polish law with EU norms but also with standards effective in OECD countries. The fourth Sub-Committee meeting held between 24 and 26 July 1995 was devoted to negotiations concerning the principles of application of regulations for state assistance in Poland (Art. 63 sec. 1 para.iii of the Europe Agreement). The negotiations are still in progress and completion is planned for the first quarter of 1996.

The AMO was asked by the Government to prepare guidelines for state aids and the Council of Ministers on 7 February 1995 approved the creation of a state aid monitoring team comprised of one representative from each of 19 ministries and central agencies.

Co-operation with OECD

In 1995, as in previous years, representatives of the AMO participated on a regular basis in the OECD's Competition Law and Policy Committee and constituent working parties. AMO representatives also took part in an OECD conference on competition and regulation in network infrastructure industries (Budapest - May 1995) and in the meetings of experts on competition in the satellite service sector (Paris - June 1995.). In addition, AMO staff members participated in various seminars organised by OECD.

Co-operation with WTO

Poland recently joined the WTO, AMO representatives participated in its sessions and conferences on anti-dumping policies and subsidies.

Our WTO membership imposes an obligation to notify regarding new legislation in the areas of anti-dumping policies, subsidies and variable levies. A draft act addressing these areas is currently under discussion by appropriate Parliamentary commissions. Poland is also committed to notify concerning subsidies, including export subsidies. This duty has been assigned to the AMO because it is an institution which has periodically performed a leading role in subsidy policy. An AMO-appointed team prepared the text of the export subsidy notification which was presented to the WTO Head Office early in 1996.

Co-operation with Germany

Two representatives of the AMO participated in a conference on cartel structures organised by Bundeskartellamt in May 1995. In addition, an AMO representative participated in the conference organised by "Deutsche Stiftung fuer Internationale Zusammenarbeit" in Prague in November 1995. The subject of the conference was the "Process of harmonising national legislation with the legislation of the European Union". Besides Poland, Bulgaria, Hungary, Slovakia and the Czech Republic were represented at the conference. The AMO consulted the Bundeskartellamt on the future organisational structure and decision-making procedures of the AMO.

Co-operation with France

In 1995 the AMO and DGCCRF of France agreed on a plan for co-operation in 1995 - 1996. The plan assumes participation by AMO representatives in DGCCRF organised seminars relating to competition policy, consumer protection and state support and organisation. In April 1995, a DGCCRF delegation visited Poland. According to the plan of co-operation in August 1995, two AMO representatives interned with the DGCCRF to learn about anticompetitive practices and consumer protection.

In September 1995 a three-day seminar conducted by French competition and consumer rights specialists was held in Warsaw and attended by thirty-two AMO representatives.

Co-operation with the Russian Federation.

Pursuant to provisions of the March 1994 Treaty between Poland and the Russian Federation on co-operation in the area of antimonopoly activities, the AMO works jointly with the Russian State Committee for Antimonopoly Policies (AMC).

In April 1995 AMO representatives met in Moscow with delegations from the antimonopoly agencies of former Soviet Union countries, and in June 1995 the AMC's President visited Poland to attend discussions on matters related to de-monopolisation of economies, antimonopoly jurisdiction and competition related policies. In September 1995, during the visit of the AMO President to Moscow a Co-operation Agreement relating to activities in 1996 was signed. Among other provisions, the Agreement provided for the exchange of trainees.

Co-operation with Ukraine

Pursuant to provisions of the Co-operation Agreement of December 1993 between Ukraine's Antimonopoly Committee and the AMO, the parties agreed to focus their activities on antimonopoly policies, support for entrepreneurship and preventing violation of competition laws.

VI. Training Antimonpoly Office Employees

To develop employee skills, the AMO organises:

-- conferences, seminars and discussions within Poland and abroad;

-- training courses, seminars and internships under the auspices of international organisations such as the European Commission or OECD;

-- internships and scholarships granted to AMO employees by various countries.

Training courses and seminars organised by the European Commission and various European countries

In 1995, five AMO employees participated in a four-week internship organised by the European Commission.

In July 1995 one representative of the AMO interned with the European Commission's DG IV and studied Commission opinions and court judgments relating to anticompetitive public procurement practices. In September and October 1995 another four AMO staff interned for two-weeks with DG IV.

Four persons participated in two-week training courses in competition offices in the following EU Members: Sweden, Belgium, Italy, Austria and the Netherlands. The Brussels training course covered EU competition legislation, analysis of basic legal acts and familiarisation with recent leading decisions. The second part of the training course, carried out in respective EU Member's antimonopoly offices, familiarised participants with national legislation and its relationship with EU legislation.

In 1995 the European Commission organised seminars and conferences attended by representatives at various levels of the AMO.

In March 1995 a conference on rules and principles of competition and relationships between the EU and the countries of Central and Eastern Europe was held in Prague. In April, the European Forum on competition was held in Brussels, where active AMO participation included presentation of relevant Polish experiences to date. In June, a conference on state aids and competition related policies was organised in Wyszehrad (Czech Republic) and was attended by representatives of the AMO as well as competition experts from other Central and Eastern European countries and the European Commission. The meeting dwelt in particular on the principles of competition policy and on issues related to state aids.

At the European Commission's initiative two seminars were held in 1995. The first was devoted to implementation of European Union regulations by national legislatures, and the second to consumer protection policies of Central and Eastern European countries.

Seminars organised by OECD

AMO employees participated in the following OECD Centre for Co-operation with Economics in Transition seminars:

-- on market definition, dominant position and de-monopolisation in Vienna, 13-24 February 1995;

-- on consumer protection, Vienna, 21 - 23 March 1995;

-- on vertical agreements, Cracow, 20 - 22 November 1995;

-- for Polish judges focused on the economic rationale of the Polish Antimonopoly Law and standard economic techniques used to process competition cases, Cracow, December 1995.

Although these seminars were primarily designed to benefit from OECD Member countries' experiences, they also enabled AMO to describe its practices.

Training courses organised by the British Council and Know-How Fund

In 1995 AMO employees participated in training courses organised by the British Council. The objective of these training courses was to familiarise participants with progress in harmonising British Competition Laws with European Laws and consumer protection systems. Training courses were held in the following Government Agencies and companies located in London: Office of Fair Trading, Monopolies and Mergers Commission, Department of Trade and Industry, HM Treasury Solicitors, and in the Birmingham Office of Electricity Regulation and Office of Water Services.

Training courses devoted to energy regulation were held in England and Wales under the auspices of the Adam Smith's Institute in London.

Training courses and seminars organised by antimonopoly agencies of the US.

AMO representatives participated in the following seminars organised by the Federal Trade Commission (FTC) and the Antitrust Divisioni of the Department of Justice (DOJ):

-- March 1995 - Vienna - consumer protection;

-- July 1995. - Vienna - competition and consumer protection policies;

-- October 1995. - Vienna - principles of competition and information exchange among the Central and East European countries;

-- October 1995. - Warsaw - investigative methods.

At the invitation of the FTC and DOJ, two employees of the AMO visited Washington in October 1995 to participate in a six-weeks training course on competition policies.

It is necessary to emphasize that during four years of co-operation with the U.S.A. , FTC and DOJ experts have served as resident advisors with the AMO in Warsaw.

Other training courses organised by International Institutions attended by AMO employees

-- one-day conference organised by the European Law Academy in Germany on 22 September 1995 on "Recent Developments in EC Law: Community State Aid and Policy";

-- international seminar organised by the International Law Institute and the World Bank in Pskov, Russia, 16 June - 8 July 1995, on "Competition policies and conditions for application of antimonopoly act provisions and procedures"). The seminar was conducted by experts from the U.S.A., Germany and employees of the Russian Antimonopoly Committee.

Other training courses organised in Poland

Any list of important training courses held in 1995 must include:

-- seminar on British Regulatory Offices and the role of the Monopolies and Mergers Commission (12 January 1995 in Warsaw);

-- a training course devoted to discussion of the Public Procurement Act (25 - 26 May 1995 in Warsaw, organised by AMO);

-- training course on amendments to the Antimonopoly Law (21 June 1995 in Warsaw, organised by AMO);

-- training course on "Basic business skills" (11 -17 September 1995, held in Rytro, organised by Price Waterhouse LLP at the request of the Ministry of Privatisation);

-- training seminar "Unified Internal Market I and II" organised under the auspices of branches of the European Public Administration Institute in Maastricht and conducted by the European Studies Foundation - European Institute in £ódŸ at the request of the Government Commissioner for European Integration and Foreign Aid;

-- training seminar - "FRG Industrial Policy - tools and objectives" held in the Ministry of Industry and Trade by the Office of the Council of Ministers - the Commissioner for European Integration under the auspices of the Office of the Council of Ministers;

-- seminar on the Polish Energy Law organised by the Ministry of Industry and Trade.

The PHARE Fund, financial aid provided by the European Union, significantly helped to improve substantive knowledge and expertise of AMO employees by financing various training courses and paying for a number of relevant competition texts and translations of useful background materials.

PHARE also ensured financing of studies developed by both Polish and foreign law firms, including *inter alia*, a study of the principles of competition applied in different sectors of the Polish economy and their harmonisation with competition principles adopted by the EU, developing the supporting legal system, consumer protection in EU member countries, Polish state aids, and antimonopoly jurisdiction in EU member countries.

VII. Antimonopoly Office information policy

In 1995 the AMO Public Relations Office continued implementation and expansion of previous years' tasks. In particular, it focused on publicizing the amendments to the Antimonopoly Law, especially amendments to art. 11 pertaining to merger review. This issue was covered in various training courses held for AMO employees and a number of press conferences. The AMO held press conferences on a roughly bimonthly basis devoted principally to AMO case decisions e.g. against Telekomunikacja Polska S.A. (Polish Telekom), Sony-Poland Company, Polskie Ksilki Telefoniczne Company (Polish telephone directory publisher) etc.

As in previous years, in 1995 the AMO organised or co-organised a number of international conferences and seminars including "Principles of Competition and Regulation in Selected sectors - Postal and Telecommunication Services" and a Polish-French seminar on issues related to "Competition and Consumer Laws".

The AMO continues co-operation with a number of Universities . Members of the AMO staff deliver lectures on a broad subject of antimonopoly issues, and the Public Relations Office often assists students by providing access to literature and information on matters related to competition.

For the third consecutive year, the AMO has published an Antimonopoly Office Bulletin containing, *inter alia*, explanations of AMO jurisdiction, information on consumer protection, legislation, and the harmonisation of Polish legislation with EU laws. In 1995 the AMO also published its Bulletins in English (issues 4, 5 and 6) and Russian (issues 1, 2, 3 and 4).

The process of sector by sector harmonising Polish law with EU legislation, was described in a 30-volume publication issued during 1995. Subsequent volumes will be published in 1996. This programme is funded by EC PHARE. The publication covers issues such as selected national antimonopoly legislation, basic EC antimonopoly jurisdiction, principles of competition and specific types of agreements, competition and regulatory practices in selected sectors, antimonopoly procedures and international principles of competition. Authors of these studies include outstanding Polish and foreign experts in law and economics.

In co-operation with the Consumer Federation, the AMO also published two sets of handbooks (exercises for elementary and secondary school teachers and students) under the title "Jestem konsumentem" ("I am a consumer"). These handbooks introduce elements of consumer education to schools during Homeroom activities. For adult consumers, again in cooperation with the Consumer Federation this time joined by the Association of Polish Consumers,
the AMO published 11 consumer protection leaflets on issues related to consumer protection under the title "ABC konsumenta" ("Consumer's ABC"). All these publications, as well as a 1995 publication entitled "Prawo konkurencji we Wspólnotach Europejskich" (Competition Laws in the European Community), have been by financed by EC PHARE. These publications have enjoyed broad popularity.

The AMO's Public Relations Office maintains contacts with journalists interested in antimonopoly issues, continually providing them with information and explanations, and organising dozens of interviews in 1995. Since the media constitute an important source of information on abuse of consumer interests, monopolistic practices and unfair competition, the AMO's Public relations Office conducts daily press reviews. This information constitutes an important means for the AMO to monitor economic developments during the transformation process.

SLOVAK REPUBLIC*

(1991-1994)

I. Changes to competition laws and policies adopted or envisaged

Summary of the legal provisions in competition law and related legislation

In the early 1990s, a market economy emerged in the former Czechoslovak Republic and with it the urgent need for substantial changes in the economic legislation. It became apparent that competition, along with privatisation and price liberalisation is the most important feature in the transition towards a market economy. After a gap of nearly 60 years, the Antimonopoly Act was adopted in January 1991. Based on the theory of practical competition, the provisions of the Act were shaped with the intention to increase legal certainty. However, it was soon obvious that the Act created too many obstacles for day-to-day business activities. Instead of promoting freedom of choice and undertaking healthy entrepreneurial risk, the Act required businessmen to seek exemption for each agreement that restricted competition, irrespective of the fact that the agreements enhanced efficiency. Mandatory notification of all agreements, including trivial agreements on research and development or on exclusive distribution, as well as notification of the internal growth of the firm that reached 30 per cent of the market share (this was considered a dominant position), are some of the most obvious examples of this approach. All merger and acquisition agreements, if the parties to them held more then 30 per cent of the total market share, were also illegal. The shortcomings of the Act led to the failure of effective support of further progress in the transition towards a market economy.

A few years after this Act was enforced, the Slovak Republic, one of the two successor states of the former Czechoslovak Republic, adopted a new Antimonopoly Act. The new act that came into force on 1 August 1994 shed the previous dogmatic approach towards competition. The Act has minimised state control over market processes to the extent necessary to protect effective competition, and does not impose excessive restrictions on the market participants.

Objectives of the new Antimonopoly Act

The purpose of the new Slovak Antimonopoly Act is to protect competition by eliminating unilateral or concerted actions that unduly restrict competition. However, the new Act does not seek to protect competition in itself, but only competition that contributes to and enhances economic efficiency. Therefore, the new Act attempts to create a balance between the negative effects of restrictions on competition, and their positive effects on the economy (to consumers, in particular). This approach is based on current economic theories, specifically John Clark's theories on markets and effective competition. The fundamental feature of the new Act is the model of consistent economic balance, and its ultimate goal is consumer welfare (i.e. social welfare). Competition must lead to economic progress that

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* The original language of this report is English.

benefits consumers. If economic agents operate in a competitive environment, they are ideally equipped to meet consumer requirements because competition entails optimum allocation of resources. However, it is important to impose some restrictions on competition, especially if they lead to increased benefits to consumers. Hence, the evaluation of all types of restrictions (agreements, abuse and mergers) is based on the balance between the effects of economic efficiency and damages to competition ensuing from such practices. However, it is necessary to note that, besides consumer welfare, there is an additional, secondary objective of the Act, which is to prevent dominant firms from abusing their dominant market position.

Scope of the Antimonopoly Act

The new Act, in principle, prohibits concerted actions restraining competition, as well as unilateral abuse of dominant position in the market. The Act also sets forth detailed provisions to constrain concentrations (mergers and acquisitions). There is no absolute ban on specific anti-competitive agreements. The Act is based on the principle that, if the agreements satisfy the specified criteria, there can be no ban on these anti-competitive agreements. The concept is a blend of prohibition and abuse principles (or in other words *per se* rule and *ex-post* control within reasonable limits). It is logical to presume that an agreement is anti-competitive until the parties prove that all criteria specified by the Act have been satisfied (i.e. the damages to competition are outweighed by the substantial increase in consumer welfare). This approach can be referred to as a "stricter" rule of reason approach (due to the prohibition presumption).

The scope of application of the new Act covers all economic activities, including production, distribution and consumption of goods and services, but excludes those undertaken only for personal use by individuals, since these may not be carried on for profits. It also includes transactions relating to intellectual property rights.

Restrictions on competition are prohibited in all sectors of the economy. However, there are some exceptions where this Act does not apply, exceptions which are covered by special laws. Therefore, industries in general are not exempted from the Antimonopoly Act. There are specific restrictions on competition imposed by special laws which are essential to perform specific jobs by organisations with special rights (e.g. the Act on postal services which established a monopoly for mail delivery) or restrictions that are consequences of state regulation of the industries (e.g. the National Bank of Slovakia Act authorises it to determine the minimum or maximum interest rates for deposits or commercial bank loans, and the Price Regulation Act stipulates special conditions for the pricing of some goods and services).

The Act also applies to the activities of state and local administrative bodies which, in fulfilling their duties, must not prevent, restrict or distort competition. Competition could be restricted by a ministry decree, administrative decisions or direct support to a particular entrepreneur (so-called state aid). But antimonopoly rules for such cases are different, and the Antimonopoly Office is not obliged to take any action against these restraints. Based on evidence and an assessment of the anti-competitive effects, the Antimonopoly Office may require the state administrative authorities or municipalities to initiate remedial actions for their activities (see Article 18).

The Act also assigns specific responsibilities to the state and local administrative bodies in the privatisation process (see Articles 19 and 20). They are required to secure the appropriate de-concentration of the privatised enterprises that were previously in state or municipal ownership. A

competitive market structure is primarily shaped through relevant ministries, and the Antimonopoly Office only renders comments on the proposals for privatisation made by the government.

Regarding the territorial scope of application of the Act, all practices, acts or operations affecting the Slovak market come within the jurisdiction of the law, irrespective of where they were committed or conducted. As a result of this so-called effects doctrine, the Act also covers all foreign activities of local or foreign firms, if they lead to the restriction of competition within the Slovak territory. Due to the restricted territorial scope of the Act, export cartels are excluded, unless otherwise stated by international treaties that are binding for the Slovak Republic.

The Act encompasses various types of entities within the subjective scope of the new Act: entrepreneurs, other individuals, legal or otherwise, participating in market relations, including state-owned firms as well as government and local bodies (when undertaking economic activities, as buyers, for instance). Foreign individuals have the same rights and duties as the local people. Individuals (the public), as the ultimate consumers, are beyond the scope of the Act. Though the term "entrepreneur" is used for each of these categories, it has a different meaning from the one used by the Commercial Code (where it refers to individuals engaged in business activities only with an authorisation to do so). Hence, for the purpose of the Antimonopoly Act, an entrepreneur is each independent entity (capable of independent decision-making) with legal subjectivity, engaging in economic or business activities, and participating in market relations on the supply or demand sides. First, there are companies and businessmen, but the new Act also applies to inventors, artists and authors if they perform any economic activity -- especially when they conclude agreements concerning the transfer of their intellectual property rights to other individuals. The subjective scope of the new Act is also extended to entrepreneurs' associations, since they can take anti-competitive decisions. Public institutions, including the state (state administrative bodies), are also considered to be entrepreneurs, as defined by the Act, provided they are engaged in economic activities (e.g. as buyers in the market). It should be noted that public institutions (state and local bodies) are also obliged to follow the Act while performing their sovereign, administrative tasks.

The substantive scope of the Act encompasses unlawful restrictions on competition and concentrations. The Act declares two kinds of behaviour as unlawful: concerted actions (agreements) that restrict freedom of action to market participants are illegal and invalid, unless justified by the economic balance they entail. Unilateral actions on the part of dominant firms signifying an abuse of their market position are also illegal. On the other hand, concentrations (structural changes in the market) are not prohibited as such, but they are subject to preventive control.

Unlawful restrictions on competition and merger control

There are three types of concerted practices that are referred to as "agreements restricting competition". The Act imposes a ban on agreements, concerted contracts between entrepreneurs and decisions taken by their associations whose objectives are, or are likely to be, the prevention, restriction or distortion of competition. This prohibition covers horizontal as well as vertical restraints. The ban also applies to agreements on transfer of rights, the protected (patents) and unprotected (know-how) subjects of intellectual property rights, and agreements restricting competition are prohibited and invalid, regardless of whether or not they are put into effect.

The Act also provides a list of examples of "bad" agreements, such as those relating to price fixing, market sharing, production limitation, with the assumption being that these cartel agreements will

almost always be prohibited. However, the ban on all agreements restricting competition is not absolute, as they will be prohibited only if they harm consumer welfare. The balancing test consists of four steps:

-- whether the agreement improves production or distribution, or contributes to technical and economic progress;

-- whether users obtain a fair share of benefits;

-- whether restrictions are indispensable for the attainment of benefits; and

-- whether competition (at least potential competition) in the relevant market will not be eliminated by these agreements.

If these conditions are satisfied, then the ban automatically does not apply to the agreements. Thus, the Act does not require any notification of anti-competitive agreements, and the Antimonopoly Office does not grant any individual exemptions. However, entrepreneurs may, if they wish, seek an opinion as to whether their agreement complies with the conditions prescribed for the clearance. The clearance does not procure any exemption for an agreement, but is only a certification that it has been lawful *ex nunc* (from the date of its conclusion). Entrepreneurs are responsible for providing evidence concerning the assessment of the anti-competitive effects of the agreements. If they fail to prove that these conditions have been satisfied, their agreements, whose objective or consequence is anti-competitive, will become invalid and prohibited. The Antimonopoly Office also has the right to require entrepreneurs to prove that their agreements satisfy these conditions on a case by case basis, whenever a substantial restriction of competition is suspected.

The new Act sets forth a general ban on the abuse of dominant position. It includes a new definition of dominant position, based on broader economic criteria, not just on the basis of market share, as it was in the old Act. Dominance is defined as a position in which the firm is not subject to substantial competition, or, as a result of its economic power, it can behave independently. Dominance is also presumed if the firm has 40 per cent of the market share. This can be refuted, however, because an allegedly dominant firm can prove that it has no power in the market.

The abuse of dominant position reveals unilateral anti-competitive conduct. It signifies an "exclusionary" practice, such as predatory pricing, discrimination or refusal to negotiate, that is particularly harmful to competition in upstream or downstream markets. As mentioned above, these provisions also allow the Antimonopoly Office to prevent dominant firms from abusing their economic power. Abuse of dominant position to the detriment of consumers' interests is prohibited (e.g. establishment of unreasonable trading conditions or tying up). However, the extent to which the abuse can be prosecuted is limited and depends on the situation in the relevant market (e.g. where high barriers to entry exist, there is no potential competition). The Act also contains an exhaustive list of examples of abusive conduct, such as: the direct or indirect application of disproportionate conditions in contracts; restrictions on the production, sale or technological development of goods, to the detriment of consumers; or the application of different conditions for equal or comparable transactions to individual entrepreneurs in the market, which constitute a competitive disadvantage.

The Act introduces substantial changes in the field of merger control. It has abandoned the prohibition that was previously imposed on merger agreements and the stipulation of their invalidity. A new term, "concentration", covers mergers and acquisitions of control, including establishment of joint ventures. The Act sets out two minimum thresholds for control -- either an aggregate global turnover of SKk 300 million, or a 20 per cent market share in the relevant product market and in the market within the

Slovak Republic (particularly for certain industries where turnover is difficult to calculate). As a result, the Antimonopoly Office will not control small local mergers. The new Act also simplifies the issue of joint ventures: joint ventures above the specified thresholds will always be subject to merger control if they are "fully-operational" enterprises (which implies that the joint venture involves material and personal funds for its activity, and that it is portrayed in the market as a separate economic entity), even though they would lead to the co-ordination of competitive behaviour between parent companies. This clarification of the joint venture problem institutes a distinction between cartel-type and merger-type joint ventures, which is beneficial to both entrepreneurs and the Antimonopoly Office.

Concentrations above the minimum threshold are subject to preventive control. The parties involved have to notify the concentration within 15 days of conclusion of the agreement or acquisition of control. Finalisation of concentration remains suspended for one month after its notification. Only in special cases (e.g. purchases of shares on the stock market) must the operation be notified after its completion. Administrative proceedings are initiated after submission of the notification and must be completed within one month, or in drawn out cases, within three months.

The criterion for a decision on concentrations, is again, the balance between the anti- competitive effects due to the creation or strengthening of a dominant position in the market and the economic advantages resulting from the concentration. The Antimonopoly Office is required to approve the concentration if the participants can prove that the anti- competitive effects will be outweighed by the economic advantages of the operation (the so-called "efficiency" defence).

Enforcement mechanism of the Antimonopoly Act

Two organisations in the Slovak Republic have primary responsibility for competition policy, namely the Antimonopoly Office and the courts of law. The Antimonopoly Office is a central state administrative body responsible for the enforcement of the Antimonopoly Act. It is headed by a chairman who is appointed by the government, and is authorised to act on behalf of the Antimonopoly Office. The Antimonopoly Office has four specialised executive divisions headed by directors, in charge of particular industries. The responsibilities of the Antimonopoly Office include: control over agreements that restrict competition, concentrations and abuse of dominant market position; supervision of the administrative activities of the state and local administrative bodies whose actions may restrict competition; identification and elimination of barriers to market entry; and promotion of competition in the privatisation process. The Antimonopoly Office has extensive investigatory powers: it may request from entrepreneurs all materials and information necessary for investigation by the Office, particularly business records and legal documents, or it may ask for an oral or written explanation on the spot. The Antimonopoly Office may also request, from other state administrative bodies, materials and information about entrepreneurs that are protected by special laws.

The enforcement of the Antimonopoly Act is accomplished through administrative proceedings conducted by the Antimonopoly Office. Proceedings are governed by provisions in the Administrative Procedure Act, unless otherwise stipulated by the Antimonopoly Act. The Office may initiate proceedings on the petition of an entrepreneur or on its own initiative. Thus, consumers (individuals) do not have the right to request the initiation of proceedings, although they can, of course, bring any matter to the attention of the Office, suggesting that the Office commence proceedings on its own initiative. The Office may stop the proceedings if the petitioner does not complete its petition, does not submit other requested information and documents, does not pay an administrative fee or if the proceedings are not justified or are terminated. In all other cases, the Office is obliged to proceed if the petitioner maintains its request.

The proceedings are inquisitorial, non-public and mostly in written form. If necessary, due to the nature of the case, the Antimonopoly Office can take a decision following an oral hearing, to which the participants must be invited. In all cases, though, before a decision is taken, the participants have a right to make submissions on the subject matter of the proceedings, and on the outcome of investigations carried out by the Office. During the proceedings, the Office may issue a preliminary ruling, if it is necessary to safeguard legitimate interests, or if the execution of the final decision would otherwise be thwarted or seriously hampered.

Following the investigative proceedings, the Antimonopoly Office may rule that the anti-competitive agreement is invalid and prohibited, or that a certain kind of behaviour is prohibited due to an abuse of dominant position. It may also issue a cease-and-desist order with respect to these anti-competitive practices, or prohibit the finalisation of a concentration operation. The Office is entitled to levy a fine on entrepreneurs; it may determine the fine on its own discretion, up to ten per cent of the annual turnover of the wrongdoer. However, if it is proved that the entrepreneur obtained material profit from the breach of a law, the fine must be at least equal to this profit. There are also special provisions in the Act, which set out fines for non-compliance with procedural rules, for failure to comply with a decision of the Antimonopoly Office or a delay in the payment of the imposed fine. It is not possible to impose administrative sanctions (fines) on individuals.

If the participants in the proceedings disagree with the decision of the respective director of the executive division of the Antimonopoly Office, they can appeal to the Chairman of the Office within 15 days of the date the decision was delivered to them. A properly submitted appeal will have a suspensive effect. The appeal is analysed by a special advisory committee that proposes a final decision to the Chairman. The Chairman may confirm, amend or cancel the first decision and return it to the executive division of the Office for a new investigation and decision; in such a case, the director of the executive division is obliged to abide by the legal position taken by the Chairman. The decision of the Chairman is final. However, if the participants still remain dissatisfied with the decision, they may take the matter to the Supreme Court, for a review of the decision from a legal point of view. Its authority ensues from the provisions of the Civil Procedure Code on judicial control of administrative decisions. The action must be brought to the Supreme Court within 30 days of delivery of the Chairman's decision. The action has no suspensive effect on the enforcement of a particular decision of the Office. The Supreme Court will dismiss the action if it finds out that the decision is in accordance with the Act. If, however, the court finds that the decision is not correct from the legal point of view, that the case has not been completely proved or that it is unclear or insufficient, it can cancel the decision and return it to the first investigating division of the Antimonopoly Office. The legal verdict of the court is binding for the Office.

Civil courts are also responsible for the enforcement of the Antimonopoly Act. Only consumers are eligible to bring civil suits in the court and may request the court to order the violating party (i.e. the entrepreneur) to refrain from anti-competitive behaviour or to rectify the violation (to restore previous conditions). Civil law also provides that claims for damages or unjustified material gains be pursued in a court, pursuant to the relevant provisions of the Civil Code. As regards these claims, every injured person (entrepreneur as well as consumer) may bring an action to the respective civil court. State prosecutors and criminal courts are responsible for applying criminal sanctions against individuals responsible for anti-competitive conduct (i.e. violation of the Antimonopoly Act or the Act on Unfair Competition) pursuant to the Penal Code.

Supplementary competition legislation

Besides the Antimonopoly Act, several supplementary laws regulate competition. The Commercial Code contains general provisions on competition, as well as provisions prohibiting unfair competition. The prevention and combat of unfair competition do not come under the purview of the Antimonopoly Office. Unfair competition is a separate Act which is enforced by the courts. The Act protects fair competition in economic activities in the interests of entrepreneurs as well as consumers. Unfair competition is defined as any action in contradiction with the law or custom that threatens or violates the interests of other competitors or consumers (general clause). The Commercial Code contains an exhaustive list of actions that are regarded as unfair competition (e.g. false advertising, deceptive description of goods and services, bribery, discrediting or breach of business secrets). Persons whose rights have been violated or endangered by unfair competitive behaviour may take the matter to court. They may demand that the offender abstain from the anti-competitive conduct and rectify the objectionable situation, compensate the damage or forfeit the unjustified gains.

Although protection of consumers' individual economic interests is closely related to competition, there is a separate act on consumer protection. This act imposes an information duty on salesmen; prohibits the sale of dangerous products, discrimination and deception of consumers; and places some restrictions on advertising (e.g. it prohibits advertising of tobacco products). The Consumer Protection Act is administered by another central state administrative body, i.e. the Ministry of Economy.

Pursuant to the Act on Investment Companies and Investment Funds, an approval of the Ministry of Finance is needed for the establishment, merger or division of investment companies or investment (mutual) funds, or for their takeover by another investment company or fund. The authority of the Antimonopoly Office is applied in a parallel manner.

The Banking Act requires the prior consent of the National Bank of Slovakia for the merger of banks or the acquisition of shares in existing banks by other persons. The Antimonopoly Act is applied in a parallel manner.

The Price Act prohibits the misuse of an economic position with the aim to obtain inappropriate economic benefit from the contracting party (i.e. over-pricing). The Ministry of Finance is responsible for the enforcement of this Act.

The Slovak Republic has also concluded several international agreements relating to competition matters, including co-operation procedures with foreign competition agencies. They are, the Europe Agreement on Association of the Slovak Republic to the European Union and the Central European Free Trade Agreement (parties to the CEFTA agreement are the Czech Republic, Hungary, Poland and the Slovak Republic). All these agreements contain provisions modelled on Articles 85, 86 and 92 of the Rome Treaty establishing the EC and calling for consultation and co-ordination in the event that an antimonopoly investigation in one country is likely to affect the business interests of another country.

Other measures promoting economic competition, including guidelines

The principle of the protection of economic competition is explicitly expressed in Article 55(2) of the Constitution of the Slovak Republic: "The Slovak Republic protects and promotes economic competition". The Antimonopoly Office was established on the basis of Act No. 347/1990 (Coll. of Laws) on the Organisation of the Ministries and Other Central State Administration Bodies of the Slovak Republic. The Authority is a central state administration body responsible for the promotion and

protection of economic competition. In its decision-making process, the Authority complies with the pertinent provisions of the Act on the Protection of Economic Competition and the Administration Code (Act No. 71/1967 of the Coll. of Laws). Personal punishment in the event of abuse of participation in economic competition is laid down in Article 149 of the Criminal Code (Act No. 140/1993 Coll. of Laws).

The Organisation Order, which is issued by the Chairman of the Authority, sets out in more detail the organisational structure, management and operation of the Antimonopoly Office, as well as the internal relations and the external relations to other central state administration bodies. The Negotiating Order stipulates more clearly the activities and conduct of organisational departments of the Authority.

The Authority issues internal methodical standards in the form of methodical guidelines and methodical information. Methodical guidelines are focused to explain and apply individual provisions of the Act on the Protection of Economic Competition. These include, for instance:

-- methodical procedure for the evaluation of mergers and application forms for merger approval;

-- matters related to administrative decisions, protection of commercial secrets and instructions to witnesses;

-- explanation of Article 2(5) of Act No. 63/1991 (Coll. of Laws), which stipulates to which activities the Act does not apply;

-- imposition of fines in case of failure to submit required documents;

-- collection and filing of administration fees; and

-- conditions for the publication of administrative rulings.

Methodical information was focused to provide information on competition policy development and on its implementation in the domestic and foreign markets. The Methodical Department issued a total of 45 studies focused on:

-- translation of decisive EC regulations in the field of competition policy (i.e. Commission Regulation No. 4064/1989 on Concentrations and Regulation No. 17 on implementation of Articles 85 and 86 of the Rome Treaty);

-- translation of foreign competition laws;

-- procedures used by authorities of foreign partners in correcting anti-competitive practices, and examples of decisions;

-- glossary of economic and antitrust terms;

-- approaches for determining relevant markets;

-- the scope of problems related to excessive prices;

-- implementation rules;

-- EC antidumping measures; and

-- access to information from OECD negotiations.

In connection with adoption of the new Act on the Protection of Economic Competition in 1994, the Authority issued four internal methodical instructions. The first concerns the evaluation of concentrations. This methodical instruction stipulates the procedures that the Authority must follow in judging whether or not the concentration will have an impact on competitive conditions. It covers criteria for selecting notifications which are to be approved and those that require the second stage of investigation.

According to the Act, a concentration is a process resulting in a change of structure due to the merger or acquisition of enterprises. These operations are subject to control by the Antimonopoly Office, if two conditions are met simultaneously: A concentration is created by the merger or amalgamation of enterprises, or by the acquisition of exclusive or joint control over an enterprise (thereby establishing a joint venture), and the concentration exceeds the threshold stated in Article 9(1) (aggregate turnover of SKk 300 million or 20 per cent market share). The concentration which meets the above-mentioned conditions must be notified to the Antimonopoly Office within 15 days of the conclusion of the agreement or the completion of the acquisition. The notification is submitted only by the enterprise acquiring control (excluding those merger cases where notification is submitted by all parties). During the evaluation of the concentration, the parties to the concentration are not allowed to take any measures that would lead to irreversible changes. In case of necessity, however, they can ask the Authority for an exemption from this prohibition.

The Antimonopoly Office shall authorise the concentration, authorise it with conditions or prohibit it. To reach a decision, it evaluates the balance between the anti-competitive effects (resulting from the establishment or strengthening of dominant position) and the economic efficiency resulting from the concentration.

Besides making decisions in administrative proceedings, the Antimonopoly Office issues opinions on concentrations or deconcentrations in the privatisation process, particularly with regard to privatisation projects; public tenders for sales of enterprises, or their parts; and direct sales of enterprises or their parts.

If the Antimonopoly Office possesses enough information before the decision of the pertinent bodies showing that no concentration that must be notified to the Authority is going to take place (because the thresholds pursuant to Article 9 are not fulfilled), that there is no negative impact on competitive conditions (the concentration does not create or strengthen a dominant position) and that the economic advantages of concentration outweigh the anti- competitive effects, then the Authority can authorise the transaction. Admittedly, this agreement predicates, but does not replace, the decision on concentration approval issued in the subsequent administration proceeding by the Authority. Any negative opinion must be justified in writing by the officer and approved by the respective executive director to the buyer.

If, however, the Antimonopoly Office does not possess enough information on the impact of the concentration on competition, then the Authority shall not issue its opinion on the selection of the buyer from the point of view of the protection of competition. The Authority shall just state in its opinion that in the event of fulfilment of the criteria pursuant to Articles 8 and 9 of the Act, the operation would be subject to control (approval) by the Antimonopoly Office. Hence, on the basis of Act No. 188/1994, the

Authority is entitled to prevent the concentration and to reverse the result of the public tender or direct sales approved by the government.

The second internal methodical instruction issued by the Authority concerned the questionnaire specifying the information which the parties to a concentration are obliged to forward to the Authority. The third concerned the procedure used by the Authority when launching administrative proceedings with regard to concentrations which defines the parties to such administrative proceedings, informal consultations between the parties to the concentration and the Authority and the procedure for collecting opinions on concentrations from third parties. The fourth instruction concerned abuse of dominant position by imposing inappropriate conditions. This instruction is focused on the procedure used by the Authority when evaluating complaints on inappropriate conditions, particularly in relation to the type of contracts, the evaluation procedures or inadequacy and examples of administrative rulings of the Antimonopoly Office and foreign antimonopoly agencies.

Official proposals to change competition laws and policies

The main task of the Antimonopoly Office in the period under consideration was the preparation of the new Antimonopoly Act. After two years of efforts to convince legislators, the Office successfully completed its work in 1994. Based on the proposal of the Antimonopoly Office, the Act Cancellation of the State Monopoly of Tobacco and Salt Enterprises was also approved by the Parliament on 31 May 1994. The Act removed the legal restraints on entry into the markets for tobacco production and restraints on the mining and processing of salt. Thus, the Act creates conditions for free competition in these industries.

Since 1993, the Antimonopoly Office has been attempting to convince the Slovak Government and Parliament to adopt the Act on the Regulation of Natural Monopolies. The purpose of the bill is to remove existing shortcomings and to unify the legal, economic and organisational preconditions for the regulation of natural monopolies (i.e. the generation, transmission and distribution of electricity, heat, gas and water, as well as telecommunications). An additional goal is to create favourable conditions for the development of a competitive environment. The aim is to encourage the natural inclination of entrepreneurs towards greater efficiency and superior quality of their supplies for the benefit of customers. The Office considers the adoption of this Act to be one of the main preconditions for the success of the privatisation process and the restructuring of these industries. On the contrary, different views were incorporated in the bill on energy policy, prepared by the Ministry of Industry. This proposal contains some regulatory factors, but it specifically preserves the state monopoly for the future period, which has been eliminated in developed market economies (i.e. regulation of electricity generation is not considered a natural monopoly). The Office also provided comments on the proposed Act on telecommunications policy.

At the end of 1994, the Office submitted a draft of the main principles of auctioning licences, at a session of the Government of the Slovak Republic. This draft proposes that individual ministries organise sales of licences by auctions, after verifying all the legislative procedures (e.g. revision of decrees, etc.). It is hoped that this system can be applied in 1995, especially in areas where valid laws do not allow for such an action. Some concrete action can be expected once the act being prepared by the Antimonopoly Office has been passed. The main thrust of this bill lies in the redistribution of budgetary income from companies operating in a competitive environment to income accruing from monopoly rents. The Office considers this decision to be more economically effective, more convenient from the standpoint of support for the creation of a competitive environment and social justice. Licence sales by auction are

also proposed in the fields of gambling, lotteries, mining of raw materials, broadcasting, exports and imports, environmental pollution, transport and telecommunication services.

The Antimonopoly Office regularly comments on every law and other legal regulatory proposals prepared by other state administrative bodies for the government before being submitted for the approval of the National Council (parliament) of the Slovak Republic. The Office provides positive comments if the proposed legal regulations do not restrict competition by creating barriers to market entry or exit, or if they do not lead to the discrimination of certain categories of enterprises or do not have any anti-competitive effects.

Specifically, the Office took a negative stand on the proposed Price Act, which the Ministry of Finance submitted for comments in February 1994. The draft contained provisions that would lead to substantial state interference in pricing and would allow price regulation on the basis of what was explained as "the undeveloped market economy" in the Slovak Republic. In its comments, the Office started from the fact that price liberalisation is a basic precondition for the development of competition and a market economy. Further work on this draft was stopped.

In its comments on the Act Adjusting the Activities of the Accident Insurance Company, the Office did not agree with the establishment of a monopoly accident insurance company as a public institution or with the temporary functioning of one of the insurance companies already active in the market. Despite this, the Parliament adopted the Act, and on that basis one of the existing insurance companies was chosen to provide these activities on a temporary basis as a monopoly, until a monopoly accident insurance company is established. Thus, the selected insurance company gained an advantage in its competition with other insurance companies.

The Office analysed existing laws regulating the activity of professional associations and chambers. The Office came to the conclusion that certain existing laws restrict competition through barriers to entry into a profession and by creating restrictions in pricing freedom. For example, lawyers and patent agents do not have equal conditions to enter the market (due to experience and citizenship requirements, etc.). The Office proposed that the relevant central state bodies amend these laws, but with no success.

II. Enforcement of competition laws and policies

Antimonopoly institutions

The Antimonopoly Office is a central state administrative body responsible for the promotion and protection of economic competition. It was established by the Act of the National Council of the Slovak Republic in 1990. The Chairman of the Office is appointed by the Slovak Government. The Office is independent in its activities, restricted only by the Act. The seat of the Office is Bratislava, with regional offices in Banská Bystrica and Kosice.

The activities of the Office are defined by the Act on the Protection of Economic Competition, especially in the following areas:

-- agreements restricting competition;

-- abuse of dominant position;

-- merger control;

-- supervision over interference of state administrative bodies and municipalities in the field of economic competition;

-- support of competitive conditions created in the privatisation process; and

-- identification and elimination of other barriers to economically competitive activities.

The internal structure of the Office includes four specialised executive divisions: one unit for methodical issues, one division for legislation and regulation, one division for information and administration and a secretariat

Actions against anti-competitive practices

Summary of activities of the Antimonopoly Office, the Court and other bodies, against restrictive business practices

Summary of activities

From its incorporation through 1 January 1995, the Office handled 207 cases of anti-competitive practices in administrative proceedings. One hundred twenty-four cases involved abuse of dominant position in the relevant market, and 83 cases involved anti-competitive agreements. In accordance with the Act on the Protection of Economic Competition, the Office also examined other forms of restriction of competition, and issued decisions or asked the relevant body to rectify the situation.

Table 1

Cases handled during the period 1991-1994

	1991	1992	1993	1994
Number of cases resolved by administrative proceedings:	50	66	42	49
-- abuse of dominant position	44	18	30	32
-- anti-competitive agreements	6	48	12	17

During the period under review, the Supreme Court reviewed four cases violating the Act on the Protection of Economic Competition (namely OMV-Benzinol, Incheba, Slovnaft-Benzinol and a cartel agreement among Slovak cement producers). Until now, the Supreme Court has confirmed all decisions of the Antimonopoly Office. In the case of the cartel agreement of the Slovak cement producers, the Court has already upheld the original decision.

The total fines amount to SKk 25 010 million, including fines on the abuse of dominant position and for anti-competitive agreements of SKk 1 050 million and SKk 23 960 million respectively. In the

initial years of its operation, the Office did not apply any harsh sanctions due to the newness of the issues, instead directing its attention to explaining principles regarding the protection of competition to entrepreneurs.

Abuse of dominant position

The application of effective deconcentration in the privatisation process and liberalisation of foreign trade have led to positive changes in the competitive market structures of the Slovak economy. Gradually, the number of monopoly and dominant entities is decreasing. Similarly, as in foreign countries, monopoly positions are gradually narrowed into the area of so-called natural monopolies. In the most recent years, the number of cases of abuse of dominant position has decreased. The old act distinguished between a monopoly and a dominant position on the basis of whether an entrepreneur was exposed to substantial competition (a dominant position) or was not exposed to any competition at all (a monopoly position). A market share greater than 30 per cent in the relevant market was considered a dominant position. A new act, valid from 1 August 1994, deals only with dominant positions and takes a cue from the economic definition of dominance. An enterprises is considered as occupying a dominant position in the market if it is not exposed to substantial competition or if, as a result of its economic power, it can behave independently in relation to other entrepreneurs or consumers and can restrict competition. A dominant position is presumed when the market share is greater than 40 per cent. This presumption can, however, be refuted.

Initiatives on possible abuse of dominant position have been extended. Until 1991, only the Antimonopoly Office could commence initiatives, while now initiatives can be brought by private entrepreneurs, state companies or municipalities. In 1994, the Office investigated three cases on its own initiative and nine cases on external complaint. In some cases, the proceedings were stopped due to the cessation of unauthorised proceedings, unjustified complaints or transfer of the matter to another central state administrative body. Some cases were settled during proceedings, and one case was resolved by an agreement. In some cases, the Office issued a decision stating that abuse of dominant position had not occurred.

The important question for the Office is the definition of relevant market. In many cases, the definition of relevant market was the subject of review in appeal proceedings or in the Supreme Court (i.e. the cases of OMV-Benzinol, Incheba). The Act covers both individual and collective dominance. The Office has yet not judged any cases of a collective abuse of dominant position. The total amount of fines imposed due to abuse of dominant position was SKk 1 050 million.

Table 2

Cases examined during the period 1991-1994

	1991	1992	1993	1994
Abuse of dominant position	44	18	30	32

Anti-competitive agreements

Agreements and concerted practices by enterprises, as well as decisions by associations of enterprises that restrict competition, are prohibited, because they restrict the decisive independence of entrepreneurs to acquire advantages that are detrimental to other entrepreneurs or consumers. The Act covers both agreements between competitors (horizontal agreements) and agreements between enterprises operating in linked markets (vertical agreements). In general, the Office took a more liberal view on vertical agreements because of their lesser effect on competition. In addition to oral and written agreements between enterprises, concerted practices are also prohibited, i.e. the conscious co-ordination of market behaviour that did not lead to an agreement, but which cannot be considered as a natural consequence of competitors' practices.

If competition exists in the market, firms try to gain customers by improving quality and lowering prices compared to other competitors. Therefore, the Office followed and intervened in agreements and concerted practices that tended to lead to price fixing, market sharing among competitors, artificial restriction of production and sales and the application of discriminatory conditions that have negative effects on consumers and customers.

The Office handled a total of 83 cases concerning anti-competitive agreements in administrative proceedings. Within the scope of the old act of 1991, the Office rendered decisions to prohibit certain cartel agreements or granted exemptions from prohibition.

Table 3

Cases examined during the period 1991-1994

	1991	1992	1993	1994
Anti-competitive agreements	6	48	12	17

The Antimonopoly Office also examined certain matters on its own initiative. Anti-competitive agreements concerned in particular price fixing, market sharing and barriers to market entry. To date, the most significant case has been the cartel agreement among the Slovak cement producers on market sharing and exchanges of information, which resulted in concerted practices in price fixing. In this case, the Office imposed the highest fine ever of SKk 19 960 million.

Major cases -- restrictive business practices

Abuse of dominant position

In the period under review, the most common cases of abuse of dominant position that were examined by the Antimonopoly Office concerned the imposition of unreasonable contract conditions, tied sales and application of different conditions to different parties for equivalent transactions.

Imposition of unreasonable conditions in electricity supply

The joint-stock company Kysucká Iozisková fabrika-Závody na vyrobu valivych lozísk Kysucké Nové Mesto (KLF), a beating company, filed a petition for administrative proceedings against Stredoslovenské energetické závody (SSE), a state-owned energy manufacturer, based on the fact that this electric power supplier had tied the signing of the contract for electric power supply to the takeover of the joint-stock company Závody na vyrobu valivych lozísk Kysucké Nové Mesto (ZVL) and to the payment of sums due to SSE, which included debts exceeding SKk 13 million.

To clarify the situation of SSE (SSE is a monopoly supplier of electric power in the relevant market), it is necessary to look back to the period before the privatisation of the state enterprise ZVL Kysucké Nové Mesto. During the period 1990-1992, large investments were made in ZVL, and these investments had placed such a heavy burden on the enterprise that it was no longer able to carry out its usual activities, while simultaneously servicing its debts. Later, the enterprise was included on the list of first-wave privatisations through coupon distributions. Subsequently, the banks that were ZVL's principal creditors forced ZVL to fulfil its obligations and proceeded with the collection of their receivables through the sale of the company's mortgaged assets in a public tender under the Civil Code.

The newly established joint-stock company KLF-ZVL Kysucké Nové Mesto won the tender and concluded a purchase contract with the company. With this, KLF acquired ZVL's pledged assets, and, at the same time, KLF assumed the commitments with respect to the bank's and the debts to the tax authorities. KLF did not, however, take over any of ZVL's other commitments, and hence, not even the commitment to SSE. It must be pointed out that, after all this, ZVL did not cease to exist, and the assets left to shareholders amounted to SKk 55 million. However, along with this, substantial payments due to a number of creditors continued to be ZVL's responsibility.

The debt towards SSE for electric power supplies in 1992 represented part of the amounts ZVL still had to pay. During negotiations concerning the conclusion of the electric power supply contract with the newly established KLF, SSE sought to ensure the payment of that debt. SSE inserted a clause into the contract that KLF will assume the obligation to pay ZVL's debt. However, KLF considered this procedure an abuse of monopoly position, and asked the Antimonopoly Office for protection against such conduct, as this may lead to severe economic damages. Hence, due to the reasons mentioned above, both enterprises signed the contract for a limited period of time (i.e. for March and April 1994), with a clause stipulating that in case KLF's Supervisory Board does not accept SSE's demands, electric power supplies will be discontinued from 30 April 1994. SSE, on the other hand, explained its attitude by stating that it protected the interests of the State, and by its observance of good business practices. SSE suggested that this case could set a serious and dangerous precedent for the future.

For KLF, on the other hand, this would lead to extensive damages and the inability to meet the goals set for 1994. Under such circumstances, the Antimonopoly Office, in compliance with the Act on the Protection of Economic Competition, temporarily regulated the legal relationship between the parties by issuing tentative orders that SSE supply power to KLF, pending a final decision in this matter, and follow the contract amounts specified under the contract of March 1994. Later, in June 1994, after a thorough investigation, the Antimonopoly Office issued an order prohibiting SSE from abusing its monopoly position and requiring it to sign the electric power supply contract with KLF. For breach of duties ensuing from Article 9(a) of Act No. 63/1991 (Coll. of Laws) on the Protection of Economic Competition, the Office imposed a fine amounting to SKk 250 000 on SSE, Zilina. The position adopted by SSE was considered as imposing inadequate conditions on the other party, KLF, which, as a result, suffered losses and was disadvantaged against its competitors.

This decision was appealed by SSE, to the Chairman of the Office. SSE sought to have the entire decision reversed, because it cannot be proved that any abuse of dominant position had been committed. The Chairman of the Antimonopoly Office rejected SSE, Zilina's appeal, and confirmed the challenged decision in its full extent. This second decision was appealed by SSE in the Supreme Court.

Applying dissimilar conditions against exhibitors

In 1992, the Antimonopoly Office started administrative proceedings as a result of a complaint filed by Exposervice, v.o.s. The complaint was directed against Incheba, ú.s., Bratislava and alleged the violation of Article 9 of Act No. 63/1991 (Coll. of Laws), which prohibits behaviour possibly constituting unjustifiable coercion of economically weaker partners with the aim of acquiring undeserved economic profit.

In this case, the definition of relevant market posed an interesting problem. The Antimonopoly Office defined the relevant market very narrowly as the Incheba International Chemical Fair, in consideration of the following facts: ICHF Incheba is the only chemical fair organised in the Slovak Republic for the chemical and processing industries. It is attended by experts, chemical companies and the public. Due to the special focus of this fair (namely chemical production), its long tradition and its regularity (it occurs once per year), it has no possible substitute, it is unique in certain ways and exhibitors have no alternative in terms of focus, tradition, importance and commercial significance. The exhibitions and fairs with similar focus and importance, which are organised abroad, cannot be considered as alternative solutions by exhibitors, because the participation costs are significantly higher.

ICHF Incheba is organised in Bratislava, the capital of the Slovak Republic, on a net exhibition area of 20 000 m^2. A large number of exhibitors participate in it. In 1992, there were 240 domestic and 223 foreign exhibitors from 26 countries.

High barriers to entry exist for the given market because of the expertise, qualifications and skills required by personnel for the organisation of these fairs and exhibitions. Under the conditions prevailing in the Slovak Republic, competitive firms can be established through, in particular, divestitures of some groups of employees in large, previously state-owned enterprises. The strong position of these companies is, to some extent, the result of the concentration concept applied in the field of the organisation of exhibitions, which was ensured by large state-run enterprises. These huge undertakings sought to strengthen their positions by preventing new competitors from entering the market. In the Slovak Republic, Incheba, ú.s., is the largest company which organises exhibitions and fairs and renders other services in this field. In 1991, it earned a profit of SKk 147.2 million for a turnover of SKk 399.2 million, which represents substantial market power.

During the administrative proceeding of Exposervice against Incheba, it was proved that one of Incheba's activities consisted of rendering services related to the arranging and organising of fairs and expositions.

Based on the investigation of submitted agreements and written documents, as well as the hearing of the parties, it was revealed beyond dispute that Incheba had applied different conditions concerning participation and the technical realisation of particular stands at the Incheba International Chemical Fair 92 and Intertech 92 with regard to exhibitors, if they ensured the technical realisation of their stands through a contract with Exposervice. Incheba forced exhibitors to withdraw their participation in the exhibition if they did not cancel the agreement with Exposervice and place an order for technical realisation with Incheba itself, or with another enterprise, despite the fact that the exposition projects

prepared by Exposervice complied with the technical and safety regulations and the adopted architectural solution. Moreover, according to the General Participation Conditions that were in force in 1992, only these two conditions authorised Incheba, as the managing company, to approve companies for technical realisation.

As a result of such conduct, exhibitors and, consequently, Exposervice faced an unfavourable position with regard to economic competition. The disadvantage to the exhibitors lay in the restriction of their choices of businesses which carry out the technical realisation of expositions. The disadvantage to Exposervice emanated from its exclusion and the discrimination it faced in the supply of technical realisation services for expositions in fairs and exhibitions.

The above-mentioned facts prove that Incheba applied different conditions for participation and technical realisation for exhibitors at the exhibitions. Incheba's behaviour violated Article 9(3)(c) of Act No. 63/1991 (Coll. of Laws), which prevents enterprises from benefitting from a monopoly or dominant position and from abusing their dominant power to the detriment of other enterprises or consumers or at the expense of public interest by applying different conditions for equivalent or comparable transactions, thus placing competitors at a competitive disadvantage.

The case was closed on 5 May 1993. The Supreme Court reviewed the decision of the Antimonopoly Office, and rejected the lawsuit filed by Incheba which had called for the review and nullification of the legal decision.

Anti-competitive agreements

In the period 1991-1994, horizontal agreements prevailed. Horizontal agreements concern agreements among competitors or agreements attempting to co-ordinate the activities of competing firms. Agreements on prices and agreements preventing potential competitors from entering the market were the most frequent intentions and goals of the anti-competitive agreements.

Price-fixing agreements and concerted practices

i) Agreements on the application of uniform sales prices

From the perspective of the number of parties to a cartel agreement on prices, an interesting case was resolved by the Antimonopoly Office in 1992. Forty agricultural co-operatives had concluded an agreement on the implementation of uniform sales prices on animals for slaughter, supplied to the state-run slaughterhouse at Presov. The minutes from the negotiations of the representatives of the parties to the agreement represented the necessary evidence. The conclusion and application of the agreement were also confirmed by written explanations of the parties to the proceeding.

ii) Concerted practice in setting sales prices for fuel

At the beginning of 1993, the Antimonopoly Office prohibited Benzinol, a.s., and Slovnaft, a.s., from applying a cartel agreement on fuel prices. In this case, the market was defined as fuel sales in the Slovak Republic, which represents a very highly concentrated market with Benzinol capturing 65 per cent and Slovnaft 25 per cent of the market share. The third competitor in the market was the OMW company.

The Antimonopoly Office got involved in this case on the basis of information that, on 31 December 1992, representatives of Slovnaft, a.s., and Benzinol, a.s., had met to negotiate the sales prices for fuels which were to be enforced from 1 January 1993. As of 1 January 1993, both sellers had increased fuel prices to the same level. Based on the above-mentioned information, it became obvious that this was not a natural imitation of competitor prices in the market. An investigation revealed that the representatives of Slovnaft and Benzinol responsible for pricing had met personally in order to exchange information on future fuel sales prices. During the negotiation, they had discussed various alternatives of price increases and their economic impact on both parties.

Although the negotiation did not end in an agreement on uniform prices, it did result in both participants applying the same sales prices of fuels in the market from 1 January 1993. Keeping in mind the other facts (i.e. a highly concentrated market, personal meetings with the intention of immediately responding to the partner's standpoint, negotiations regarding future prices and lack of necessity to agree upon equal sales prices), this exchange of information can be judged as an illicit concerted practice. The Antimonopoly Office came to the conclusion that Slovnaft and Benzinol had concluded a cartel agreement in the form of mutual understanding (concerted practice) in setting sales prices for fuels, and imposed a fine on both parties involved in the agreement, of SKk two million each. The Supreme Court confirmed the decision of the Antimonopoly Office on 28 April 1994.

Agreements preventing other enterprises from entering the market -- cartel agreement among Slovak cement producers

In March 1994, the Antimonopoly Office issued a decision prohibiting all Slovak cement producers (i.e. Hirocem Ltd., Rohozník; Stredoslovenská cementáren, state enterprise, Banská Bystrica; Cemmac, Ltd., Horné Srnie; Povazské cementárne, state enterprise, Ladce; Cementáren Lietavská Lúçka, Ltd.; Zeocem, state enterprise, Bystré; and Cementáren, state enterprise, Turna) from concerted practices leading to the division of the market and the setting of quotas for cement sales. They were also prevented from regular mutual exchanges of information on essential economic indices which, owing to their nature, could lead to co-ordinated practices in setting cement prices in the Slovak Republic and the subsequent restriction of economic competition in the relevant market. At the same time, the Antimonopoly Office imposed the following fines on the above-mentioned enterprises: Hirocem, Ltd., Rohozník -- SKk 7.3 million; Stredoslovenská cementáren, state enterprise, Banská Bystrica -- SKk 2.85 million; Cemmac, Ltd., Horné Srnie - SKk 1.48 million; Povazské cementárne, state enterprise, Ladce -- SKk 3.36 million; Cementáren Lietavská Lúçka, Ltd. -- SKk 1.72 million; Zeocem, state enterprise, Bystré -- SKk 0.9 million; and Cementáren, state enterprise, Turna -- SKk 2.35 million.

During the investigation, it was proved, based on written documents (such as minutes from the regular meetings of the directors of the enterprises in question), expert witnesses and thorough analysis of written documents, that the enterprises in question had engaged in cartel agreements over a period of at least two years. It was proved that, in the summer of 1991, the parties had agreed upon the regular mutual exchange of essential economic indices concerning their companies. The authorised employees of the enterprises compiled survey tables containing data on production, costs, exports, inventories, profits, number of employees and average wages and salaries. This data was initially reported on a quarterly basis and, later, monthly, to an agreed reporting place, where aggregate tables from all cement factories were compiled. These tables were then presented to the directors of individual factories. It was also proved that within the same period of time a mutually established consulting firm prepared documents proposing the geographical division of the market amongst individual cement factories and suggesting quantity quotas for each cement factory. Those documents also proposed other principles that, if enforced, would unambiguously entail the restriction of economic competition in the entire market of the Slovak Republic.

These proposals suggested that a region with a cement factory will be exclusively supplied by that cement factory, and in the other regions one major supplier will be designated with which other suppliers interested by the same market may agree upon the quantity and price of the cement marketed).

Within the statutory limits, the parties appealed this initial decision, and the Chairman of the Antimonopoly Office had to take the final decision in this case. He confirmed the original decision of March 1994, to its fullest extent, including the imposition of fines. This decision will be reviewed by the Supreme Court.

The total amount of the fines levied in this case (SKk 19.96 million) represents the highest penalty imposed by the Antimonopoly Office for breach of the Act on the Protection of Economic Competition.

Mergers and concentrations

Concentrations

During 1991-1994, the Antimonopoly Office evaluated a total of 123 concentration projects. Thirty-five of them were completed by issuing decisions. From the number mentioned, there were two cases where concentrations were not approved, three cases where concentrations were conditionally approved, three cases in which the proceedings were terminated because the concentrations were not subject to the approval of the Authority and one case in which a preliminary measure was issued. In the other 26 cases, the concentrations were approved without conditions. On the whole, in the 1991-1994 period, 30 concentration operations were approved.

Table 4

Sectors in which concentrations occurred

Industries	**25**
-- engineering	5
-- metallurgy	1
-- civil engineering	2
-- ceramics	1
-- electro-technical industry	3
-- automobile industry	2
-- chemical industry	4
-- food industry	2
-- tobacco industry	2
-- paper industry	1
-- wood industry	1
-- polygraphic industry	1
Generation and distribution of electricity, gas and water:	**2**
-- gas industry	1
-- electricity supply	1
Communications:	3
-- radiocommunications	1
-- telecommunications	2

Table 5

Types of concentrations

Total number of concentrations approved	30
-- vertical concentrations	1
-- horizontal concentrations	29
-- purely Slovak undertakings	2
-- undertakings with foreign participation (joint ventures)	28

Since 1991, the number of notified concentrations was conspicuously influenced by the privatisation of old state-run enterprises. In the privatisation process and the entry of foreign capital, the cases examined represent proposals of concentrations of undertakings or parts of undertakings and the establishment of joint ventures. The Antimonopoly Office drew special attention to the evaluation of concentrations in cases where the dominant and monopoly positions of enterprises or the strengthening of their positions could have significant anti-competitive effects. The proposed Slovnaft-Benzinol merger, entries of foreign capital into the engineering, chemical, tobacco and telecommunications industries can all be regarded as concentrations in that category.

Table 6

Concentrations evaluated by the Antimonopoly Office in the years 1991-1994

	1991	1992	1993	1994	Total
Total number of notifications	51	40	10	22	123
Notifications before implementation	40	32	3	17	92
Notifications after implementation	11	8	7	5	31
Cases completed by a ruling	11	8	10	6	35
Ruling on approval without conditions	9	5	7	5	26
Ruling on conditional approval	-	3	-	-	3
Ruling on precautions	-	-	-	1	1
Total number of concentrations approved	-	-	-	-	30
Ruling on disapproval	2	-	-	-	2
Ruling on termination of proceedings (1)	-	-	3	-	3

(1) Concentrations which, due to the small aggregate market share, were not subject to the control of the Authority within the scope of the Act.

Description of significant cases

The cases described below were evaluated according to the Antimonopoly Act in effect from 1991 that prohibits the conclusion of every agreement on mergers or acquisitions of control, if parties to the agreement hold a market share exceeding 30 per cent. These agreements require approval by the Antimonopoly Office to become valid. The Office approves a merger if the anti-competitive effects were outweighed by the economic advantages of the merger.

MEZ, a.s. Michalovce/Siemens AG, Germany

In the process of restructuring the former state-owned company MEZ Michalovce, a dominant producer of electric motors for washing machines and for other uses, the Slovak company MEZ, a.s. Michalovce, and the German company Siemens AG Munich, set up two joint ventures: MEZ, s.r.o. Michalovce and Siemens Automotive s.r.o. Michalovce. These agreements required the approval of the Office as merger agreements. The Office combined these cases into a single set of proceedings and approved the agreements on the basis of the following conclusions, which were arrived at after an investigation. There was capital sharing and personal interaction between the parent companies in both

joint ventures. The first joint venture agreement led to the strengthening of the dominant position of MEZ, s.r.o. in the market for electric motors for washing machines. On the other hand, the economic advantages of the agreement outweighed the potential anti-competitive effects. The advantages are specifically: an increase in the projected turnover in the years 1993-1996, a prerequisite for reducing production costs as a consequence of increased production, an opportunity to improve the price/quality ratio of electric motors for washing machines because of the high innovative ability of the joint venture, a guarantee of delivery to customers without delay, as well as a strengthening of the competitive ability in foreign markets by using the brand name of the foreign partner.

The second joint venture will produce and sell electro-technical systems and components for household appliances and develop automobile technology. From 1993 to 1994, the company manufactured tachogenerators, stators for universal motors, dish-washing stators and motors for drying machines. By assessing the possible impact of the merger on competition in the relevant markets, the Office stated that the company would obtain a dominant position in the relevant markets. The potential for entry is significantly limited, because of high capital investment and the limited access to technologies for the products concerned. In its analysis of the consequences of the merger, the Office stated that the joint venture offered such advantages as increased competitiveness in foreign markets, the feasibility of entry to the extensive market of Ukraine and the countries of the former Soviet Union, a higher volume of electro-technical production using progressive technology, flexibility in the fulfilment of demand in an unsaturated market, more effective service for the products demanded and the allocation of highly qualified electro-technical production by the employees in the Slovak Republic.

As for the evaluation of the anticipated effects and possible impacts on competition, in both cases the Office concluded that the damage caused by the restriction on competition in the relevant markets would be significantly outweighed by the economic advantages resulting from the creation of the joint venture. For this reason, the agreements were fully authorised.

Eurotel joint venture

On the basis of the proposal submitted by the Administration of Post and Telecommunications, Prague, state enterprise, the Administration of Post and Telecommunications Bratislava, a state enterprise (SPT) and Atlantic West, B.V. Amsterdam, the former Czechoslovak Federal Office for Economic Competition (FCO) carried out the proceeding that was initiated for the approval of agreements establishing the joint ventures Eurotel, Ltd. Praha and Bratislava. The FCO evaluated these agreements as mergers under Article 8 of the Act and approved them on the condition that the parties not fully apply the non-competition clause of the agreement because it would prevent the access of third parties to the single Slovak telecommunications network administered by SPT.

The Supreme Court of the CSFR repealed the decision of the FCO and submitted the case to the Czech Ministry for Economic Competition in Brno and to the Antimonopoly Office of the Slovak Republic in Bratislava, as the competent authorities. According to the Court, the competent office was obliged to evaluate the submitted agreement and decide on its validity with regard to the inter-temporal provisions of the Act, because the agreement had been concluded before the Act came into force. The Antimonopoly Office of the Slovak Republic concluded that the agreement for establishing the Eurotel joint venture was a merger that restricted competition, and was therefore subject to control by the Office.

The joint venture is intended to ensure the rendering of services in the field of cellular radio-telephones and packet data networks. Slovak Telecommunications, a state enterprise, Bratislava (the former SPT), which provided radio-telephone services as a monopolistic supplier in the Slovak market,

was also a potential competitor in data services. Although Atlantic West had no share in the Slovak market, it was a potential competitor in these relevant markets as well, because its founders U.S. West and Atlantic Bell are potential competitors of SPT. Eurotel is jointly controlled since the approval of both parent companies is needed for decisions regarding the operation of the enterprise. The parent companies decided not to compete with the joint venture in the future, as this would lead to the reduction of the number of competitors in the relevant markets. This arrangement was considered indispensable for the merger and for the normal functioning of the joint venture. The agreement also includes an article which can be interpreted as preventing Slovak Telecommunications from connecting third parties to the single telecommunication network, which is necessary for each public radio-telephone and public data network. However, during the hearing before the Antimonopoly Office, the parties declared that this provision did not prevent any third party from rendering technical services of interconnection to any third party possessing the valid licence for the operation of a wireless telephone network, and the interconnection would be based on common non-discriminatory commercial conditions.

Although the establishment of the joint venture led to the creation of a monopolistic position for Eurotel in these markets, the Antimonopoly Office concluded that the establishment of a joint venture brought substantial economic advantages. Both services are needed for the overall development of the economy, and they must be developed as quickly as possible. To do so, substantial investments, know-how and co-operation with the administrator of the single telecommunications network are needed. It was not possible to arrange for these services more effectively in any other way. Therefore, the Office came to the conclusion that these advantages of the merger would outweigh the drawbacks ensuing from the restriction of competition, and thus, the Office issued the decision that the agreement for establishing the Eurotel joint venture is valid.

III. The role of the Antimonopoly Office in the formulation and application of other policies

The Slovak economy is going through a phase of economic transformation, during which state administrative regulations will be replaced by a competitive mechanism. The Authority considers the competitive mechanism to be the best tool for global market regulation. Therefore, in its opinions on the proposals for economic policy measures and their subsequent implementation, the Authority emphasised the following recommendations:

- -- reduction of state administrative interventions and extension of areas open to competition;
- -- efficient deconcentration measures in the privatisation process, which is fundamental to the creation of natural competitive structures;
- -- free market entry and liberalisation of foreign trade; and
- -- advice to ministries, other central state administrative bodies and municipalities that they must not restrict competition through their measures.

The role of the Authority in regulation

Since its incorporation, the Authority has stood for restriction of regulation and extension of competitive conditions in the individual sectors of economy. In this direction, the Authority conducted the following legislative activities:

-- the act abandoning the state monopoly of the tobacco and salt enterprises.

-- the Act on the Regulation of Natural Monopolies.

-- the draft of the definition of the main principles for licensing by auction.

-- initiative concerning the government's resolution on public procurement.

-- passive legislation: the Authority comments on bills and other legal regulatory proposals that are prepared for approval by the government and by the National Council and other state administrative bodies. The Authority provides positive comments if the proposed legal regulations do not lead to the restriction of competition by creating barriers to entry or exit, if they do not lead to the discrimination of particular enterprises or if they do not adversely influence economic competition in any way. Some examples include the Price Act, the Act Governing the Activities of Accident Insurance Companies, the proposed Act on Legal Executors and Executory Activities, etc.

The Authority also analysed legal regulatory proposals amending activities of some professional associations and chambers. The Authority came to the conclusion that some of them contained two practices that restricted competition: restraints on entry into the relevant profession and restraints on the freedom of pricing. For instance, in the case of counsels, commercial lawyers and patent attorneys, unequal conditions for entry into the market existed (in the form of required practice, citizenship and exclusions). The Authority suggested to the relevant central state administrative bodies that they prepare amendments to these regulations.

The regulation of natural monopolies is currently not covered by any particular law. It is carried out by the Ministry of Finance, the respective supervisory ministries and the Antimonopoly Office as far as the abuse of dominant position is concerned.

The role of the Authority in industrial policy, privatisation and restructuring

A draft on the concept of industrial policy, prepared by the Ministry of Economy, is under discussion in the Slovak Republic. The Antimonopoly Office was established primarily because the goal of industrial policy should be to encourage the ability of enterprises to face competition. The Authority firmly believes that industrial policy should not be viewed as the direct support of individual sectors, but as the creation of general conditions for the promotion of innovation, competitiveness and open markets by supporting export efficiency and the quality of infrastructure. Taking into account the structure of the domestic market, the important prerequisite for the creation of a competitive environment and the competitiveness of domestic products is the liberalisation of economic relations. The Authority can actively participate in the creation of competitive structures in the privatisation process and in the assessment of concentrations. The Authority gave its opinion on the concepts of sector privatisation and on privatisation projects of individual undertakings.

The privatisation process offers a unique opportunity for the dynamic market mechanism to create a favourable ownership structure as well as a complete organisational structure. The aim of effective deconcentration and demonopolisation measures applied by the Antimonopoly Office was to develop conditions for an effectively operating competitive environment. In assessing privatisation projects, a case-by-case approach was applied, taking into account the future effects of international trade liberalisation, i.e. entry of foreign entrepreneurs into Slovak market as well as the influence of Slovak economic agents on foreign markets.

The legal framework of the activities of the Antimonopoly Office in the privatisation process is set forth in Act No. 188/94 (Coll. of Laws) on the Protection of Economic Competition and Act No. 92/1991 (Coll. of Laws) on Conditions Concerning the Transition of State Property to Other Persons (the so-called Act on Large-scale Privatisation), as amended by applicable regulations. Under these laws, the Authority is obliged to deliver its opinion on the draft privatisation projects proposed by the supervisory ministry from the standpoint of effective deconcentration. The Authority acts exactly in the same way as the Ministry of Administration and Privatisation of National Property of the Slovak Republic when it amends the conditions of an effective deconcentration in the process of appraising a privatisation project. In 1994, the Authority worked these provisions into the Concentration Guidelines, which also deal directly with the issues of direct sales and public tenders in privatisation.

The approach of the Authority was towards designing the privatisation process in such a way that the transition of property could be accompanied by the appropriate restructuring. Thus, it involved not just the "division" of privatised entities. Nevertheless, some proposals did not adhere to the specified criteria, and the Authority did not accept them and suggested other solutions (e.g. privatisation of the Interhotel Tatry, a state enterprise, the wine industry, the Slovak Electrical Industry, state enterprise, and the Slovak Savings Bank, Ltd.).

The role of the Authority in trade policy

Competition policy tends to create competitive market structures and hence establishes a close link with trade policy. This can sometimes, especially from the standpoint of short-term effects, lead to various types of conflicts.

Implementation of import restrictions at the national level can create restraints for competitive action. The conflicting effects at the international level are revealed when trade policy regulations (export support), which have an anti-competitive effect on the market of another country, are implemented.

Therefore, the Authority followed and reacted to the implementation of governmental trade policy instruments. From the standpoint of the protection and promotion of competition, foreign participation increases competitive pressure in the domestic market, especially in the sphere of prices, quality, range of assortments and incentives for introducing new products and technologies. On the other hand, trade barriers protecting some sectors of domestic production have an anti-competitive effect in the national market. Considering the size of the Slovak market and the existing level of concentration, foreign competition often creates the only competitive pressure on domestic producers.

While accepting the protective regulations of the government (i.e. implementation of an import surcharge, prolongation of validity), the Authority criticised them and presented its criticism in the press several times. A certain dilemma exists between the condition of the Slovak economy and the liberalisation of foreign trade. It is necessary and beneficial to expose domestic producers to pressure from imported or potentially imported foreign products. But low production efficiency and the lower

competitiveness linked to it form the basis for some protection of domestic production. In the end, the government accepted these regulations which, in accordance with international commitments, can also be applied in exceptional cases. In its comments, the Authority pointed out the long-term negative effects which would make export restrictions produce only artificial effects, distorting economic relations and hindering the broadening of adaptability to world conditions. The Authority also required the timely implementation of the import surcharge at a diminishing rate.

The analysis of the price evolution of selected products, which was finalised by the Authority in 1994, indicated that the greatest price growth had been in precisely those sectors not exposed to the pressure of domestic competition and accordingly not protected against imports from abroad (e.g. motor-cars, cigarettes and some food articles). On the other hand, minimal price growth (lower than the rate of inflation) was noted in the competitively strong sectors and where there was no protection against imports (e.g. textiles, clothing products, final engineering and electro-technical products).

Currently, no antidumping law exists in the Slovak Republic. The Authority will be participating in its preparation.

Activity of the Authority in relation to arrangements of state and local administrative bodies

Creating a competitive environment can also be markedly influenced by decisions of state and local administrative bodies. Article 18 of the Act clearly prohibits these organisations from restricting economic competition. As revealed in the data in Table 7 below, there has been an increase in these initiatives over the past few years.

Table 7

Cases observed in 1991-1994

	1991	1992	1993	1994
Measures taken by state administrative bodies	16	4	39	54

Under Article 18, the Authority asked the municipal or district offices that restricted the entry of enterprises into the market or that created unequal conditions among them to take the necessary measures to rectify the situation.

For instance, in 1994, the Authority received a complaint from an entrepreneur from the town Tomásov requesting a review of the decision of the Municipal Office Council regarding the establishment of a bulk-purchase centre of secondary raw material. The Municipal Office had agreed to the proposal of establishing a bulk-purchase centre for secondary raw materials, but it was restricted to paper, textiles and plastics. It had not agreed to a bulk-purchase centre for iron and non-ferrous materials.

After a thorough evaluation of the facts, the Authority ruled according to Article 18 of the Act, which prohibits state and local administrative bodies from restricting or eliminating economic competition by their own initiatives, by their apparent support or by arrangements of any kind. The Antimonopoly Office asked the Municipal Office in Tomásov to revise its decision regarding establishment of a bulk-

purchase centre, whose activity was not restricted with regard to iron and non-iron materials. The Municipal Office complied with the request of the Antimonopoly Office, which had a favourable impact on the competitive environment in the town. The Authority also asked the central state administrative bodies to take corrective measures when their decisions restricted economic competition.

In 1993, the Authority investigated the conclusion by the Ministry of the Interior of a co-operation agreement with the company RIMI-EURO. The subject of the agreement was the supply and installation of technical safety and fail-safe equipment in protected buildings, thus enabling the transmission of secret digital signals by wireless. The agreement stated that the Ministry of the Interior, during the course of co-operation with the company, would not conclude an agreement for building a similar or the same fail-safe system with a third party. The fulfilment of the agreement would thus restrict competition. After the Authority's decision, both parties modified the agreement.

IV. Description of or reference to new studies relevant to competition policy

The first Slovak study on antimonopoly legislation was prepared by Ms. Alena Cernejová, entitled *Právo hospodárskej súť aze* (the Act on the Protection of Economic Competition), Slovak Academy of Science, Bratislava, 1993. The author is revising this work with regard to changes in the legislation and policies as a result of the adoption of the new Antimonopoly Act. A group of employees of the Antimonopoly Office are also working on a guide to the new Antimonopoly Act. Employees of the Antimonopoly Office have published a large number of articles in economic newspapers. Employees of the Office carried out several other studies, concerning, for example privatisation funds and their impact on concentration, and evolution of prices with particular emphasis on detection of cartel agreements.

V. Foreign activities of the Antimonopoly Office

International co-operation

Act No. 188/94 (Coll. of Laws) on the Protection of Economic Competition assigned the Antimonopoly Office to represent the Slovak Republic in foreign relations. Therefore, it is in charge of a series of activities which will reduce the gap between local competition law and the norms of the EU, the application and harmonisation of these rules and the dissemination of information on the policies of the Office both at home and abroad.

The international activities of the Office are focused primarily on organisations or groups of countries where the Slovak Republic is a member or where it expects to become a member.

European Union

One of the priorities of the Antimonopoly Office in its relationship with foreign countries is establishing a close communication link with the European Commission, especially with DG-IV (Directorate-General for Competition). This priority is a consequence of the Europe Agreement on the Association of the Slovak Republic into the EU. According to the provisions of this agreement, trade barriers between EU countries and the Slovak Republic should be removed gradually and asymmetrically, i.e. the EU shall lower its import barriers at a faster pace than the Slovak Republic. This has led to an increase in Slovak exports to the developed countries, and also to a positive balance of trade with these countries. Once all the conditions for entry into the EU are satisfied, one of which is the evolution of a

system of protection of economic competition, phenomenal opportunities for the development of the Slovak Republic will open up.

The on-going integration of the economy of the Slovak Republic into international structures was concretised by the establishment of rules for the application of laws on the protection of economic competition between the EU and the Slovak Republic in July 1994. The Antimonopoly Office and DG-IV of the European Commission participated in the preparation of these rules. The Interim and Europe Agreements, which were concluded between the Slovak Republic and the European Union, provided for the preparation and acceptance of these rules.

In addition to bilateral visits by experts from both sides, the Office regularly sends its employees to attend training courses in Brussels. The aim of these short-term assignments is to train Slovak experts for the harmonisation of EU competition law and its applications.

The Office participates in the Phare programme of assistance of the EU within the framework of departmental requirements. It is also participating in the Phare indicative programme for the years 1994-1996, directed towards the implementation of the Europe Agreement and the institutional and legislative reforms, which are a prerequisite for the entrance of the Slovak Republic into the EU.

OECD

In the case of the Organisation for Economic Co-operation and Development, which has the most developed countries of the world as its members, the Slovak Republic has very bright chances of getting membership relatively early. This is evident from the preparation of the memorandum for the entrance of the Slovak Republic into the OECD. The Office contributed to the memorandum by collaborating with the concerned bodies of the OECD, within the framework of the "Partners in Transition" programme, with the intention of putting forth the principles of protection of economic competition in the Slovak Republic, and also bringing them in line with the system in operation in OECD Member countries. The employees of the Office also participated in professional seminars organised by the OECD. These seminars presented actual cases of violation of rules on the protection of economic competition, experiences in the field under discussion were shared and the most recent developments in the sector of economic competition were assimilated. Co-operation with the OECD entails two major responsibilities for the Office: to inform foreign experts on the state of the competitive environment in the Slovak Republic, with which some OECD Member countries are already familiar, so that they can exert a positive influence on the position of Slovak Republic in foreign professional circles, and the Office must attempt to learn about the current activities and experiences of its partner offices in other countries, some of which have already been functioning for several decades.

The Office is associated with the Co-ordinating Committee of the Slovak Republic-the OECD Liaison Committee, which is responsible for contacts in key areas in the Slovak Republic, and it also participates in the Government Council of the Slovak Republic for implementation of the Europe Agreement.

Central European Free Trade Agreement

The special co-operation among antimonopoly offices of the V-4 countries in the field of economic competition underlying the liberalisation of trade relations represents one of the major tasks for

the development of co-operation in the region of Central Europe under the Central European Free Trade Agreement, which was concluded among the Czech Republic, Hungary, Poland and the Slovak Republic.

In the framework of the joint activities of the antimonopoly authorities of the four countries, the Antimonopoly Office of the Slovak Republic participates in a research project within the Phare Programme which aims at restructuring the enterprises of the V-4 countries. The programme is focused on scientific research, university education, applied research, studies and expert opinions for private enterprises and state administration bodies.

United States

Long-term assistance from experts from our partner authorities, the Federal Trade Commission and the Department of Justice, has been the predominant means of co-operation with the United States. Later, assistance was administered through seminars, the contents of which were chosen by the Antimonopoly Office of the Slovak Republic based on the practical needs of the economy of the Slovak Republic, namely health care, insurance, transportation, telecommunications, banking, methods for evaluating concentrations, etc. Other forms of co-operation consist of preparing studies and organising on-the-job training of the specialists from the Slovak Antimonopoly Office in the U.S. and the regular exchange of information on economic competition. Realisation of the mentioned activities was largely funded by USAID, an American agency of co-operation and development, which manages aid to Central and Eastern Europe guaranteed by the U.S. Government.

Bilateral relationships

The process of integration into the West European economic structure is reflected in the development of bilateral relationships with partner institutions abroad. In addition to discussing legislative procedures related to harmonisation of competition law, these relationships also focus on the scope of problems related to restructuring, removal of entry barriers to new companies, methods of regulation of natural monopolies and the role of competition policy in the economic reforms of Central and East European countries. Exchanges of information on issues concerning anti-competitive practices were quite frequent as well. Examples of such bilateral co-operation are co-operation with the German Bundeskartellamt (following contacts successfully developed through the Foundation for Legal Co-operation of the State of Bavaria, with which sector co-operation continues within Slovak-Bavarian Working Group), the Monopolies and Mergers Commission and the Office for Fair Trading of the United Kingdom, and the Competition Councils of France, Spain, Sweden, Italy, Japan, etc.

In addition to this summary of the foreign relations of the Antimonopoly Office of the Slovak Republic, foreign publication activities of the Office should be mentioned as well. These included in particular articles on economic competition for the press agencies Reuters, CTK, DPA, ITAR-TASS and foreign periodicals such as *Business Weekly*, *Financial Times*, *Wirtschaft und Recht in Osteuropa*, etc.

Public relations

The Antimonopoly Office is one of the youngest state administrative bodies in the Slovak Republic. Its main goal is not only to protect economic competition, but also to promote it. Due to its relatively recent incorporation in 1990 the Office has no traditions to follow and public awareness about its activities has been rather limited. This short span of time since its inception and the low awareness of

the public, enterprises and the media about antimonopoly policy are the main reasons why the Office must utilise every bit of knowledge and information from its public relations cell, to build and spread its name and image. The Office recognises that the public is entitled to sufficient detailed information on its goals and activities. The Office divided the public it had to reach into several categories: citizens, corporate executives and mass media.

The Office co-operates with companies, insofar as the Office is striving to make them more aware and better informed about the new Act No. 188/94 (Coll. of Laws) on the Protection of Economic Competition. With this in mind, the officers of the Office organised a series of seminars for entrepreneurs all over the Slovak Republic. It contacted entrepreneurs, professional associations and institutions, as well as chambers of commerce and industry. The Office is also collaborating with schools, particularly those that specialise in economics and law, as it is certain that graduates from these institutions will be the managers, lawyers and entrepreneurs of tomorrow and that they will come in close contact with competition law.

In its effort to familiarise the public with its activities, the Office also uses mass media. Some heads and staff members of the Antimonopoly Office participated in some television and radio broadcasts, and collaboration with the press also became more intensive. In 1993, 63 articles on economic competition issues were published, in contrast to 217 in 1994.

The number of articles published the staff in daily newspapers, professional and regional journals increased from 23 in 1993 to 62 in 1994. The Office has utilised for this the electronic network, which has been installed.

Table 8

Number of articles published on competition issues

	1991	1992	1993	1994
Total	81	63	63	2
Drafted by the Antimonopoly	17	1	23	62