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COMPETITION POLICY IN OECD COUNTRIES

1995-1996

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FOREWORD

This General Distribution document contains reports by OECD countries presented to the Committee on Competition Law and Policy in 1996. Depending on the countries, these reports cover the period 1995, 1996 or both, and for each, the review period is clarified in a footnote. In addition, the annual report for the Slovak Republic is included here.

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.

TABLE OF CONTENTS

MAIN DEVELOPMENTS IN COMPETITION POLICY IN 1995 AND 1996

I. Summary

Twenty Member countries as well as the European Union and the Slovak Republic submitted reports on their activities for the period which, globally, covers 1995-1996 years[1]. All these reports were presented to the Committee on Competition Law and Policy in 1996[2]. There were initiatives that resulted in new competition legislation being passed or coming into force in Australia, New Zealand and United States; significant amendments to existing competition legislation were made in Denmark, Finland, France, Greece, Italy, Japan, Korea, Norway, United States and European Union. Three countries considered introducing changes to existing competition legislation: Germany, Ireland, Sweden. To facilitate compliance with their law, the United States published guidelines on various aspects of competition law and policy.

Although deregulation and privatisation have had a great impact on laws, regulation and procedural rules, all countries were active in enforcement. Efforts were not spared to counter practices constituting horizontal and vertical restraints on competition. Supervision over mergers which might have anticompetitive effects continued.

II. Changes to competition laws and policies adopted or envisaged

In **Australia,** the most significant development was the implementation of an integrated competition policy package which comprises the Competition Policy Reform Act 1995, three intergovernmental agreements and State and Territory application legislation. This package included the creation, on 6 November 1995, of the Australian Competition and Consumer Commission (the Commission) by merging the Trade Practices Commission and Prices Surveillance Authority, and the creation of the National Competition Council (the Council). In addition, amendments were introduced to competition laws notably concerning the competitive conduct rules, the national access regime and prices oversight. In July 1996, the Commission issued revised merger guidelines explaining how it will enforce sections 50 (domestic mergers) and 50A (overseas mergers) of the Trade Practices Act.

In **Austria**, no development was reported in this area.

In **Canada**, the possible amending of the Canadian Competition Act proceeded during 1995 and part of 1996 and encompassed a wide range of consultations. Public requests for input gave way to the

1. For some countries, however, the review period is limited to year 1995, while for others, it is circumbscribed to year 1996. Therefore, the relevant time period is mentioned on top of each country report.

2. Because they were reviewed by the CLP in 1997, Mexico and Hungary's reports for 1995-1996 will be compiled in the forthcoming GD document on 1996-1997 period.

establishment of a consultative panel which examined alternative proposals and produced a report in March 1996.

In the **Czech Republic**, no development was reported in this area.

In **Denmark**, an amendment providing for extended access to appeal cases concerning concealment of information was passed. In addition a draft of a new Danish Competition Act was released on August 1st 1995 which, *inter alia*, combines the principle of prohibition (against anticompetitive practices) with the principle of control (i.e. on abuse of dominance) by the competition authority. It envisaged also a "one-stop-shop" principle (a case or an issue is dealt by one single authority either the Danish authority or the EU Commission).

In **Finland**, after the accession to the European Union, a technical amendment was made on provisions of the Act on Competition Restrictions**,** pertaining to the application of the Act on the arrangements concerning the primary products of agriculture; another provision was also changed to oblige competition authorities to assist the European Union in its investigations. In addition, a working party has been established to consider possible reforms of the Act on Competition Restrictions, notably to include provisions on merger control.

In **France**, in 1995, two new texts were adopted concerning public procurement markets aiming at ensuring that local authorities are adequately informed and at improving transparency of procedures; they, for the first time, include the concept of the quality of services provided which cannot be dissociated from the cost of said services. A third text was introduced which focuses on controlling concentrations; it clarifies the type of information required in the course of the examination procedure. In addition, in 1996, the Ordinance of 1986 was amended notably to clarify invoicing rules; to prohibit from offering consumer prices that are abnormally low as compared to production and marketing costs; to liberalise the rules governing the refusal to sell. In 1995, were also examined the reform of the Government procurement Code and the opening of the telecommunications market.

In **Germany,** no development was reported in this area. However, the government has decided to examine the Act against Restraints of Competition notably to harmonise national law with EU law whenever necessary with a particular focus on the general ban on horizontal cartels and merger control. Areas exempted under the ARC have also been reviewed.

In **Greece**, during 1995, the Greek Competition Act was amended to establish a general merger control procedure for all sectors of the economy, to provide for granting negative clearance to notified agreements or decisions, to introduce a new composition for the Competition Committee (it was reorganised as an independent authority), to broaden the Competition Committee's powers.

In **Ireland**, in 1995, an amendment of the 1994 Competition Bill was considered by the Parliament to give the Competition Authority the power to enforce the Competition Act, including the capacity to investigate suspected agreements and to institute proceedings in the courts.

In **Italy**, with the passing of Act n° 52/96 in February 1996, the Antitrust Authority has been empowered to directly enforce articles 85(1) and 86 of the EC Treaty.

In **Japan**, in 1995, to enable a more vigorous implementation of the competition policy, the government sent a Bill to the Diet to amend the Antimonopoly Act so as to strengthen the structure and the functioning of the Fair Trade Commission. The JFTC revised and released "the Antimonopoly Act

Guidelines Concerning the Activities of Trade Associations" to prevent violation of the Antimonoply Act by trade associations and to assist them in carrying out appropriate activities.

In **Korea**, as a follow- up measure to the revision of the Fair Trade Act in December 1994, the Commission enacted or revised in 1995 the relevant Enforcement Decrees, Guidelines, and Notifications. The Commission has been pursuing a revision of the "Monopoly Regulation and Fair Trade Act" (hereinafter, the Fair Trade Act) in order to carry out its advocacy role more efficiently following the elevation of its status and role to a minister-level government agency. The current revision is also aimed at playing a role tantamount to its reinforced status and role and at actively participating in international talks of converging competition policies. The revised Fair Trade Act will be applied to a wider range of areas, and the provision on "prior consultation" (under Article 63 of the Fair Trade Act, government ministries are obligated to consult with the Commission prior to new enactment and revisions of their laws to remove any elements that may restrain competition) will be enforced more effectively. Furthermore, the Commission will not only correct the laws undergoing revision or being newly enacted, but also remove or revise anticompetitive elements in the existing laws, decrees, and administrative dispositions.

In **Norway**, after the coming into force in January 1994 of the new Competition Act, new provisions were adopted in 1995 which limit market sharing agreements (that may be necessary to make a seller willing to transfer a property to a new owner, or to protect a buyer or renter from competing business carried out at a nearby estate) to a period which cannot exceed ten years. Specific provisions concerning superfluous information were also issued by the Competition Authority.

In **New-Zealand**, the amendments to the Commerce Act contained in the Commerce Amendment Act 1996 came into effect on 2 September 1996.

In **Portugal**, no development was reported in this area.

In **Spain**, there has been no change in 1995; in 1996, though, a Royal Decree modified the fundamental structure of the Ministry of Economy and Finance: the Service for the Protection of Competition is now part of the General Directorate of Economic Policy and protection of Competition.

In **Sweden**, no amendments were made to the Swedish Competition Act during 1995. However, several reviews of existing legislation and competitive conditions in Sweden were initiated. The Swedish Government decided to appoint a governmental commission on the application and functioning of the Swedish Competition Act. Special attention should be paid to how the so-called *de minimis* rule has been applied so far and to make clear to what extent there is a conflict between the Competition Act and other legislation, and whether this has led to particular problems from a competition point of view. The commission should also examine to what extent restrictive practices fall outside the Competition Act and the experiences that have been gained so far in court from the application of the Competition Act. In the field of merger control the investigation should, in particular, consider whether the current turnover threshold of four billion SEK is set at an appropriate level and functioning satisfactorily. It should also consider the application of the merger rules on concentrative and co-operative joint ventures since the Competition Act at present makes no distinction in this respect. Finally, according to its directives the commission should also consider the feasibility of ordering dominant companies to divest in cases where this would be the only appropriate way of achieving effective competition in a market.

In the **United-Kingdom**, no development was reported in this area.

In the **United States**, during the period October 1994 through September 1995, President Clinton signed on 2 November 1994 the International Antitrust Enforcement Assistance Act (IAEAA). The new law authorises the Department of Justice and the FTC to negotiate reciprocal assistance agreements with foreign antitrust authorities, provided those authorities protect law enforcement information with the same degree of confidentiality accorded in the United States. On March 1995, the FTC and the Department announced eight major steps to streamline the Hard-Scott-Rodino (HSR) premerger review process in order to reduce the cost of compliance and make the process quicker and more efficient. On April 1995, the FTC and the DOJ issued their Antitrust Enforcement Guidelines for International Operations which articulate the agencies' resolve to protect both American consumers and American exporters from anticompetitive restraints where such restraints have direct, substantial and reasonably foreseeable effects on US commerce. The same month, they also issued Antitrust Guidelines for the Licensing of Intellectual Property which explains the generally complementary relationship between the antitrust laws and the laws that protect intellectual property, and the circumstances in which an attempt to exploit intellectual property rights can raise antitrust concerns.

In the **European Union**, the Commission adopted in June 1995 a new group exemption relating to the distribution and servicing of motor vehicles which aims at intensifying competition in the markets for car and spare parts and guaranteeing consumers the benefits of the internal market. A revised group exemption for technology transfer agreements came into force on 1 April 1996 which adds a list of restrictions that are not permitted, the "black" clause which include restrictions on the selling price of the licensed product, the quantities to be manufactured or sold and restrictions on exploiting competing technologies. The Commission also published notices on Air Transport and Cross Border Credit Transfers. Concerning mergers, the revised implementing regulation came into force on 1 march 1995 and four interpretative notices were applied in 1995. They concern the distinction between concentrative and co-operative joint ventures, the notion of a concentration, of undertakings concerned and the calculation of turnover.

In the **Slovak Republic**, no development was reported in this area.

III. Enforcement of competition laws and policies

In **Australia,** the Commission considered 149 proposed mergers (compared with 151 in the previous period) against the concentration thresholds set out in its draft Merger guidelines. It has not opposed any merger where there has been substantial import competition, recognising the increased exposure of Australian businesses to global markets. The Commission has also been directing its attention to mergers that have arisen through privatisation and in deregulating industries. During the review period, the Commission brought a number of non-merger cases before the Court which resulted in penalties amounting to A$ 27.8 million; in many other cases, it negotiated settlements on the basis of undertakings to cease alleged offending conduct or to provide some form of redress. Following the national competition reforms the workload of the Commission increased over that of its predecessors, especially in relation to authorisation and exclusive dealing notifications matters.

In **Austria**, 267 merger cases were filed in 1995, and 221 were announced or registered from January to August 1996. Since the introduction of merger control in November 1993, no case has led to a negative decision.

In **Canada**, the highest fine yet imposed (Can$ 2.5 million) was recorded; it resulted from one conspiracy charge under section 45(1)(c) of the Competition Act. This case benefited from investigative

co-operation between Canada's Competition Bureau and the Antitrust Division of the US Department of Justice, following the co-operation agreement signed in August 1995 between Canada and the US. Merger activity increased significantly, from 193 over the 1994-1995 fiscal year to 228.

In the **Czech Republic**, the Ministry of Economic Competition took actions notably against anticompetitive behaviours engaged by the Czech Pharmaceutical Chamber, the Union of Sugar beet producers and the Union of Oilseed producers and processors. He was vigilant in the case of regional and local monopolies for instance, in the case of refusal to supply electricity. In 1995, the Ministry issued 53 decisions approving concentrations; only one was not approved. Most were effected through acquisitions of control over a company by another.

In **Denmark**, the Competition Council addressed several horizontal agreements concerning the petroleum industry, the bacon factories, the cement industry, the professional services. It was vigilant towards discriminating behaviour/anticompetitive discounts

In **Finland**, 269 new matters came up in 1995 before the Office of Free Competition (compared to 268 in 1994). 36 percent involved horizontal restraints, 25 percent vertical restraints, 22 percent abuse of a dominant position and 16 per cent competition restrictions concerning public authorities.

In **France**, in 1995, the Directorate General for Competition, Consumer Affairs and Product Safety/Quality (DGCCRF) was involved in approximately 200 enquiries, and the Ministry made 42 referrals to the Competition Council. The Directorate General also closely monitored government procurement contracts. The activity of the Competition Council focused notably on prohibited agreements, agreements and exchanges of information on prices and profit margins, on barriers to market entry, on abuse of dominant positions. 536 mergers and acquisition operations were recorded in 1995, of which 406 involved a European investor. These operations concerned the food and drink sector, the construction and the communications and the transport sectors, the mining and the manufacturing industries.

In **Germany,** during the reporting period, the Bundeskartellamt conducted a number of proceedings based either exclusively or additionally on the European competition rules. The number of cartels legalised rose from 258 to 264 (against an increase from 239 to 258 in the 1994-1995 period). The increase is mostly due to ten cases of purchasing co-operation agreements operated exclusively by small and medium sized firms. Such co-operation agreements account for some 40 per cent of all legalised cartels. The year under review saw a decrease in the overall number of notified mergers (1530 in 1995; 620 from January 1996 to end June 1996). This trend can be explained by the declining impact of German reunification on merger statistics, which are almost back to their 1988 and 1989 levels.

In **Greece**, during the review period, 114 cases have been notified to the Competition Committee's Secretariat. Out of the 114 cases, 90 of them have been handled. On mergers, seven decisions were issued, and six were positive. For one the decision was negative since it has been appraised as constituting a significant impediment of competition in the national market.

In **Ireland**, in 1995, 38 notifications of agreements were made to the Authority; it disposed of 179 notifications and took 70 decisions notably on agreements involving the licensing of copyright in musical work. 126 mergers were notified to the Minister under the merger Act; one was referred to the Competition Authority for investigation but none was prohibited.

In **Italy**, in 1995 and early 1996, the Authority ruled on 47 agreements, 43 cases of abuse of dominant position and 378 mergers. The Authority also issued 70 opinions to the Bank of Italy and the Broadcasting and Publishing Authority, and five surveys were conducted in data transmission, electricity industry, rolling stock, the High speed railway system and the distribution of liquefied petroleum gas for heating.

In **Japan**, the Fair Trade Commission investigated in 1995 208 cases of alleged violations of the Antimonopoly Act. Of these, 84 were brought forward from the preceding year, while 124 were initiated during this period. On the legal measures, among the 130 cases completed, 25 resulted in formal actions where orders were given to cease and desist illegal practices. These 25 cases of violations concerned 14 cases of bid-rigging, four cases of price cartels, one case of another type of cartel, four cases of unfair trade practice and two other cases. Of the legal measures taken, five were applied against trade associations. In 1995, 3 688 notifications of mergers and transfers of business were filed with the FTC. In none of these, did the FTC initiated legal action.

In **Korea**, during the reviewed period, the Commission made great progress in correcting monopolistic and oligopolistic market structures and undue collaborative acts through the effective enforcement of competition policy. The strengthening of co-operation with the US, Japan, and France through annual competition policy consultations is especially noteworthy, as well as the "Competition Policy Training Program for Developing Nations" which the Commission held in September 1996 to play the role of a bridgehead between the advanced and developing nations.

In **Norway**, several cases have been investigated, reported to the police by the Competition authority, appealed and decided by the Supreme court. In one case, the Supreme Court quintupled the fines imposed by the lower court. An infringement of the prohibition against price-fixing agreements in the gold and silver market was reported to the police. Several interventions against restrictive agreements have been carried out and the Authority has intervened in a merger case. The trade agreement in the book market has been granted a renewed exemption from the prohibition against price fixing agreements on certain conditions, the main one being that sale of schoolbooks should be excluded from the agreement. The case was appealed to the Ministry of Government Administration which accepted the exemption without conditions.

In **New-Zealand**, from 1 July 1995, there were 76 investigations completed, including those on hand at the start of the year, leaving 31 on hand at 30 June 1996. During the year which ended on 30 June 1996, the Commission approved the commencement of penalty action in the High Court against two cases which both related to the North Island meat processing industry. From July 1995 to June 1996 37 merger applications were registered under the clearance provision and two under the authorisation provision.

In **Portugal**, from August 1995 to September 1996, 82 cases were investigated by the Directorate General for Competition and Prices, the majority of which (58) originated in complaints. During the same period, seven cases referred to the Competition Council for final decision. They concerned: exclusive TV exhibition rights of football matches' highlights, licensed by the Football clubs' association to the Portuguese public TV company through an advertising company; selective distribution in the market for optical material; collusive tendering and tacit price collusion in the market of medicinal gas; abusive behaviours through price discrimination and foreclosure to distribution in the tobacco market; collusive tendering in the construction market; abusive behaviour in the market of credit cards; and horizontal customer allocation in the market for transportation of cash and other means of payment;

exclusive/selective distribution of maize seeds. Since June 1995, the DGCeP examined 25 merger operations, three of which were still pending in August 1996.

In **Spain**, the Tribunal for the Protection of Competition has delivered in 1995 judgement on more than 80 antitrust cases, most of them being horizontal agreements in the sectors of bakeries, obstetricians, sales of second hand vehicles, game machines and distribution of home appliance. The Tribunal, also, examined a limited number of cases of abuse of dominant position. In addition, the Competition Authorities investigated in the distribution of oil products and in the sector of game machines. Concerning mergers, it is noteworthy mentioning the increase in the number of voluntary notifications especially of those of acquisitions and control taking operations. The chemical sector was the most active in this area.

In **Sweden**, a total of 23 Competition Authority decisions were appealed to the Stockholm City Court (court of first instance) and so far the Court has made a judgement in 18 cases. The Market Court has during the same period taken decisions in five cases. Its consultative role on existing and proposed public regulations is an important task assigned to the Competition Authority. A total of 117 formal opinions were submitted to Governmental and public authorities.

In the **United Kingdom,** details of 1 393 agreements were sent to the OFT in 1995 compared with 1 280 in 1994. In 1995, 602 agreements were added to the register (four percent more than in 1994). The DGFT was able to advise the Secretary of State that 40 agreements (11 percent more than in 1994) did not contain significant restrictions on competition. 45 new investigations were started, section 36 notices were issued in respect of two investigations and a number of less formal letters of enquiry were also sent. In 1995, the OFT received 63 complaints alleging contravention of the Resale Price Maintenance Act (compared to 34 in 1994). In 10 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 made two monopoly references to the MMC and the MMC published two reports in 1995 one on the market of video games hardware and software and another on bus services in the north east of England. On the retail financial services front, the new product and commission disclosure rules of SIB and the Personal Investment Authority (PIA)came into force for “life products” in January. These rules have increased the information given to investors about such products. The total number of mergers considered by the OFT in 1995 rose from 381 in 1994 to 473 in 1995 (a year-on-year increase of around 24 per cent). The total value of assets acquired or bid for in the qualifying merger situations examined by the OFT in 1995 was £178 billion (1994, £162 billion). Horizontal mergers accounted for 91 percent of the total number of qualifying cases.

In the **United States**, in FY 1995, the Antitrust Division of the DOJ opened 249 investigations and filed 84 antitrust cases, both civil and criminal , in federal courts. The Division was a party to 11 US antitrust cases decided by the federal courts of Appeals, and filed *amicus curiae* in four Court of Appeal cases and one Supreme Court case. The Division filed 60 criminal cases against 40 corporations and 32 individuals. The average fine imposed on corporations in FY95 exceeded $1.2 million (in 1992, under 500 000$). The Division opened 227 civil investigations both merger and non-merger and issued 2 029 civil investigative demands. The same year, the Division filed 24 civil complaints and 18 proposed consent decrees or final judgements. In the non-merger area, the Federal Trade Commission (FTC) brought 12 enforcement cases during FY 1995. Eleven were settled by consent agreements; ten concerned cases of alleged horizontal restraints, including boycotts, market allocation or price fixing, and one concerned an alleged vertical restraint. One administrative complaint was issued that concerned an alleged horizontal restraint. During FY 1995, 2 816 proposed mergers and acquisitions were submitted for review under the notification and filing requirements of the HSR Act (this represents a 20 percent

increase over the previous fiscal year). Fifty-eight second requests were issued by the FTC. The Commission authorised the staff to seek preliminary injunctions in federal district court to block five proposed mergers, accepted 30 consent agreements and issued two administrative complaints. A wide variety of industry were involved, including medical devices, drugs and vaccines, national defence, computer software, consumer money wire transfer, retail pharmacies and supermarkets.

In the **European Union**, during 1995 the Commission registered 559 new cases, of these 368 were notifications 145 complaints and 46 cases opened on the Commission's own initiative. This represents an increase of 42 percent compared to 1994. Almost half of the increase in new cases, 78, is attributable to the transfer of cases from the EFTA surveillance authority following the accession of Sweden, Finland and Austria to the Union. During the year the Commission closed 433 cases, of which 419 were through an informal procedure and 14 by formal decision. During the reviewed period, the Commission devoted attention notably to restrictions in parallel trade, to restrictions on access to the markets to new entrants and to abuse of dominant position in secondary product markets. On mergers, during 1995 the Commission received 114 notifications under the Merger Regulation and took 109 final decisions. Activity was over 24 percent higher than in the previous year. A total of seven in-depth (second phase) investigations were completed during the year. As a result of these investigations two proposed operations, both in the media sector, were prohibited. The remaining five operations were all cleared two unconditionally the remaining three with conditions designed to remove the competition problems identified by the Commission. Activity in the first half of 1996 continued to increase with the Commission taking over 80 decisions by the end of July 1996. These included one prohibition, four clearances with conditions attached and the decisions to start four further second phase investigations.

In the **Slovak Republic**, the Antimonopoly Office tackled in 1995 with 116 new cases of anticompetitive practices, of these there were 39 which could restrict competition and 77 which could be suspected of abuse of dominant position. During the reviewed period, there were no application for judicial review of any administrative ruling of the Antimonopoly Office filed before the Supreme Court.

IV. Deregulation, privatisation and competition policy

In **Australia**, the national competition policy package provided principles for systematic legislation review, competitive neutrality, infrastructure access and structural reform of public monopolies. The reform package settled in 1995 is an important element in an ongoing reform program covering the Utility (electricity, gas), Communications (postal services ; broadcasting; telecommunications) Transport (waterfront; shipping; airports; aviation; rail) and the Professions sectors.

In **Austria,** the Federal Ministry for Economic Affairs tried, through deregulation efforts, to abolish unjustified barriers to entry notably in the air transport and the telecommunication sectors.

In **Canada,** the electricity sector was an important focus of the Bureau competition advocacy work. Its submissions incorporated a number of recommendations relating to elements of market structure and regulation.

In the **Czech Republic,** the Ministry of Economic Competition endeavoured to introduce some degree of competition in key sectors of public services, particularly electrical energy and telecommunications.

In **Denmark**, the Competition Council continued to attach great importance to the termination of restrictive practices subject to public regulation and to the application of equal competition between public and private enterprises on the same market. To strengthen the impact of its recommendations to the competent the authorities, the Council decided to publish their responses to its recommendations as well as to publish leaflets concerning competition on markets subject to public regulations.

In **Finland**, the Office of Free Competition focused in 1995 on the abolishing of competition distortions caused by state aids and on the activities of public authorities. It intervened on competition issues related to regulatory amendments, with respect to foodstuff markets, traffic, city planning, construction and environmental issues. The Office made four regulatory initiatives to different ministries and issued 63 statements in regulatory matters.

In **France**, in 1995, the competition authorities focused not only on some sectors (i.e. telecommunications) but also on competition conditions under which state-owned monopolies diversify. The Directorate general followed two sets of criteria: *i)* to clarify and, if necessary, reinforce the rules governing the provision of a universal service; *ii)* to keep as broad as possible the scope of application of competition rules. Mail services, energy and the health care sector were notably reviewed against these tests.

In **Germany,** no development was reported in this area.

In **Greece,** no development was reported in this area.

In **Ireland**, in 1995, the Minister for Enterprise and Employment requested the Competition Authority to undertake a wide-ranging study of competition in the newspaper industry. An interim report was published concerning the pricing of UK newspapers in Ireland and on the question of dominance. In addition, the Minister for Transport, Energy and Communications announced the award of a second mobile telephone licence. He also announced his intention to introduce competition in electricity.

In **Italy,** from January 1995 to March 1996, the Antitrust Authority issued 31 reports and opinions to Parliament and the Government aiming at promoting competition in a number of sectors including Transport and allied services, Telecommunications, Electricity and Natural Gas and Professional Services as well.

In **Japan**, the promotion of deregulation was embodied in the "Deregulation Action Programme" presented in March 1995 with the objectives of making the Japanese economy fully integrated into the global economy, and making it an economy based on market mechanisms and the principle of self-responsibility. The Government notably announced that the system of exemption from the Antimonopoly Act through individual laws would be reviewed with a view to eliminate them by end of March 1998.

In **Korea**, as the government agency in charge of enforcing competition policies, the Commission has been performing its advocacy role in establishing economic policies by strictly enforcing Article 63 of the Fair Trade Act and by voicing its opinions at cabinet meetings and economic ministers' meetings. In 1995, the Commission examined a total of 205 acts and decrees and presented its views on 93 of them. Out of the 93, the Commission's opinions were reflected in 61 of them. Thus, the Commission is successfully eliminating anticompetitive elements in the enactment and revisions of laws and decrees throughout the economy. In addition, the enhanced status and role granted to the Korean FTC in the government (the Chairman has been elevated to ministerial level) signifies that competition policy

now bears much more significance in the Korean economy and that it has equal weight as other macroeconomic policies.

In **Norway**, the Competition authority dealt with deregulation of the state monopoly for wine and spirits and with several cases in the market of telecommunication.

New Zealand, which places reliance on the Commerce Act 1986 to regulate access to the facilities of vertically integrated natural monopolies (VINMs), devoted particular attention to the regulation of Airport authorities, the gas industry, the electricity industry, reforms in generation, in transmission, reforms of distribution and retailing, the wholesale electricity market, the electricity market Company, the agricultural marketing arrangements and the quality of regulation.

In **Portugal**, after the general elections of 1 October 1995, the new government approved in March 1996 a privatisation programme for 1996/1997, clarifying the goals pursued and the criteria chosen, as well as setting the priorities for each sector. Among the companies sold during the period referred to, the most noteworthy cases concerned Cement, Bank, Insurance companies, Telecommunications, Tobacco manufacturing and the Chemical industry.

In **Spain**, the Competition Authorities issued reports on regulatory matters concerning various sectors and notably the sectors of water, energy, transport, telecommunications and cable TV. In addition, the Tribunal made public its third report on competition where it put forward proposals for legislative changes in five newly studied sectors: retail banking, ports, distribution of oil products, film industry and pharmacies.

In **Sweden**, Parliament decided in 1995 to deregulate the Swedish electricity sector as of 1 January 1996. Drawing on British and Norwegian experiences, a new system was adopted, which is based on a strict separation of network services and supply of electricity. The network is considered to be a natural monopoly, and network services will be strictly regulated. A special regulatory authority has been established to monitor the supply of these services. Supply of electricity, however, is considered to be a normal good subject to competition and as such under the competence of the Competition Authority. The former monopolies of alcoholic beverages in Sweden on manufacturing, exports, imports and wholesale trade were abolished as from 1 January 1995. However, the monoploy on retail sales to consumer has been maintained.

In the **United Kingdom**, regulatory developments concerned mainly the Electricity sector where there were in 1995 ten take over bids for regional electricity companies and the Telecommunications sector where the Oftel published proposals for a new licence condition prohibiting anti-competitive practices together with deregulatory measures. In addition, progress towards Rail privatisation was maintained during 1995. Preparations continued for the May 1996 stock market flotation of Railtrack, which owns and manages the railway infrastructure. The first passenger franchise contracts were awarded in December, and invitations to tender were issued for a further six.

In the **United States**, the Antitrust Division of the DOJ continued its efforts to promote competition by filing comments in *i*) Federal Energy Regulatory Commission proceedings involving power pooling arrangements and electric transmission access rules; *ii*) Securities and Exchange Commission proceedings on new rules governing the execution and price improvement of small orders in the NASDAQ stock market; *iii)* Department of agriculture proceedings relating to the economic effects of marketing orders for tart cherries*; iv)* Interstate Commerce Division proceedings involving the consolidation of major railroads. As part of its Competition advocacy programme, the FTC submitted

comments or *amicus curiae* to federal and state entities on competition issues in such areas as telecommunications, broadcasting, transportation, patents, electric power, funeral establishment and cemeteries, motor vehicle brokering and health.

In the **European Union**, throughout 1995 and 1996, the Commission has continued to pursue its policy of liberalising and opening up to competition certain sectors traditionally subject to monopoly such as telecommunications, energy, postal services or transport.

In the **Slovak Republic**, the Antimonopoly Office gave in 1995 its opinion to about 200 drafts of bill. It also actively participated in the assessment of the privatisation projects of the ongoing privatisation process which it sees as the most significant tool of deconcentration and demonopolisation. In the evaluated period, the Office worked out 230 views to privatisation-related drafts.

AUSTRALIA*

(July 1995 - June 1996)

Executive Summary

The implementation of an integrated national competition policy culminated in the passage of legislation and the creation, on 6 November 1995, of the Australian Competition and Consumer Commission (the Commission) and the National Competition Council (the Council). This policy is based on recommendations of the August 1993 Hilmer Committee Report, a detailed explanation of which was set out in the preceding Annual Reports presented by Australia. The momentum of reform has been maintained by the new Commonwealth Government, which came into office following the general election held in March 1996.

Enforcement of the national competition statute, the *Trade Practices Act 1974*, and its State/Territory counterpart - the Competition Code, is a matter of high priority for the new Commission - as it was for its predecessor, the Trade Practices Commission. Again, the significance of competition law in Australia continues to be reflected in the high level of penalties which the Court has been prepared to impose on firms which contravene the competitive conduct rules in the Trade Practices Act. A feature of these high penalty awards is that they are often the result of negotiations between the firms involved and the Commission. This has avoided protracted litigation, with the Court confirming that a lower penalty can be expected where firms admit the contravention, co-operate in its investigation and avoid full trial.

Throughout 1995-96, the Commission continued to scrutinise a number of significant mergers and published revised Merger Guidelines. Merger law is once again receiving attention in the media, predominantly in the context of the financial sector where there is significant debate about the benefits of bank mergers. It is expected that this will be examined in considerable detail by the Financial System Inquiry, which was established in June 1996.

Microeconomic reform processes are proceeding in the electricity, gas, telecommunications and transport sectors of the economy, with major reforms in these and other sectors scheduled for commencement throughout 1997. The Government also plans major labour market reforms through the introduction of amendments to the Commonwealth industrial relations legislation, which are currently under consideration by Parliament. An important theme of the reforms is an extended application of competition principles to labour market arrangements.

I. Changes to competition laws and policies in Australia

The most significant development during 1995-1996 was the continuing implementation of the national competition policy package agreed between Australian Governments in April 1995. The national competition policy package comprises of the *Competition Policy Reform Act 1995*, three inter-

* The original language of this report is English.

governmental agreements and State and Territory 'application' legislation. Last year's Annual Report presented by Australia explains how these components fit together.

A. Administrative arrangements

The change of Government in March 1996 has not lead to a change of responsibility to the Commonwealth Parliament for competition policy and law enforcement, which continues with the Treasury portfolio[1]. Policy and enforcement functions are split between the following bodies:

a) the Department of the Treasury, in particular its Competition Policy Branch within the Structural Policy Division, which advises the Treasurer on competition policy issues generally;

b) the Australian Competition and Consumer Commission (the Commission)[2] is the Government's independent competition enforcement body. Its functions also include adjudicating on authorisation and notification issues, preparing reports, price oversight and the enforcement of consumer protection laws. As noted above, the Commission now exercises functions under the legislated access regime;

c) the National Competition Council (the Council) has an advisory role in the Government's access and price oversight regimes and may assist governments with legislation review, competitive neutrality and structural reform issues in accordance with an agreed work program. The Council is also responsible for advising the Commonwealth Government in respect of State and Territory Government fulfilment of the requirements necessary to receive 'competition policy payments';

d) the Australian Competition Tribunal (the Tribunal)[3] hears appeals against the Commission's authorisation and notification decisions. It also has a review role in respect of Ministerial and certain Commission decisions under the legislated access regime.

e) the Federal Court of Australia determines whether the Trade Practices Act has been contravened and determines the appropriate remedy[4]. It is also responsible for enforcing access arrangements determined under the Trade Practices Act.

B. Recent amendments to Australia's competition laws

Competitive Conduct Rules

Extended Cover of the Competitive Conduct Rules to all Business Activity

The competitive conduct rules in Part IV of the Trade Practices Act have been extended to apply to the unincorporated sector and to State and Territory government business activities which were previously outside the coverage of the Act. (Commonwealth government businesses have been subject to the Act since 1977.) From 21 July 1996, these rules will apply to all business activity irrespective of the legal form of the business entity or its State or private ownership status.

The mechanism for extending coverage of these rules necessarily involves both Commonwealth and State/Territory legislation, because of the division of constitutional powers between different levels of government in the Australian Federal system. This means that the competitive conduct rules are now found in:

a) Part IV of the Commonwealth's Trade Practices Act, which applies to activities within Commonwealth legislative competence. This includes the Commonwealth's business activities, the activities of 'corporations', and the activities of firms engaged in interstate/overseas trade or commerce, including State/Territory government businesses;

b) Part IV of the Competition Code of each State/Territory, which applies to persons resident, incorporated, carrying on business within or otherwise connected with the State/Territory concerned.

Administration of both Commonwealth and State/Territory law is vested in the Commission. 'Double jeopardy' provisions prevent dual liability where the laws overlap.

The deadline for the commencement of the Competition Code was 21 July 1996. All States/Territories, except Western Australia, met this deadline. Although Western Australia's legislation was not enacted by 21 July 1996, it is expected to be enacted shortly.

Amendments to the Competitive Conduct Rules

On 17 August 1995, a number of amendments to the competitive conduct rules came into operation. These were foreshadowed in last year's Annual Report, and included:

a) repealing the specific prohibition against anti-competitive price discrimination (the misuse of market power provision may still apply to such conduct);

b) extending the competitive conduct rules to the re-supply of services (eg. application of the resale price maintenance provisions to telecommunications services);

c) extending the notification procedure to third line forcing; and

d) extending the authorisation process to price agreements on goods and resale price maintenance.

On this date, the Competition Policy Reform Act also amended the exception provision of the Trade Practices Act (section 51) to improve the transparency of exceptions. New Commonwealth, State and Territory laws excepting conduct from the Trade Practices Act and the Competition Code must expressly refer to that legislation. Old exceptions which do not comply with the new transparency requirement will lapse in three years. Further, exceptions created by regulations will only be effective for two years. New exceptions will also need to comply with the legislation review principles discussed below.

Boycott Laws

The Workplace Relations and Other Legislation Amendment Bill 1996, which has been introduced into the Commonwealth Parliament, includes provisions that reinstate substantially former sections 45D and 45E of the Trade Practices Act, as they existed prior to 30 March 1994. If enacted, the new provisions will prohibit:

a) secondary boycotts which have the purpose of causing a substantial lessening of competition (covered by the existing section 45D);

b) secondary boycotts which have the purpose and effect of causing substantial loss or damage to the target of the boycott conduct;

c) primary and secondary boycotts which have the purpose and effect of preventing or substantially hindering the target of the boycott conduct from engaging in territorial, interstate or overseas trade or commerce; and

d) a person making an agreement with an organisation of employees for the purposes of preventing or hindering trade between that person and the target.

Primary or secondary boycotts taken by employees in relation to the terms and conditions of employment affecting their workplace will be exempted from the new provisions; as will direct industrial action taken by employees against their employer during 'bargaining periods'. The Court can also order a stay of injunction where to do so would facilitate settlement of the boycott dispute by conciliation.

Revised Merger Guidelines

In July 1996, the Commission issued revised Merger Guidelines explaining how it will perform its functions in relation to sections 50 (domestic mergers), 50A (overseas mergers), 87B (enforceable undertakings) and 88 (authorisations) of the Trade Practices Act. These guidelines replace the draft guidelines released in 1992. The key changes include:

a) an additional threshold (in addition to the concentration thresholds[5]) within which mergers are unlikely to be challenged where unrestricted, independent competitive imports account for more than 10 per cent of the market;

b) a fast track review process where a merger falls within the concentration thresholds;

c) a discussion of the Commission's approach to mergers in the non-corporate sector, and the Commission's role in reviewing mergers arising from privatisations and deregulating industries; and

d) clarification of certain matters, including the approach to market definition, section 87B undertakings and the Commission's approach to examining efficiency claims.

New National Access Regime

The national access regime, described in last year's Annual Report, commenced on 6 November 1995.

In 'network industries', such as electricity, the emerging pattern is for an industry code to be developed governing access arrangements within the industry which will form the basis of access undertakings to the Commission by individual service providers. The Trade Practices Act currently requires the Commission to undertake multiple public consultation processes in relation to such codes - one in relation to the access code, if it is necessary to authorise the code, and others in relation to the access undertakings of individual access providers. Legislation, which was introduced into Parliament on 27 June 1996, will streamline this process by introducing a single industry-wide access code approval process for 'network industries'. It is expected that Parliament will consider this legislation later in the year.

Price Oversight

Amendments to formalise the monitoring functions of the Commission came into force on 6 November 1995. These amendments were outlined in last year's Annual Report.

C. Principles for future reforms

. Reflecting Australia's broad approach to competition policy, the inter-governmental Competition Principles Agreement sets out principles agreed to by the Commonwealth, State and Territory governments to establish and guide future reforms. Over the past year, considerable progress was made towards achieving a national approach to the implementation of those principles, which are set out below.

Legislation Review

Over June and July 1996, the Commonwealth, State and Territory governments each published a timetable 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 10 years.

The guiding principle in review is that legislation should not restrict competition unless it can be demonstrated that:

a) the benefits of the restriction to the community as a whole outweigh the costs; and

b) 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-like activities: government businesses should not enjoy any net competitive advantage simply as a result of their public sector ownership. Where cost effective, competitive neutrality will be applied to government activities which operate user charges for services that are contestable.

In order to neutralise this advantage, the 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. Also over June and July 1996, each government published a policy statement on competitive neutrality, including 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 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; 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 III of this report looks at various structural reforms which have been undertaken consistent with this principle.

II. Enforcement of competition laws

The primary focus of this Part is the administration of the competitive conduct rules in the Trade Practices Act and the Competition Code. This Part also deals with the new infrastructure access legislation in the Trade Practices Act, and the prices oversight functions of the Commission.

A. Competitive conduct rules

The Trade Practices Act and the Competition Code prohibit 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.

However, except for misuse of market power, immunity from Court action may be available under one of two administrative procedures.

Under the authorisation procedure, the Commission is empowered to grant immunity when satisfied that the conduct will be likely to result in a net public benefit. Authorisation may be granted conditionally or subject to a time limit and may be revoked if there has been a material change of circumstance. It is a public process involving submissions from interested parties. Except for mergers, the Commission must publish a draft determination and provide interested parties with the opportunity for a conference before making a final determination. Under the notification procedure, a party which notifies exclusive dealing to the Commission obtains automatic immunity when the notice comes into force, which will continue unless revoked by the Commission.

Commission determinations under both procedures are reviewable by the Tribunal, upon application. The number of Commission determinations processed in 1995-1996, including those reviewed by the Tribunal, appear later in Table 4.

Mergers and other Acquisitions

Since January 1993 section 50 of the Trade Practices Act has prohibited mergers and acquisitions which substantially lessen competition: previously the section had prohibited mergers and acquisitions which created or enhanced market dominance[6]. Whilst only the Commission[7] may seek an injunction to prevent a merger which is likely to contravene section 50, after a merger has occurred any person (including the Commission) may seek divestiture, a declaration or a compensatory award of damages.

Australia does not operate a pre-merger notification scheme. The previous Government had issued a discussion paper on whether a form of pre-merger notification should be considered but had not completed evaluating comments received when it left office.

1995-1996 saw 149 proposed mergers considered by the Commission, compared with 151 in the previous year. A breakdown of the types of mergers considered over the past two years is shown in Table 1. The Commission reviewed these mergers against the concentration thresholds set out in its draft Merger Guidelines in order to determine whether it should undertake more detailed investigation. Under these thresholds, the Commission will further consider mergers where:

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

b) 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;

unless other aspects of the market (eg import competition or barriers to entry) are such as to indicate the merger would be unlikely to raise competition concerns.

The revised Merger Guidelines issued by the Commission in July 1996 retain these thresholds.

Table 1. Types of Acquisitions and Mergers considered[8]

	1995-96	1994-95
Horizontal	96	115
Vertical	28	20
Changed shareholding	5	5
New entry to market	27	18

Since the merger test was changed in 1993 the Commission has not opposed any merger where there has been substantial import competition, recognising the increased exposure of Australian businesses to global markets. The Commission has also been directing its attention to mergers that have arisen through privatisation and in deregulating industries[9]. During the year there was significant merger activity in the banking and wholesale grocery sectors. Details of the numbers of the mergers considered and their outcome appear in Table 2.

Table 2. Result of Mergers Considered by Commission

	1995-96	1094-95
New mergers referred to the Commission	149	151
Considered by the Commission and Foreign Investment Review Board	30	20
Not proceeded with or amended following Commission concern	11	8
Court action	2	2
Authorisation sought	3	1

Where a merger raises competition concerns, options available to the parties include applying for authorisation or offering the Commission a statutory undertaking under section 87B of the Trade Practices Act to remove any competition concerns, or both. Undertakings offer the opportunity for a merger proponent to restructure its proposal so as to address aspects of concern to the Commission[10]. The Commission's preference is for 'structural' undertakings as opposed to ongoing behavioural undertakings, such as price, quality and service guarantees.

Significant Mergers and Acquisitions

i) Retail banking

On 21 September 1995, the Commission announced that it would not oppose the acquisition of the West Australian regional, *Challenge Bank*, by the national *Westpac Banking Corporation*. The Commission's assessment of the proposal focused on the effect of the acquisition on competition in Western Australia, because it considered that consumers and many small businesses could not easily go interstate for banking requirements. Despite new developments in financial facilities, such as mortgage securitisation, the Commission took the view that the market should be regarded as one for retail banking services rather than financial services as a whole. Banks were considered to have certain distinctive features; for example, were they to raise rates or charges, many consumers could not, or would not, switch

to other financial institutions for particular services (typically those provided by banks through their branch network).

Because of the high barriers to entry, the Commission viewed increased concentration in the banking market with concern. While the acquisition reduced the number of significant banks in WA from six to five, the remaining regional bank should continue to be a vigorous competitor to the major four national banks. Even if *Westpac* acquired *Challenge Bank*, the unique characteristics of the other regional bank would continue to provide choice to customers and small business, including farmers, in WA. In the Commission's view, regional banks, by adding diversity, innovation, closeness to customers and price competition, play a key role in promoting competition and consumer choice.

ii) Pay TV

Pay TV services commenced in early 1995 when Australis Media Pty Ltd started providing Multipoint Distribution Services (MDS). Pay TV services provided on broadband cable by a joint venture (Foxtel) between the government owned telecommunications carrier Telstra Corporation and News Corporation, and also by Optus Vision, based on the second telecommunications carrier Optus Communications commenced in late 1995. By 1999, it is expected that the Foxtel cable network will pass quatre million homes and Optus Vision cable network three million. The Optus Vision cable network also provides telephony services. Both are expected to offer a wider range of broadband services in the future.

The Commission announced on 23 August 1995 that it would not oppose a programming deal between Foxtel Pay TV and XYZ Entertainment Pty Limited, a potential competitor of Foxtel. XYZ is a program packaging corporation which produces types of programs (variety, documentaries, children's, and music) currently distributed as part of the Galaxy package via the Australis delivery system. The deal essentially involved Foxtel acquiring 50 per cent of XYZ from its current US owners and the exclusive cable distribution of XYZ's four types of programs on Foxtel's cable network.

The Commission was particularly concerned that this deal closely followed upon another Foxtel had entered into with Australis in March 1995 for the exclusive cable distribution of Australis programs and the four XYZ programs. The new deal between Foxtel and XYZ strengthened and replaced the earlier arrangement with Australis in respect of XYZ programming, removing any potential for competition between Foxtel and XYZ in the production and distribution of XYZ-genre programs. The Commission noted, however, that the effect on competition was incremental (rather than substantial) and did not remove competition in respect of the main drivers of pay TV subscriptions, sports and movies. Accordingly, it did not challenge the arrangement.

In October 1995 the Commission was advised of the proposed acquisition of Foxtel by Australis. After extensive inquiries, and conscious that the merger had competition implications not only for pay TV but also for local telephony and the supply of broadband local access networks, the Commission announced on 7 February 1996 that it considered the acquisition would contravene the Act because it would lead to a substantial lessening of competition.

Authorisation decisions

i) Grocery Wholesaling

On 28 March 1996, the Commission granted an authorisation for independent grocery wholesaler Davids Limited to acquire grocery wholesaler QIW Limited. This brought an end to a series of activities (detailed in previous reports), and resulted in the creation of Davids as a 'fourth force' in the wholesale grocery sector; servicing most of the independent supermarket groups and potentially placing increased competitive pressure on the three major vertically integrated grocery companies.

Davids' original bid in 1992 for QIW (without authorisation) was blocked when the Attorney-General obtained an injunction. Subsequently, Davids sought authorisation to acquire another wholesaler (Composite Buyers Limited) and, upon review, the Tribunal authorised the acquisition because of the net public benefits flowing from the creation of a 'fourth force' comprising the independent operators. At that time, Davids was, however, unsuccessful in the acquisition, because QIW acquired Composite Buyers. Davids later sought an authorisation from the Commission to acquire QIW. It was granted and the Government agreed to lift the injunction.

ii) Joint Venture to Manufacture Sodium Cyanide

In May 1996, the Commission authorised a proposed joint venture for the manufacture of sodium cyanide and associated exclusive marketing arrangements. Under the proposal, subsidiaries of DuPont (Australia) Limited and Ticor Limited would form an unincorporated joint venture to manufacture solid and liquid sodium cyanide at an existing Queensland plant. Sodium cyanide is an essential element in processing ore for the retrieval of gold.

The Commission noted the industry's high level of concentration internationally and that two of the three major international producers of sodium cyanide had significant shares in the Australian domestic market. The oligopolistic structure of the industry and the undifferentiated nature of the product have the potential to lead to cooperative arrangements between the major players at the expense of competition. The Australian market is very close to self-sufficient, with around 90 per cent of domestic demand satisfied from domestic production.

The market for sodium cyanide is growing and directly related to the production of gold world-wide. Because of this, the Commission considered it highly likely that demand would increase substantially over the coming years in response to technological advances and increased gold exploration and production. It accepted that increased production would satisfy this forecasted demand, otherwise likely to be satisfied by imports, thereby assisting Australia's external trade account over the medium to long term. The Commission accepted this as a substantial benefit to the public. The Commission also accepted the parties' contentions that the techniques and technology that would be brought to the joint venture by DuPont had significant potential to improve the efficiency of the existing operations and to do so in such a way as to provide substantial environmental benefits, particularly in decreasing nitrous oxides, greenhouse gases and solid contaminated waste.

iii) Paint Manufacturing

On 12 March 1996 the Commission filed proceedings in the Federal Court seeking to restrain the acquisition by Wattyl Limited of the architectural and decorative paint business of Taubmans, on the grounds that it would be likely to substantially lessen competition. Two days later the companies offered an undertaking to the Federal Court not to proceed with the acquisition, pending a hearing of the Commission's application for a final injunction.

In taking action, the Commission particularly took into account that the proposed acquisition would remove a large competitor from the market and create a high level of concentration in the national market for the manufacture of architectural and decorative paints (the merged Wattyl/Taubmans entity and its main rival would account for around 90 per cent of paint manufacture by value). The Commission also noted high barriers to entry, the extent of vertical arrangements between the paint manufacturers and paint resellers, and the absence of significant import competition. Ultimately, the Commission concluded that consumers would be likely to face higher paint prices as a result of the proposed acquisition.

Subsequently, on 3 April 1996, Wattyl and Taubmans lodged an application for authorisation of the proposed acquisition. This was denied on the basis that the public benefits did not outweigh the anti-competitive effects. Wattyl subsequently appealed the decision to the Tribunal but before that matter was resolved it was announced that Taubmans was to be sold to another party.

iv) AGL Cooper Basin natural gas supply arrangements

In March 1995, the Commission revoked an authorisation granted in 1986 to The Australian Gas Light Company (AGL) in respect of arrangements for supply from the Cooper Basin Producers in the State of South Australia, and substituted a new, more limited, authorisation. Under the arrangements the Cooper Basin producers supply gas extracted from fields in the vicinity of Moomba, South Australia. The gas AGL purchases is then distributed to users in the State of New South Wales and in the Australian Capital Territory.

Insofar as they relate to conduct within South Australian borders, the arrangements are protected from action under the Trade Practices Act by state legislation - the *Cooper Basin (Ratification) Act* (CBRA). In practice, however, it is convenient and cost effective for the parties to conduct negotiations and price arbitrations under the agreements in another state. As the reach and protection of the CBRA does not extend to other states, in 1986 the parties sought and obtained authorisation from the Commission for conduct arising under the agreements. This authorisation was granted on the basis that the anti-competitive detriment was outweighed by public benefits.

In revoking the 1986 authorisation, the Commission identified several material changes of circumstance (including the increased anti-competitive detriment of the take or pay contract, exclusive dealing and first right of refusal clauses), which were no longer seen to be outweighed by a public benefit.

On 17 April 1996, the Cooper Basin Producers filed an application with the Australian Competition Tribunal for a review of the Commission's decision. The appeal will be heard in March 1997.

Anti-competitive behaviour

i) Enforcement action by the Commission

The Commission seeks to secure compliance with the rules in the Trade Practices Act and the Competition Code by bringing suitable cases before the Court in an effort to strike an appropriate balance between the goals of long term improvement in compliance, deterrent effect and achievement of compensation or redress. In 1995-1996, penalties amounting to A$27 775 000 have been imposed by the Federal Court in proceedings brought by the Commission. A summary of the details of those cases (set out in Table 3) shows that most conduct took place before the higher penalty regime commenced on 21 January 1993, when the maximum penalty for an offence by a corporation increased from A$250 000 to A$ 10 million.

In many other cases the Commission negotiates settlements of matters on the basis of undertakings to cease alleged offending conduct or to provide some form of redress or compensation for affected parties. Such undertakings have been enforceable in the Court since 1993 and have again been used widely and effectively.

The A$20 million penalties imposed in the Brisbane pre-mixed concrete case against the three major participants and their officers would have been even higher, but for the co-operation they provided to the Commission, and the fact that much of the conduct occurred before the increased penalty levels came into operation. None of the companies entered defences in response to the Commission's assertion that price fixing and market sharing resulted from more than 50 meetings and regular telephone conversations. Counsel for the Commission then made submissions to the Court on penalties with the agreement of the corporate and individual respondents.

The Commission achieved a speedy result in a Victorian retail petroleum price fixing case which it launched in November 1995. Although the price fixing was alleged to be confined to three sites, substantial penalties were awarded against a national oil company and a much smaller independent site operator following settlement discussions. As part of the settlement, the independent site operator stated it would endeavour to supply discount petrol to country areas in the States of Victoria and New South Wales, provide access to its terminal for other independents, and distribute and retail petrol in the island State of Tasmania. The Commission anticipates that the presence of a significant independent sector, and access to the terminal facility, should lead to greater price competition.

Table 3. General Anti-competitive Provisions - Penalties Imposed

		Penalty (A$)	
Offence(s) alleged	**Market**	**Corporation(s)**	**Individual(s)**
Price fixing & market sharing 1989-1994	Brisbane pre-mixed concrete	(a) 19 600 000	(a) 350 000
Price fixing 1994-95	Victorian retail petroleum	2 675 000	100 000
Resale price maintenance 1992-93		1 000 000	40 000
Price fixing 1992-93	Tasmanian wholesale frozen foods	1 360 000	185 000
Collusive bidding 1988	Sydney building project	(b) 1 000 000	75 000
Resale price maintenance 1995-96	National Men's clothing	515 000	75 000
Price fixing 1992-93 & market sharing	South Aust wholesale chicken meat	500 000	
Price fixing 1988-92	South Australian roof tiles	300 000	

a. Penalties of A$ 500 000 and A$ 30 000 were previously imposed against other companies and individuals involved in the arrangements.

b. In addition, restitution of $750 000 was also ordered.

In one case which has not yet gone to trial, the Commission commenced court action against a Commonwealth government agency, the Bureau of Meteorology, after complaints from the privatised New Zealand rival agency (MetService). The Commission claims the Bureau had misused its market power for anti-competitive purposes contrary to section 46 of the Trade Practices Act; in particular, it claims that the Bureau refused to supply basic meteorological information to a competitor for the purpose of deterring entry into the market for specialised meteorological services. It also alleged that the Bureau has itself provided specialised meteorological services free to newspaper customers for the purpose of deterring competitive conduct; the information would enable MetService to compile a competing newspaper service. The Bureau, as an agency of the Commonwealth, is subject to the Trade Practices Act, except that a pecuniary penalty may not be awarded; accordingly, the Commission is seeking a mandatory injunction that the Bureau provide information to MetService and an injunction restraining the Bureau from supplying its specialised services other than on commercial terms.

In another developing matter, the Commission is investigating exclusive TV program supply arrangements in the Northern Territory and regional Western Australia, where currently only one commercial broadcaster is licensed in each of those two areas. Plans to license a second commercial broadcaster in each area are being developed and the Commission is concerned an exclusive supply arrangement between the incumbent and two major national networks may prevent or inhibit potential broadcasters from applying for a new licence, thus preserving the current sole status of the incumbents. While the regional WA broadcaster offered undertakings, the Commission found them unacceptable. The Northern Territory broadcaster has not yet responded to the Commission's concerns. The Commission is also investigating circumstances surrounding the close timing of the signing of both deals and whether the two national networks involved may have reached any understanding contrary to the general prohibition on anti-competitive arrangements.

Significant private action

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 of the Trade Practices Act or the Competition Code. One case during the period, involving an attempt to establish a new professional sporting competition, attracted a very high level of media attention.

News Limited v. Australian Rugby League Limited

Anticipating high levels of revenue from broadcasting rugby league football on pay TV, News Limited approached clubs from the existing national competition in an effort to gain their services in a new competition (called Superleague). In 1994 the Australian Rugby League (ARL) became aware of this attempt by News and asked the clubs to sign a 'Commitment Agreement' and later in 1995, a 'Loyalty Agreement'. These agreements, which all clubs signed, purported to ensure the clubs exclusively supplied their services to the ARL for five years.

In 1995, News commenced proceedings in the Federal Court seeking to have the agreements set aside either because they were a misuse of market power by the ARL, they caused a substantial lessening of competition in the 'rugby league market', or because certain provisions were exclusionary - all contraventions of the Trade Practices Act.

The Court, dismissing the action, determined that rugby league football was a sub-market in the broader sporting entertainment market and that, in a such a large market, there had been no misuse of market power by the ARL. The agreements were not found to be exclusionary because the clubs and the ARL are not in competition, nor were the clubs in competition with each other (rather being partners with the league in competition with other sports). The decision has been appealed and a decision is awaited.

Authorisation decisions and Notifications

The workload of the Commission is increasing following the adoption of the national competition policy package, which has extended the reach of the Act into previously exempt areas.

Under the national competition policy reforms, the notification process was extended to third line forcing conduct. This process was used on several occasions. Noteworthy authorisation matters include the following.

Table 4. Adjudication Action - 1995-96 and 1994-95

	Tribunal Reviews		**Authorisations**		**Notifications**	
	1995-96	1994-95	1995-96	1994-95	1995-96	1994-95
Previously under consideration	1	8	17	16	1	2
New applications/notices	3	1	33	22	38	3
Withdrawn	0	5	2	2	0	0
Decided	1	3	22	19	21	4
Unresolved at 30 June	3	1	26	17	18	1

Review of Accreditation System for Advertising Agencies

In 1976, the Commission granted conditional authorisation to the accreditation system, which was designed to facilitate trading arrangements between advertising agencies and the major media owners. That decision was 'appealed' to the Tribunal and the system was subsequently authorised in 1978 after the Tribunal requested that the Commission periodically examine the workings of the system.

In January 1995 the Commission commenced a review of the system and, after considering submissions, was satisfied that a material change of circumstances had occurred in a number of areas which warranted revocation of the authorisation. On 26 July 1996, the Tribunal upheld the Commission's decision revoking the accreditation system for the advertising industry.

Review of Newspaper Distribution Arrangements

The previous report noted that in November 1994 the Tribunal had refused to grant an authorisation covering proposed new arrangements for newspaper distribution in the State of Victoria. In its reasons for decision, the Tribunal indicated circumstances had changed significantly since the authorisation was granted in 1982. Consequently, in 1995 the Commission decided to review the authorised arrangements in the eastern States and Territories. The Commission has received a large number of submissions and is currently considering them. The Commonwealth Government intends to make a submission.

B. Access to infrastructure services

The importance of third party access to certain key facilities markets is recognised in the national competition policy. The notion underlying this regime is that access to certain infrastructure facilities with natural monopoly or near-monopoly characteristics, such as electricity grids or gas pipelines, is needed to encourage competition in related markets, such as in electricity or gas production. 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. New Part IIIA of the Trade Practices Act establishes a legal regime providing for third party access to a range of facilities of national importance. The regime provides both voluntary and mandatory mechanisms for third party access. Further detail can be found in Australia's 1994-1995 Annual Report.

Under the regime, the Commission cannot compel access to a particular service until the relevant (Commonwealth, State or Territory) Minister has declared the service. The Council provides advice to the Minister on whether the service should be declared.

One application for access was received during the year from a national association of tertiary students effectively seeking establishment by a Commonwealth department of a membership subscription deduction service with funds to be deducted from financial assistance paid by the Commonwealth to approved students. The Council recommended that the Commonwealth Treasurer not declare the service sought for reasons including that the department's computer facility is not of national significance and that it was not satisfied that it would be uneconomical for anyone to develop another facility to provide the service. After considering the Council's reasons, the Treasurer formed the same view, deciding not to declare the relevant service. Review of the decision has since been sought in the Tribunal.

C. Price oversight

In Australia, at the Commonwealth level, the Prices Surveillance Act provides for three forms of price oversight (not control) - surveillance, monitoring and inquiries.

Price surveillance is a mechanism whereby the Minister can 'declare' the goods and services supplied by particular firms. Currently 26 firms, supplying eight categories of goods and services are subject to declaration, representing a decline from the 28 firms and 11 categories under surveillance a year ago. A declared firm is required to notify the Commission in advance of raising the prices of declared goods and services, and the Commission is then required to indicate whether it supports the proposed price increase. Firms are not required to comply with the Commission 's recommendations, the system relying on moral suasion. Since the Act's inception, however, declared firms have on all occasions followed the pricing body's recommendations. The outcome of, and (from November 1995) reasons for, the Commission's recommendations are placed on the public register.

Under section 27A of the Act, the Commission has the power to monitor prices, costs and profits within an industry or individual businesses at the discretion of the Minister, and is required to make copies of monitoring reports available to the public.

By direction of, or with the approval of, the Minister, the Commission can hold public pricing inquiries and report to the Minister on those inquiries.

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. These arrangements will continue as part of the national competition policy, although the Commonwealth surveillance regime will apply to State and Territory government businesses, where:

a) the State or Territory concerned has agreed; or

b) 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 has consulted the relevant Minister of the State or Territory concerned. The details of, and information on, this process are set out in the inter-governmental Competition Principles Agreement and the Prices Surveillance Act.

Over the year, the Commission, and its predecessor in this area, the Prices Surveillance Authority, continued to review the need for continued surveillance of particular firms, handing down the following reports.

Inquiry into Harbour Towage Declarations

Harbour Towage has been subject to surveillance since 1991 and this report was released in December 1995. The inquiry found that, in most cases, harbour towage operators enjoy substantial market power because of inelastic demand and high barriers to entry, economies of scale and geographic factors which limit competition in the industry. The Commission also found that towage profits were high and some towage companies may be misusing their market power at a cost to users. On this basis, the Commission recommended that formal monitoring of harbour towage be applied in the major general and bulk cargo ports.

Steel Mill Products and Welded Steel Pipes Declarations

Steel mill products and welded steel pipes supplied by the dominant domestic producers in each sector were declared for prices surveillance in 1986. The inquiry noted that the producers' market power was now sufficiently constrained to warrant removal from prices surveillance. In the case of pipes, competition between suppliers had increased and, because the producer had demonstrated price restraint, the declaration was subsequently removed.

Petroleum Products Declaration

The four major oil refining/marketing corporations are declared under the Prices Surveillance Act. On 15 August 1996 the Commission released the report of its inquiry into that declaration. The Commission recommended that the declaration be revoked during 1997, subject to some market adjustments occurring which are expected to address the existing market structure problems restraining competition. The adjustments expected include the growth and spread of direct imports of refined fuel leading to an increase in the numbers of independent retailers.

D. Other legislation

In addition to general enforcement functions under the Trade Practices Act, the Commission has specific statutory reporting powers in relation to pay TV under the *Broadcasting Services Act 1992*. This legislation contains a range of licensing and regulatory requirements on broadcasting services within Australia, including a requirement for the Australian Broadcasting Authority to request a report from the Commission as to whether the allocation of licences would contravene the merger provision of the Trade Practices Act and not be authorised under the Trade Practices Act. During the year the Commission continued to report on these applications covering more than 270 licences.

III. Implementation of competition policy principles

With a broad approach to competition policy, Australia's national competition policy extends beyond the competition law (the competitive conduct rules, infrastructure access and price oversight) to provide principles for legislation review, competitive neutrality, infrastructure access and structural reform of public monopolies. These principles guide reform throughout the economy.

Responsibility for reform rests with the Commonwealth, State and Territory governments. The reform package settled in April 1995 under the auspices of the Council of Australian Governments (COAG), saw the Commonwealth, States and Territories agree to a reform program covering the electricity, gas, water and road transport sectors of the economy. As part of that package, the Commonwealth agreed to provide the States and Territories with competition payments in return for their adherence to the reform program. The Council is charged with guiding and assessing adherence by the States and Territories to that program. To date the Council has assessed the policy statements published by the States and Territories on legislation review, competitive neutrality and application of competition principles to local government, offering suggestions as to possible improvements.

A. Utility reform

Electricity

In February 1994, the 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; however, this has been delayed, and it is now expected to commence in its first stage (involving the States of Victoria and New South Wales and the Australian Capital Territory) in early 1997.

The basic characteristics of this competitive market are: generators competing for the right to supply electricity; open access to the grid for 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.

These functions will be set out in the National Electricity Market Code of Conduct, which will be underpinned by State and Territory legislation and access undertakings of grid operators. 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. Upon approval of the Code by State and Territory jurisdictions, it will be submitted to the Commission for

authorisation and implemented in 1997. Structural separation of what were vertically integrated State electricity utilities has been undertaken. Further details are set out in Part IV - Studies.

Gas

In February 1994, the COAG agreed to implement a package of reforms for the natural gas industry, including removal of legislative and regulatory barriers to trade, aimed at stimulating a more competitive framework for the industry with effect from 1 July 1996. A key element to implementation of the reforms, a code of conduct incorporating a national framework for third party access to supply networks, is nearing finalisation by the Gas Reform Task Force following a period of public consultation (including with industry). The code of conduct, and an associated Inter-governmental Agreement, will be submitted to the COAG for endorsement. The code of conduct and the agreement will be supported in legislation by each jurisdiction.

B. Communications

Postal services

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. From January 1995 additional competition (including reduced reserved services protection) was introduced into the mail services market. A review of the remaining restrictions on competition will be conducted in 1996-1997.

Broadcasting

The *Broadcasting Services Act 1992* contains a range of licensing and regulatory requirements on broadcasting services within Australia, including cross-media provisions. All commercial radio and TV broadcasting services, subscription TV broadcasting services and community broadcasting services, other than national broadcasting services (ie the Australian Broadcasting Corporation and Special Broadcasting Service), must be individually licensed by the Australian Broadcasting Authority.

The Authority recently completed an inquiry into the content of on-line services to determine the extent to which on-line services are regulated by the Broadcasting Services Act, and would thereby be subject to licensing and content regulation. The Authority concluded that on-line service providers need not be licensed in the same manner as broadcasters due to the point-to-point nature of such services. The Authority concluded that a self regulatory regime based on a code of practice developed by participants in the on-line environment was more appropriate than imposed regulation. To this end it supported the development of representative industry bodies to develop such a code. It also suggested that effort be directed toward developing appropriate filter software products and labelling standards to give end users control over the content to which they are exposed.

The new Government is to review the cross-media provisions of the Broadcasting Services Act. The review is to determine the most effective means of achieving the public interest objectives of plurality, diversity and competition. The outcome of the review will have important implications for Australia's media market structure.

The new Government has also indicated its intention to review the implications of the increased broadcasting capabilities arising from digital broadcasting. The timing of the switch to digital broadcasting is yet to be announced. The Government has also announced a review of the sixth free to air TV channel. Presently the sixth analogue channel is reserved for community broadcasting, pending the outcome of the inquiry. The terms of reference of this inquiry preclude its use for future commercial broadcasting.

Telecommunications

There are currently two general carriers operating 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, 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.

The Government has confirmed that the analogue mobile telephone radiocommunications spectrum used by the Telstra network is to be withdrawn by the year 2000. From 1 July 1997, regulatory restrictions will be removed allowing other providers to offer mobile telephony services. Radiocommunications spectrum in the 1800 MHz band will be offered for sale prior to that date.

The Government is committed to the commencement of full and open telecommunications competition from 1 July 1997. Under the new legislation there will be no restriction 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 Commission. There will also be a telecommunications specific third party access regime based on the general Trade Practices Act access regime, under which carriers controlling network facilities will be required to allow interconnection of other carriers and service providers.

C. Transport

Waterfront

The Government aims to create an environment which will encourage stevedoring employers and employees to address waterfront work practices through industrial relations reforms. These reforms include enacting boycott provisions based on the former sections 45D and 45E of the Trade Practices Act, ending the union labour monopoly and encouraging enterprise bargaining.

Shipping

The Government gave an election commitment to wind back current cabotage restrictions and examine the appropriateness of alternative shipping register arrangements. Also, as part of the reform plan, the Government has introduced a Bill to abolish subsidies available to the shipping industry under the *Ships (Capital Grants) Act 1987* and *International Shipping (Australian-resident Seafarers) Grants Act 1995*.

Airports

The airports owned by the Commonwealth are to be 'privatised' through the sale of long term leases. The Airports Bill 1996 has been introduced to facilitate the sales process and establish a regulatory regime to protect the public interest. The first tranche of airports to be privatised in 1996-1997 will include Melbourne, Brisbane and Perth. Adelaide airport is expected to be privatised later in 1996-1997. The privatisation of the Sydney airports is to await the resolution of noise problems at Kingsford-Smith and the completion of an environmental impact statement at two possible sites for the second Sydney airport.

Aviation

Other reforms to further open the aviation market to competition are being considered. Negotiations for a Single Aviation Market with New Zealand have recommenced and more open aviation arrangements are expected to be in place by 1 November 1996. The Airports Bill 1996 includes measures to facilitate access to airport services for potential new entrants in the domestic aviation market. Restrictions placed on international aviation by the current system of air services agreements are to be reviewed in 1996-97.

Rail

To ensure open access to the interstate rail network for current and potential operators, the Government intends to negotiate with the States and others over access arrangements, including the proposed establishment of a National Rail Infrastructure Authority. The Government is also considering the future operation of the Australian National Railways Commission (AN) in light of its continuing poor financial performance. This follows a review which examined the commercial performance of AN and the National Rail Corporation and considered a range of options for the future of AN and its services.

D. Legal profession

The recently released Wilkins Report, issued under the auspices of the COAG, set down principles for further reform of the legal profession to encourage and guide State and Territory reform efforts. In addition, it called for further research on proposed reforms, and for the Standing Committee of Attorneys-General to identify State and Territory legislation not meeting the principles and to work towards a national framework for the regulation of the legal profession. The principles in the Wilkins Report should also assist the State and Territory regulation reviews now under way to identify and remove restrictions on competition where appropriate.

IV. Studies

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

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 in that State. The report, released in August 1995, concludes that Pacific Power has considerable market power and accordingly, should be divided into at least three independent generation businesses of similar size (with separate boards, reporting to the appropriate Minister) competing with each other.

Since the release of the report, the New South Wales Government established two new independent government-owned generation entities, which acquired a total of six coal fired generation plants previously owned by the incumbent utility, Pacific Power.

Private Infrastructure Task Force Report

The Economic Planning Advisory Commission (EPAC) was commissioned by the previous Prime Minister to establish a task force to investigate and report on private sector involvement in the financing, management and control of public infrastructure. The task force was to focus on: the scope for future private sector funding; the appropriate form of interaction between government and the private sector; impediments to efficient private sector involvement; and measures to reduce those impediments. Submissions from the public were invited and an interim report was publicly released in May 1995. The final report was released in September 1995.

The EPAC report makes a number of recommendations in three broad areas: establishing best practice procedures for assessing and managing infrastructure projects; improving intergovernmental planning and co-ordination of infrastructure expenditure; and improving government accounts pertaining to infrastructure expenditure and financing.

Implementing the National Competition Policy: Access and Price Regulation

Following passage of the *Competition Policy Reform Act 1995*, the Industry Commission released in November 1995 an information paper on access to essential facilities and prices regulation. The paper discusses some key issues in implementing the access provisions of the Trade Practices Act, including: the appropriate scope of a national approach to mandatory access; the establishment of an appropriate framework for firms to achieve efficient outcomes through commercially negotiated terms and conditions; and the difficulties facing regulators where it is necessary for them to determine the terms and conditions of access. The paper also examines issues likely to arise in implementing prices regulation.

Bureau of Industry Economics (BIE) report on International Benchmarking - Rail Freight

This report, released in December 1995, compares the performance of Australia's rail freight industry domestically and against corresponding industries in selected overseas countries. The major findings were that average Australian freight rates in 1993-94 were well above most North American systems, particularly for coal and grain rates. However, grain rates were broadly comparable with North American rates when adjusted for haul length, and for general freight Australia has closed the gap with world's best practice. The BIE's analysis of standardised operating costs (taking into account Australia's much smaller freight tasks and lower traffic densities) also indicated a much smaller gap below world best practice.

The BIE report concluded that Australia's high cost and rate structures can be addressed through vigorous implementation of competition policy reforms. The most important reforms relate to: restructuring rail systems to encourage competition; promoting competitive neutrality; allowing third party access to rail track; adopting commercial pricing policies; prices oversight; introducing direct and transparent financial support for community service obligations; and removal of regulations that tie the transportation of commodities to rail.

The Electricity Industry in South Australia

In April 1996, the Industry Commission released its review on the structural arrangements for the electricity industry in the State of South Australia. It found that the present structure would enable the government-owned electricity generator, ETSA, to exert market power in the South Australian region of the national electricity market and would discourage other generators and retailers from entering the regional market. The Industry Commission recommended a two stage structural separation of ETSA, with the scope of the second stage subject to more detailed study.

Since the review, the South Australian Government announced the separation of electricity generation from its currently vertically integrated government-owned utility. Separation of generation activities into a new government owned corporation will take effect on 1 January 1997.

Industry Commission report on Competitive Tendering and Contracting (CTC) by Public Sector Agencies

The Industry Commission was requested to prepare a report on the scope for scontracting out by Commonwealth, State, Territory and local governments, as well as their agencies. The report, which was tabled in the Parliament on 18 June 1996, found that successful CTC implementation across all three tiers of government could lead to significant gains to economic and allocative efficiency. The report estimated net economy-wide gains from CTC somewhere between 0.3 and 1.7 percent of GDP. The report found that through improved information and management practices CTC can lead to increased public accountability. The report also identified a number of areas where incorrect CTC practices, or inappropriate use of CTC, could lead to net negative results (increased costs or reductions in quality).

Industry Commission review of the draft Merger Guidelines administered by the Commission

The Industry Commission conducted a review of the Commission's draft Merger Guidelines, releasing a report in June 1996. It made a number of suggestions, including that the Commission increase the level of the concentration thresholds with a view to excluding more mergers from detailed analysis. The increased use of quantiative measures was encouraged, where the Commission was considering the potential for market power (eg in respect of barriers to entry). The Industry Commission also suggested the Commission should be more willing to recognise private efficiency gains and be more cautious in the use of enforceable undertakings that affect the structure of a market. The Commission has responded to some of the suggestions in its revised Merger Guidelines. It has also stated that, in 1996-1997, it will review mergers against both the current concentration thresholds and those suggested by the Industry Commission.

Industry Commission Stocktake of Progress in Microeconomic Reform

The Industry Commission was asked by the incoming Government in March 1996 to carry out a stocktake of progress in microeconomic reform. The stocktake, released in July 1996, provides a broad overview and discussion of the microeconomic reform landscape, pointing to general directions for reform. It includes recommendations on a wide range of areas, including labour markets, education, health, community services, industry assistance, the environment, infrastructure, taxation and government performance. The Government addressed a number of the stocktake's specific recommendations in the 1996-1997 Budget, and has indicated remaining recommendations will be considered in subsequent processes.

Appendix

PUBLICATIONS AND RELEVANT ARTICLES

Australian Competition and Consumer Commission Publications

The *ACCC Bulletin* is a widely circulated regular publication 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:

- Summaries of the Trade Practices Act and the Prices Surveillance Act (August 1995);
- Guide to Authorisations and Notifications (November 1995);
- Guide to the Access Regime (December 1995);
- ealth Sector Guide (January 1996);
- Small Business Guide (November 1995);
- Revised Merger Guidelines (July 1996).

In addition, the Commission planned to implement an Internet home page from September 1996 with on-line versions of all the Commission's major guidelines, media releases and other public statements.

Private Articles

Richard COPP, 'The economic effects of a decade of merger policy in Australia : suggestions for reform.' *Trade Practices Law Journal* 3 (3) September 1995 108-125

Stephen CORONES, 'Is the adversary process appropriate in restrictive trade practices cases' *Australian Business Law Review* 24 (1) February 1996 71-75

Henry ERGAS, 'Competition policy in deregulated industries' *International Business Lawyer* 23 (7) July/August 1995 305-306, 308-310

Robert J. GLANCE, 'Merging down under : a comparative analysis of Australian and United States merger guidelines' *Cornell International Law Journal* 28 (2) Spring 1995 501-523

Jacqueline D. LIPTON, 'Third line forcing in Australia : current problems and future directions' *Trade Practices Law Journal* 4 (2) June 1996 77-92

Timothy J.F. MCEVOY, 'Takeovers and the TPC : the use of interim injunctions in response to alleged violations of the Trade Practices Act 1974' *Competition And Consumer Law Journal* 3 (1) September 1995 86-98

G.Q. TAPERELL, 'Competitive conduct rules for telecommunications after 1997: will national competition law suffice?' *Competition And Consumer Law Journal* 3 (2) December 1995 165-198

AUSTRIA*

(1995-1996)

Since Austria's accession to the European Union and the opening up of Central and Eastern European Countries, an increase in competition has been experienced in Austrian economy. This is especially true for companies in the formerly protected sector. Considerable price decreases took place while companies specialised in parallel imports emerged. The period 1995-1996 was also marked by the bankruptcy of several important enterprises, which led to increased concentration. The construction, transport and tourism sectors as well as producers of foodstuffs were as much affected as manufacturers of consumer goods.

Enforcement of competition laws and policies

Action against anti-competitive practices, including agreements and abuses of dominant positions

a) Summary of activities

Statistical overview	
	November 1995 - September 1996
Proceedings on horizontal agreements	13
Abuse of a dominant position	7
Decisions of the cartel high court on abuse of a dominant position	2
Total number of notified (exempted) cartels	25
of which petty cartels	6
Notified vertical agreements	1 200
Notified non-binding recommendations of associations	60

b) Description of cases

1. Cartels / horizontal restrictions

Cartel procedures in Austria usually consist of three phases:

* The original language of this report is English.

-- Application to the Cartel Court; The legal parties may comment within four weeks. Thereafter the Cartel Court requests the Joint Committee on Cartel Matters to give an opinion in the respective cartel case.

-- It is then - within a period of 3 months - the duty of the Joint Committee on Cartel Matters to examine and finally confirm or deny the "economic justification" of the planned cartel.

-- The cartel court passes a decision.

An application, filed by two Austrian trade associations of different sectors with diverging interests, is currently in phase 1. In detail, the problem consists of a percentage fixation of licence fees of one association in relation to entrance fees of the other association.

Currently eight cartel procedures in phase 2 are being dealt with, all dealing with the prolongation of existing cartel agreements. As already mentioned in the preceding annual report on competition policy, only non hard core cartels are concerned.

One cartel was cancelled, another one was transformed into a vertical agreement. In the forwarding sector the cartel court established the existence of a cartel of minor importance for cargoes with a market share of only about 1.5 percent of domestic freight traffic.

With regard to a non - competition clause with excessive duration in the sales contract concluded by a major Austrian producer of building materials with a small producer, the Joint Committee on Cartel Matters gave a negative opinion as the buyer was not willing to reduce the duration of the respective clause to a maximum of three years.

The cases in the sector of waste disposal mentioned in the latest competition report have not come to a conclusion; the ARA system was qualified as a cartel - as was the case with the Dual System in Germany. Changes in the legal framework of waste disposal ("Abfallwirtschaftsgesetz") require a revaluation of pending cases.

A disposal system for car starter batteries was regarded as complying with the cartel law, since ancillary restraints to competition flanking the per se neutral agreements are necessary for the implementation of the whole agreement and appear to be the least severe means in attaining these objectives.

A market information system for purchase and sale of waste paper has been released for another three years.

In recent years the number of cartels notified to the cartel court fell by more than 50 percent to 25 cartels, of which six represent petty cartels.

2. Vertical agreements

According to the Austrian cartel law, the binding enterprise is obliged to report vertical agreements to the cartel court. The cartel court has no power to examine the contracts itself, but has to rely on the application of the legal parties.

These provisions were introduced with the 1993 amendment to the cartel law.

Since then about 1 200 vertical agreements were notified to the cartel court, amongst which were franchising agreements, exclusive purchasing agreements and exclusive distribution agreements. Up to now two agreements were blocked, in about 40 cases the proceedings ended in modifications of the relevant contracts.

Moreover about ten proceedings were brought to court according to the provisions of cartel law section 8a, which treats applications of ascertainment whether a matter is subject to the cartel law. All but two cases were concluded with the decision that the contracts examined were subject to the cartel law.

The case of the Benetton distribution agreements is still pending. Benetton maintains that no restrictive clauses (such as exclusive dealership, obligation to respect non- binding price recommendations) are imposed on their distributors.

The cartel court itself initiated about ten proceedings on the basis of non reporting of vertical distribution agreements.

3. Non-binding recommendations of associations

Horizontal non-binding price recommendations and calculation schemes might have the same effects as price cartels. Thus they are subject to compulsory notification and control of abusive practices. Up to now the majority of cases have fallen within the framework of EC - competition law as defined by the Court of Justice.

In two cases the court stated that they were not non - binding and thus were subject to the provisions of cartels of recommendations. These concerned a recommendation of the trade association of film distributors and a recommendation of an association of manufacturers of sports goods.

Furthermore three requests for ascertainment whether the matters were subject to the cartel law (Section. 8a cartel law) were made, as recommendations were issued without prior notification.

At present around 60 non-binding recommendations have been notified to the cartel court.

4. Abuse of a dominant position

During the period under review (November 1995 until September 1996) seven cases were initiated or decided in the first or second instance.

5. Decisions of the cartel high court

The cartel high court had to deal with a complaint filed by a producer of small aeroplanes and a producer of small aeroplane- engines against Austro Control GmbH an enterprise in charge of the technical licensing of aeroplanes. The former federal aviation authority was privatised some years ago. Since then prices, determined by a decree of the Federal Ministry for Science, Transport and the Arts, have risen considerably. As these services of Austro Control have the character of acts of state, the cartel high court confirmed the ruling of the cartel court to dismiss the case on grounds of non - applicability of the cartel law.

An appeal lodged by a legal party against a decision of the cartel court concerning the nation-wide recycling system ARA was dismissed by the cartel high court. The cartel high court did not consent to the allegation that the trusteeship agreement within the ARA system between licensees, disposal associations, and sectoral recycling companies was an abuse of terms.

6. Non - appealable decisions of the cartel court

Concerning an alleged abuse of a dominant position by a manufacturer of car starter batteries by refusal to supply a car accessory's retailer depicted in the previous report the court could not decide the point at issue. As the plaintiff did not provide further information the cartel court could not decide in the case itself and the case was referred to the public prosecutor's office which has investigatory powers. The case is still pending.

In the case of a supplier of liquid gas allegedly abusing its dominant position by an exclusive purchasing agreement mentioned in last years report, the cartel court held that a linkage of a sales agreement of a tank for liquid fuel gas with an exclusive purchasing agreement for the supply of gas for a period of 5 years does not constitute an abuse. An appeal was made.

A proceeding in respect of a small tobacconist running his business in a train station vs. the Austrian Railways as owner of the premises is still at an early stage. The tobacconist maintains that the Austrian Railways, privatised recently, raised prices for rents for shops at train stations to about twice the price before privatisation. Although only one specific tobacconist is complaining, the decision will be taken as juridical precedent.

A soda producing subsidiary of Solvay, one of Europe's largest producer of salt, complained about alleged monopoly price - practices of the Austrian salt producing monopoly. It is worth noting, that Solvay and the Austrian salt producing monopoly are in strong rivalry in the trade of salt. Furthermore the latter will be privatised in the near future and Solvay is a potential buyer.

The case arousing most public interest during the time under review is definitely the complaint of a middle sized newspaper publisher against the largest newspaper publisher in Austria about abusive refusal of access to its distribution system. The largest newspaper publisher, in which a large German newspaper publisher has a significant interest, disposes exclusively of a house to house distribution system. The plaintiff regards the distribution system as an essential facility and argues, that a parallel distribution system cannot be set up at acceptable prices. Moreover questions were raised about the rivalry of these publishers' newspapers as well as the maximum capacity of the house to house distribution system.

A second point concerned the practice of offering combined advertisements in the two newspapers of the dominating publisher at a very low price, which was seen as predatory pricing practice. The cartel high court decided in a temporary injunction, that the dominant publisher has to stick to the price level of 1st January 1995.

The members of the Joint Committee on Cartel Matters published diverging opinions. The Cartel Court interrupted the proceedings and requested the European Court of Justice for a preliminary ruling.

Mergers

In 1995, 267 merger cases were filed. From January to August 1996, 221 cases were announced or registered (announcements and registrations in a ratio of approximately 1-2).

The mergers concerned various economic sectors as follows:

	1995	Jan. - Aug 1996
manufacturing, building	97	89
construction, building materials, real estate, waste management	48	50
energy	11	13
co-operatives	10	5
media	12	17
trade and commerce	28	15
banks	9	6
insurance, various services	44	22
hotels, tourism	8	4
Total	**267**	**221**

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

Since the introduction of merger control in November 1993 no case led to a negative decision. In 1995 and 1996 (January to August) about 50 applications were lodged with the cartel court by the legal parties; especially concerning detailed descriptions of markets, market shares, ownership or a possible excess of turnover thresholds.

a) Vetropack

The Austrian subsidiary of the Swiss company Vetropack, specialised in the production of glass packings, bought Straza AG, the Croatian producer of glass packing. Vetropack has a turnover of ATS 1.3 billion in Austria and thus a market share of more than 70 percent. The consolidated turnover of Straza AG is about ATS 700 m, about half of which is sold via an Austrian subsidiary of Straza, nonetheless only 1.5 percent of its turnover remain in Austria, the remaining 98.5 percent being exported. This percentage was checked. Despite the high market share of Vetropack and the potential competition from Straza the merger was not blocked, as there are according to customers no barriers to trade for the standardised production of glass packings and Vetropack has to be considered small in comparison with German, Italian or French producers.

b) EC-Merger-Control cases affecting the Austrian market

Billa-Rewe

Serious concerns were raised about the merger of the retail chain Billa with Rewe, a German retail chain for food. Billa is the market leader of the Austrian food retail market with a market share of 28 percent and a turnover of about ATS 50 billion Rewe is the second largest German food retail group with a turnover of about ATS 140 billion. This merger was notified to the European Commission. Although both companies were active in different regional markets, the purchasing power of both companies rose considerably. The turnover of the new conglomerate will be more than twice as much as

the whole Austrian food retail market. Austrian producers of food have rather small production capacities adapted to the Austrian food market, thus some of them will not be able to supply such large companies. Therefore the possibility of substitution of demand for the Austrian food industry was considerably decreased. However, the European Commission examined the combined market share for the Austrian as well as the German market and found no considerable increase in market power.

The role of competition authorities in the formulation and implementation of other policies

a) Deregulation

A main issue of competition advocacy is the abolition of unjustified barriers to entry by deregulation.

There have been several activities organised by the Federal Ministry for Economic Affairs concerning the attractiveness of Austria as a business location. The regulatory framework was found to be one of the most important criteria for founding an establishment. In connection with the globalisation of the markets and the creation of the internal market, the competition of business sites became more and more a competition of the regulatory systems.

It is said that the licensing procedures for business sites and admission of newcomers take too long. Together with other bureaucratic obstacles, e.g. strict qualification requirements for entering and switching the branch of a business, business performance is hindered. This is a result of split competencies between the federal government ("Bund", e.g. approval under the Austrian industrial code, approvals under the Water Act) and the provinces ("Länder", e.g. approvals under the different Building Acts and Nature Preservation Acts). Another problem is the codecision of e.g. different ministries, which slows down the decision making process.

The efforts to simplify business law were intensified in recent years, as all the activities of different institutions in Austria e.g. public bodies in "Bund" and "Länder" (e.g. a project within one local district brought a concentration of different administrative procedures - a project worth copying), social partners, but also activities in the European Union (Molitor Group, Ciampi-Report, SLIM-Initiative) show.

The "Commission for the Simplification of the Business Law" was installed by the Minister for Economic Affairs in fall 1995, especially to present a solution for the above mentioned problems. The aim of this group is to examine the impact of different regulations on the competitiveness of the Austrian economy and to improve employment. The following topics should be dealt with both in quantitative and qualitative respects:

-- Elimination of superfluous rules and regulations

-- Areas which could be the subject of a codification

-- The potential for deregulation and presentation of concrete drafts for amendments of law, especially with the aim of simplification of approval procedures

A final report including a statement on the proposal for an amendment of the Austrian industrial code should be finished in fall 1996 to be submitted to parliamentary discussions shortly.

b) Air transport

The trend towards co-operation between carriers continued in this period with code-share as the most often used framework. It is still unclear to authorities whether this sort of co-operation is undercutting competition or - quite the opposite - whether this is the way by which competition of networks can be made effective. Authorities generally believe the latter is true and therefore favour such co-operations in general.

The EU - liberalisation of ground handling services seems to be the most substantial progress having been achieved in this period, even if it should be borne in mind that the full impact of the said EU - directive will not be felt before the year 2003.

During the legislation process it has become obvious that competition policy is - at least in the short run - harmful to the interest of organised labour and that only by building in safeguards - such as long transition periods - deregulation can materialise.

Different opinions exist on how to deal with natural monopolies such as airports: whether to regulate them tightly (by cost - control, rate of return - control, price - caps) or to abstain from any state interference; if the EU - internal market enhances competition of networks substantially, the latter could be feasible.

The most pressing competition problem in EU and Austrian civil aviation seems to be the generous attitude of the European Commission as far as state aids for carriers are concerned. This helps to keep less efficient foreign carriers in the market which is the cause of ongoing price wars. The Austrian authorities are not able to intervene because of insufficient EU legislation as far as fares are concerned.

c) Telecommunication

Privatisation of the Post- and Telecom AG

The Austrian Postal and Telecom operator was transformed into an independent corporation owned by the Republic of Austria. It is intended to go public by the end of 1999. The Republic of Austria as owner is now represented by the Ministry of Finance. The Federal Ministry for Science, Transport and the Arts created a department for regulation and licensing matters. The Post- and Telecom AG provides mail services, telecommunication services, and bus- services. In order to avoid cross subsidies the above mentioned services have separate accounting. Mobilkom, a 10 percent subsidiary of Post and Telekom AG, is currently looking for a minority shareholder. Services like value added services and the selling of telephone equipment are provided by DataKom, another subsidiary of Post- and Telekom AG.

Procurement of the 2nd GSM-Licence

According to the provisions of the European Union Austria issued tender invitations for the second GSM licence. Several consortia including big international telecommunication enterprises made bids of up to ATS four billion. Finally a consortium consisting of DeTeMobil, a subsidiary of Deutsche Telecom, Siemens and some other enterprises made the highest bid. As Siemens was also the main provider of Mobilcom, the GSM - subsidiary of the Austrian Post and Telecom public company, it was assumed that Siemens has particular knowledge about the Austrian market, customers of Mobilcom and has a special ability to control the technical maintenance of Mobilcom. Moreover it was assumed that Max.Mobil, the second GSM - Network will send out an invitation to tender for its technical equipment to Siemens and this assumption was confirmed.

Following a complaint by the competitor Ericsson the European Commission investigated these proceedings. As Ericsson withdrew its complaints and Austria promised to introduce a the third GSM - licence within a reasonable time period, the investigation was closed. Austria will invite for tender for the third GSM - licence in Spring 1997.

d) Liberalisation of the market for gasoline

An administrative fuel price setting process has been replaced by an agreement between the Minister for Economic Affairs and the Federal Association of the Austrian Petroleum Industry in the eighties. The agreement, also called the "System of Transparent Bags", provided for price changes if the Rotterdam price varied by more than 20 Austrian Groschen per litre. In April 1996 this agreement was suspended for one year in order to examine whether a competitive market will evolve without regulation. At the time the respective developments are reviewed continuously.

A problem arises for petrol stations near the border. As there are considerable price differences (up to 50 percent) between neighbouring non EC - countries, petrol stations near the border face serious price competition caused by different regulatory regimes and tax systems.

References to new reports and studies on competition policy issues

Bundesministerium für wirtschaftliche Angelegenheiten, Sektion WirtschaftspolitiK
Wettbewerbsbericht 1995, Wien, Eigenverlag

Kammer für Arbeiter und Angestellte für Wien
Informationen über multinationale Konzerne, (Journal), Vienna

Aktuelle Aspekte der Wettbewerbspolitik:
Die große Herausforderung durch neue Rahmenbedingungen
Teufelsbauer, Wirtschaftpolitische Blätter 6/95, Vienna 1995

Gibt es ein theoretisches Referenzmodell als Leitbild für die Wettbewerbspolitik Karl Aiginger,
Wirtschaftspolitische Blätter 6/95, Vienna 1995

Marktabschottungspolitiken und Wechselkursschwankungen,
Roland Mittendorfer, Wirtschaftspolitische Blätter 6/95, Vienna 1995

The usefulness of oligopoly models for explaining firm differences in profitability, Karl Aiginger, WIFO Working Papers 79/1995, Vienna 1995

Looking at the cost side of "monopoly",
Karl Aiginger, Michael Pfaffermaier; paper presented at the EARIE Conference in Vienna, Vienna 1996.

NOTES

1 . Maintaining responsibility for competition law and policy within the Treasury portfolio is part of the new Government's microeconomic reform agenda. The responsible Minister varies over time according to a Government's arrangements - for example, from 1983 until 1992 the Attorney-General was the responsible Minister, until March 1996 the Assistant Treasurer and, currently, the Treasurer.

2 . Since November 1995 the Commission has comprised 300 staff, about one third of whom are located in Canberra, another third in Melbourne with the balance located in the other States and the Northern Territory. Its litigation is undertaken by a Branch of the Australian Government Solicitor co-located in Canberra and in State Capitals, with specialist advocates being engaged from private practice as required. Reforms to telecommunication regulatory arrangements in 1997 may result in more staff being added to the Commission's Melbourne Office.

3. The Tribunal underwent a name change in November, from the Trade Practices Tribunal to the Australian Competition Tribunal. 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.

4 . Cross-vesting legislation allows actions under the Trade Practices Act to be heard by State and Territory superior courts in restricted circumstances.

5 . See Part II - Mergers and Acquisitions.

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

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

8. Because of overlaps these total more than 149/151.

9 . For example milk, pay TV and ports.

10 . 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 are present which outweigh the anti-competitive detriments.

CANADA*

(1st April 1995-31st March 1996)

Introduction

This Annual Report of the Director of Investigation and Research records some significant achievements of the Competition Bureau during the 1995-1996 fiscal year. Yet, in common with many other organizations, public and private, at home and abroad, the Bureau has found itself coping with the reality of diminishing resources in an environment of constantly increasing demands.

We have been approaching the challenge in a number of different ways: we have consolidated and streamlined many of our operations, particularly in the Marketing Practices area, and have increasingly chosen to pursue cases having a significant economic impact; we have increased our efforts in the compliance and education areas; we have continued to develop and refine our case selection criteria - an initiative whose importance increases as continued deregulation in the telecommunications, electrical and financial sectors gives us an ever growing workload; and we have actively encouraged greater international cooperation, with the consequent sharing of information and resources.

The past year has seen the preparation of a new quarterly publication called CompAct, which was introduced in April 1996, and which increases the transparency of our activities through more detailed and timely reporting.

The process leading to the eventual amending of our legislation, the *Competition Act*, proceeded during the year and encompassed a wide consultation process. Public requests for input gave way to the establishment of a consultative panel which examined alternative proposals and produced a report in March of 1996. A more detailed description of the process follows.

The past year saw the highest fine yet imposed for a single charge under the *Competition Act* , $2.5 million, as well as the start of the first jury trial under the Act.

Merger activity increased significantly, with the number of merger examinations we started rising by 18 percent over the previous year.

Technological change not only affected the business we do, but also affected the way we do business. We now have a web site on the Internet (http://strategis.ic.gc.ca/competition).

The following pages provide a more detailed look at Bureau activities from 1 April 1995 to 31 March 1996.

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* The original language of this document is English.

I. Amending Canada's Competition Act

At the request of Industry Minister John Manley, the Competition Bureau started a consultative process on legislative amendments to the Competition Act in the spring of 1995. The Minister asked the Bureau to engage in broad and open public consultations aimed at updating the Act, so that it remains an effective instrument in shaping a more innovative economy in Canada.

Our consultative plan featured wide circulation of a discussion paper requesting written comments leading to a more detailed discussion of issues and options with a small panel of stakeholders. We hoped that this process would lead to a consensus on many elements and avoid the controversy which resulted during past attempts at changing the law. The goal of the current exercise is to update the law in certain areas and to build a framework for periodic review of the *Competition Act.*

The first step we undertook was to release a discussion paper in June 1995, which identified eight areas for legislative amendment, as follows:

- notifiable transactions;
- the protection of confidential information and mutual assistance with foreign competition law agencies;
- misleading advertising and deceptive marketing practices;
- "regular price" claims and section 52(1)(*d*);
- price discrimination and promotional allowances;
- access to the Competition Tribunal;
- prohibition orders; and
- deceptive telemarketing solicitations.

We received more than 80 responses to the discussion paper before the extended deadline of 6 October 1995. They represented the views of a wide variety of interested parties including large and small businesses, law firms, various organizations and associations, provincial governments, and private individuals.

To continue the dialogue with stakeholders in more detail, a Consultative Panel was established in September 1995. The Panel's ultimate goal was to make recommendations to the Director with regard to each of the areas of the Act to be amended, and to the greatest extent possible, to reach a consensus concerning the suitability and feasibility of the proposals or alternatives put forward. The Panel's report was issued in March 1996.

Panel meetings were chaired by Ed. Ratushny, Q.C., of the Faculty of Law at the University of Ottawa.

Its twelve other members, appointed by the Director, were:

1. Donald S. Affleck, Q.C., Senior Partner at Kelly Affleck Greene;

2. Robert D. Anderson, Q.C., General Counsel at Procter & Gamble Inc.;

3. Yves Bériault, Partner with the law firm McCarthy Tétrault;

4. Sara Blake, Senior Investigation Counsel in the Enforcement Branch at the Ontario Securities Commission;

5. Harry Chandler, Head of the Amendments Unit at the Competition Bureau;

6. Rosalie Daly Todd, Executive Director and Legal Counsel at the Consumers Association of Canada;

7. Calvin S. Goldman, Q.C., Partner with the law firm Davies, Ward & Beck;

8. Lawson A.W. Hunter, Q.C., Partner with the law firm Stikeman Elliott,

9. George Post, former senior public servant, now a Policy Consultant;

10. William T. Stanbury, Professor at the Faculty of Commerce and Business Administration at the University of British Columbia;

11. Norman J. Stewart, Vice President and General Counsel at Ford Motor Company of Canada, Limited; and

12. Peter Woolford, Senior Vice President, Policy at the Retail Council of Canada.

Between October 1995 and February 1996, the Panel met several times to review policy proposals for amendment prepared by the Bureau. In its deliberations, the Panel took into account the comments received from the general public during the consultation process, as well as information gathered and analysis undertaken by the Bureau. The Panel was able to arrive at a consensus on a broad package of reforms, some of which differed from proposals in the discussion paper, but were seen as equally effective and more responsive to the concerns of stakeholders.

While Panel deliberations were carried out in private, many Panel members maintained an ongoing dialogue with other interested parties. This dialogue involved discussions of concepts and proposals which arose at Panel meetings, thus allowing the Panel to obtain information on the acceptability or feasibility of such concepts or proposals.

The Bureau has also maintained an ongoing dialogue with other stakeholders interested in separate aspects of the amendments and has held focus group discussions on topics such as prenotification, confidentiality and telemarketing.

Government officials will study the Panel report in order to develop proposed amendments to Canada's competition legislation.

II. Enforcement of competition laws and policies

Resources

In 1995/1996 the operating budget for the Bureau was $21.4 million including carry forward. A major portion of this budget, $13 216 998, was allocated to salaries for 245 authorized full time staff. As of 31 March 1996, the Bureau was authorized to staff 242 positions consisting of 17 executives, 12 economists, 151 commerce officers and program managers, and 62 employees carrying out informatics, administrative services and support functions. The Bureau also funds the costs for three lawyers employed by the Department of Justice who are assigned to the Department Legal Services Unit.

The Bureau has administrative responsibility for collecting fines imposed by the courts. During 1995/96, $5 587 850 in fines was imposed of which $5 437 850 was imposed and paid during the year in 28 cases, and $150 000 was outstanding in five cases. An additional $138 379,90 in three cases outstanding from previous years was paid, giving a total of $5 576 229,90 paid during the year and credited to the government's Consolidated Revenue Fund. At year end, a total of $992 607,10 remained outstanding in 42 cases.

Activities and significant cases

Criminal Matters

Canada Pipe Company

On 27 September 1995, the Federal Court in Toronto convicted and fined Canada Pipe Company Limited $2.5 million for one conspiracy charge under section 45(1)(c) of the *Competition Act*, the largest fine ever imposed for a single charge under the Act. The Hamilton, Ontario company pleaded guilty to arranging with one of its competitors to prevent or lessen competition unduly in the sale of mid-size range ductile iron pipe in Canada. The offence covered the period from January 1990 to September 1990, and the competing firm was U.S. Pipe and Foundry Company of Birmingham, Alabama. A Prohibition Order was also imposed against Canada Pipe by Mr. Justice McKeown of the Federal Court.

Ductile iron pipe is used in municipal water systems to carry drinking water to residents. Although plastic and concrete pipes are also used in these systems, many municipalities specify only ductile iron pipe due to its strength, flexibility and compatibility with existing pipes. Canada Pipe is the sole manufacturer of ductile iron pipe in Canada and at the time of the conspiracy, had an 85 percent market share in Canada in the sale of ductile iron pipe in the mid-size range (12-24 inches).

In his sentencing decision, Mr. Justice McKeown noted several mitigating factors in Canada Pipe's favour. It was significant that Canada Pipe had entered a guilty plea and that it had co-operated with the Crown. Mr. Justice McKeown, however, noted that the high level of fine was for a crime that was not carried into effect thus signaling that conspiracies that are implemented may face even higher fines, that the level of fine was related by the court to the amount of commerce affected by the conspiracy and that the court reasoned that the level of fine should be high enough to deter persons outside Canada from engaging in actions which violate the Competition Act.

This case benefited from investigative co-operation between Canada's Competition Bureau and the Antitrust Division of the US Department of Justice demonstrating the effectiveness of co-operative efforts that are made in accordance with the competition agreement signed in August 1995 between Canada and the U.S.

Firms or individuals found guilty of such offences can expect to be subject to fines that take into account the cost of the investigation and prosecution. The court agreed in this case that the fine should reflect the cost of the investigation and allocated 20 percent of the fine or $500 000 for this cost.

Freight Forwarders

On 9 January 1995, the Crown proceeded to trial in Toronto before the Ontario Court, General Division, against five pool car freight forwarding companies: Clarke Transport Canada Inc., Consolidated Fastfrate Transport Inc., Cottrell Transport Inc., TNT Canada Inc., and Trans Western Express a division of Northern Pool Express Ltd. One charge had been laid against these companies under the conspiracy provision (s.45) of the *Competition Act*. It was alleged that the pool car freight forwarders had conspired illegally to fix prices for the provision of pool car freight forwarding services in the Toronto to western Canada market over the period 1976 to 1987.

On 9 November 1995, Mr. Justice Moldaver acquitted the five companies. He was satisfied beyond a reasonable doubt that the accused conspired in respect of prices for the delivery of freight by rail from Toronto to various destinations in western Canada and engaged in other forms of anti-competitive behaviour designed to further the success of the companies. Furthermore, he also found that the conspirators knew that the effect of their agreement, if implemented, would be "to lessen competition among themselves and their competitors." However, notwithstanding that he found the resolution of this issue difficult, he was of the view that pool car services on their own did not form a relevant market. He concluded that the relevant market included trucking and intermodal rail services. In the context of this broader market, he could not conclude that the accused had sufficient market power for their agreement to cause an undue lessening of competition.

La Boutique L'Ensemblier Inc./Boutique Le Pentagone Inc./Boutique Vagabond Inc.

On 16 October 1995, La Boutique L'Ensemblier Inc., Boutique Le Pentagone Inc. and, Boutique Vagabond Inc. pleaded guilty to several charges under sub-section 61(6), the price maintenance provision of the Act. These firms are involved in the retail clothing industry in Rimouski in the province of Quebec. A fine of $20 000 was imposed on each company for a total fine of $60 000. In addition, the court issued against each company a prohibition order under sub-section 34(1).

Towing Services - Winnipeg

On 14 December 1995, Dr. Hook Towing Services Ltd., Nick Roscoe, Suburban Centre & Auto Service Ltd. doing business as both Midway Auto & Truck Parts and Hi-Way & Metro Towing Services, Walter Stratychuk, Majestic Towing Services Ltd. doing business as Donway Towing and Lynne Anne Leah were each acquitted of one count of bid-rigging under section 47(2) of the Act in the Manitoba Court of Queen's Bench. The Court concluded that there was insufficient evidence of an agreement between the accused to rig the bids tendered by them in response to a tender call by the City of Winnipeg for the towing and storage of motor vehicles for the period 1989 to 1991. The Crown has filed Notice of Appeal in this matter.

Mr. Gas Limited

On 11 August 1995, Mr. Justice David Dempsey of the Ontario Court (Provincial Division) found Mr. Gas Limited guilty of having influenced upward, by threat, the prices charged by one of its competitors, Caltex Petroleum Inc., in September 1992, in the Ottawa area. Mr. Gas Limited was acquitted of nine other charges.

On 26 January 1996, Mr. Gas Limited was fined $50 000. Mr. Gas Limited filed a notice of appeal against its conviction and the fine on 23 February 1996.

Rittenhouse Ribbons & Rolls Ltd

On 18 December 1995, Rittenhouse Ribbons & Rolls Ltd. was convicted and fined $98 000 in the Federal Court, Trial Division, in Toronto for attempting to induce a supplier of thermal facsimile paper to cut off supplies to a Vancouver distributor, because of the latter's low pricing policy.

The company pleaded guilty to one charge under section 61(6) of the Act. The illegal conduct involved pressure placed on a supplier by Rittenhouse Inc., a large American converter of fax paper which is also the parent company of Rittenhouse Ribbons & Rolls Ltd. The offense involved firms in Canada, the United States, Japan and Hong Kong.

This is the third conviction and fine obtained in the thermal fax paper inquiry, which is part of an ongoing joint investigative effort undertaken by the Competition Bureau and the U.S. Department of Justice (Antitrust Division).

Association québecoise des pharmaciens propriétaires (AQPP)

On 12 May 1995, L'Association québécoise des pharmaciens propriétaires, Le Groupe Jean Coutu (PJC) Inc., McMahon Essaim Inc., Les Magasins Koffler de l'Est Inc.(Pharmaprix), Famili-Prix Inc., Pharmacentres Cumberland (Merivale) Ltée and Uniprix Inc. pleaded guilty to a charge of conspiracy under subsection 45(1)(*c*) of the *Competition Act.* The case involved cash sales of birth control pills and prescription narcotics, including the dispensing fees, in the province of Quebec in 1988.

At the same time, the Court imposed an Order under subsection 34(2) of the Act against Messrs. Jean-Guy Prud'Homme, Guy Lanoue, François-Jean Coutu, Pierre M. Bossé, Guy- Marie Papillon, Michel Lesieur and Claude Gagnon who held senior management positions in the AQPP or one of the convicted corporations at the time of the offence. The Order specifically prohibits them from doing anything directed toward the repetition of the acts mentioned in the information filed by the prosecution.

On 19 May 1995, Madame Justice Ginette Piché of the Superior Court of Quebec imposed a fine of $2 million.

Compressed Gas

Mr. T. John Tindale, the former President of Canadian Oxygen, was committed to stand trial in December 1994, on one count under s. 45(1)(c) of the Act, for his involvement in a conspiracy relating to the supply of bulk compressed gas in Canada. A trial date has been set for 7 October 1996.

In addition to the criminal aspects of this case, on May 21 a Notice of Motion returnable in the Supreme Court of British Columbia was served on the Director by certain parties pursuing private actions under s.36 of the Act against various companies and individuals. The Motion asks for access to the seized documents in the Director's possession which relate to the issues in the actions. The matter will be heard on 7 October 1996.

Wainwright Bus Transportation

On 23 July 1995, Bison Bus (1985) Ltd. was convicted on two counts of bid-rigging under paragraph 47(2) of the Act on two tenders called by Supply and Services Canada for the provision of charter bus services to transport military personnel in Wainwright, Alberta. Bison Bus was fined $2 500 for each count.

Eye glasses

On 10 April 1995, Vilico Optical Inc., doing business as Safilo Canada, was charged with two counts under section 61(1)(a) and one count under section 61(1)(b) of the price maintenance provisions of the Act.

On 6 and 7 September 1995, a preliminary trial was held for Luxottica Canada Inc. The company had been charged with one count under section 61(1)(a) and one count under section 61(1)(b) of the price maintenance provisions of the Act. The trial was not completed and was remanded to a future date. The Attorney General applied for a stay of proceedings and was granted the request.

Land Surveyors - Edmonton

On 24 January 1996, ten companies and 13 individuals in the Edmonton area were each charged with one count under section 45(1)(c) of the *Competition Act*, of unlawfully conspiring to prevent or lessen competition in the production, sale or supply of residential resale Real Property Reports. It is alleged that these persons, in the fall of 1994, did agree to fix the price of such Real Property Reports. A preliminary hearing in the matter is scheduled for 21-25 October 1996.

Tenneco Canada Inc

On 22 September 1995, an order of prohibition was issued pursuant to sub-section 34(2) of the *Competition Act* against Tenneco Canada Inc. for acts or things directed toward the commission of an offence under paragraph 61(1)(a). Tenneco Canada Inc. manufactures auto parts, including shock absorbers and mufflers.

Civil Matters

Interac

On 14 December 1995, the Director filed a Draft Consent Order with the Competition Tribunal to restore competition in the Canadian shared electronic network services market. The Director's inquiry had determined that the actions taken by the Interac Association and its Charter members constituted an abuse of a dominant provision contrary to section 79 of the Act. Under the terms of the proposed Order, the by-laws of the Interac Association will be changed to allow non-financial institutions to become members in the Association. The Director believes that this will increase the number of direct and indirect participants on the system and provide for greater competition in the provision of these network services. The hearing began on March 4, and continued into April. Four parties have been granted leave to

intervene before the Tribunal with their views on the effectiveness of the proposed resolution to restore competition.

Teledirect

An application was made to the Competition Tribunal on 22 December 1994, alleging tied selling and abuse of dominance in the publication of classified telephone directories and involves Tele-Direct (Publications) Inc. and Tele-Direct (Services) Inc., subsidiaries of Bell Canada Enterprises. The Director alleges that the tying of advertising services to advertising space by the Tele-Direct companies has prevented advertising agencies from competing for the advertising services business of advertisers in a substantial part of the market. Other alleged anti-competitive acts have had an exclusionary effect on advertising agencies, advertising consultants and competing telephone directory publishers. The hearing commenced on 5 September 1995, and concluded in March 1996.

Local Phone Submission (CRTC 95-36)

The Director filed a written submission with the Canadian Radiotelevision and Telecommunications Commission (CRTC) on January 26, 1996. This is part of a series of proceedings with respect to opening local telecommunications markets to competition. The Director advocated maximum reliance on market forces for the provision of local telecommunications services, minimized regulation and the adoption of competition policy principles in respect of competitive safeguards.

Radio Station Intervention (CRTC 1995-204)

The CRTC has initiated a proceeding to examine its treatment of cooperative radio station management agreements. The Commission has approved a number of such agreements pursuant to the Broadcasting Act. The DIR filed written comments with the CRTC in its proceeding, drawing attention to the competition issues arising out of these arrangements.

Teleglobe Mandate Review Submission

In December 1995, the Director filed a submission with the CRTC in respect of the Government’s review of Teleglobe's monopoly mandate. The Director advocated the removal of TeleGlobe’s monopoly status and relaxation of restrictions on traffic by-pass and foreign ownership limitations.

Canada Post Mandate Review

The Government has appointed Mr. George Radwanski to consider Canada Post’s mandate. The review includes Canada Post’s business activities in competitive markets. The Director filed a written submission with the panel on 15 February 1996. The submission suggests removing Canada Post's monopoly over mail delivery and recommends reduced regulation in services provided by Canada Post if its statutory monopoly over first class mail is maintained. The Director also recommends that Canada Post

be authorized to take the necessary measures to deter the use of postal services for deceptive marketing solicitations.

Law Society Of Upper Canada (LSUC)

In November 1994, the Director received a six resident application alleging that the Law Society's compulsory negligence claims insurance scheme for its members precludes them from purchasing insurance in the open market and therefore constitutes an abuse of a dominant position contrary to section 79. In May 1995, the LSUC made a motion to the Ontario Court for an order preventing the Director from making further inquiries into this matter on the grounds that it was outside the scope of the Competition Act. The motion was heard during November 1995.

Marketing Practices

Hudson's Bay Company

On 16 June 1994, charges under section 52(1)(a) and 52(1)(d) (misleading representations and ordinary price claims) were laid against the Hudson's Bay Company and its President, N.R. (Bob) Peter and its Vice-president Merchandising, Robert Norris. The charges relate to advertising practices that occurred between 1 April 1989 and 28 February 1991. The preliminary inquiry was scheduled to be held from 27 May to 28 June 1996.

In keeping with its initiative of reorienting its activities towards cases of higher economic impact, the Bureau obtained fines of $200 000 in the K-Mart case, $100 000 in the Dalfens case, and $300 000 from Suzy Shier.

Mary Kay Cosmetics Ltd.

On 5 February 1996, a total of six charges were laid against Mary Kay Cosmetics Ltd. under section 55 of the Act (multi-level marketing schemes). The charges involve representations relating to compensation made by the company with no accompanying disclosure of income earned by a typical participant in the plan, as required by section 55. On 5 February 1996, the company appeared in Ottawa provincial court and pleaded not guilty. The matter was put over to 8 August 1996, for a preliminary inquiry.

Mergers

Merger activity on both a Canadian and North American scale, both in terms of the number and economic value of transactions, is greater now than in the so called "merger boom" of the late 1980s and early 1990s. The total number of merger examinations commenced during the fiscal year increased by 18 percent over the 1994-95 fiscal year, from 193 to 228. The first application under section 92 of the Act in almost six years was filed with the Competition Tribunal in respect of the Seaspan International Ltd. and Norsk Pacific Steamship Company, Limited matter. Three merger proposals were abandoned by parties as a result of concerns identified by the Bureau.

On 22 February 1996 the Director announced that there were insufficient grounds to proceed with an application to the Competition Tribunal under either the merger or abuse provisions of the Competition Act with respect to Stentor, the alliance of major Canadian telephone companies.

The examination resulted from concerns about the Stentor arrangements and their effect on competition in telecommunications markets. While the Stentor Alliance facilitates a fully interconnected national telecommunications network among its nine member companies and enables them to offer customer services on a national and regional basis, these arrangements also constrain the telephone companies from entering into competition with one another. Ultimately, these concerns were tempered by evidence of competitive entry into long distance markets and significantly declining rates for long distance services since the Canadian Radio-television and Telecommunications Commission opened the door for facilities based competition in 1992.

The Competition Bureau will continue to closely follow the future activities of Stentor in respect to long distance services and the emerging market for competitive local telecommunications and broadband services to safeguard the competitive process as telecommunications industries move from a regulated to market competition environment.

Southam Inc./Lower Mainland Publishing Inc.

On 8 August 1995, the Federal Court of Appeal released two judgments relating to Competition Tribunal decisions in the Southam/Lower Mainland Publishing matter. In the first, the Federal Court of Appeal granted the Director's appeal, concluded that community newspapers and daily newspapers were in the same product market, and remitted the matter back to the Tribunal to determine whether these acquisitions substantially lessened competition within the relevant markets.

The second Federal Court of Appeal judgment dealt with Southam's appeal from the Competition Tribunal's remedies decision on 10 December 1992. In the remedies decision, the Tribunal had ordered Southam to divest itself of either the North Shore News or the Real Estate Weekly in order to address a substantial lessening of competition in the print real estate advertising market in the North Shore of Vancouver. The Federal Court of Appeal dismissed Southam's appeal and concluded that the Competition Tribunal's judgment as to the effectiveness of the alternative remedies proposed by the parties was "unassailable".

Southam sought leave to appeal these decisions to the Supreme Court of Canada, and on February 8, 1996 Southam was granted such leave. The matter is scheduled to be heard by the Supreme Court of Canada on 25 November 1996.

Dennis Washington and K&K Enterprises / Seaspan International Ltd. andDennis Washington / Norsk Pacific Steamship Company, Limited

On 1 March 1996, the Director filed an application with the Competition Tribunal with respect to two mergers. The application opposes both the October 1994 merger whereby Mr. Dennis Washington, the owner of C.H. Cates & Sons Ltd., indirectly acquired a significant interest in Seaspan International Ltd. and the June 1995 merger whereby Mr. Washington purchased Norsk Pacific Steamship Company, Limited.

The application alleges that the mergers prevent or lessen, or are likely to prevent or lessen, competition substantially in the provision of tug boat services used to berth ships in the Port of Vancouver, and in the provision of barging services in and around British Columbia's coastal waters.

Ultramar Canada Inc.

In February 1990, the Competition Tribunal issued a Consent Order requiring Imperial Oil Limited to divest the Atlantic assets of Texaco Canada Inc. acquired in 1989. In September 1990, Ultramar Canada Inc. acquired the Atlantic assets of Texaco Canada Inc., subject to an undertaking to the Director of Investigation and Research that it would continue operation of the Dartmouth refinery for a minimum of seven years, barring a material adverse change. In the event of a material adverse change, Ultramar was obliged to provide the Director with 90 days' notice before taking any action affecting the continued operation of the refinery.

On 25 October 1993, Ultramar provided a second undertaking to the Director requiring that, in the event that it provided the required notice of material adverse change, it would "provide to the Director evidence establishing whether there is any reasonable, legitimate continuing interest on the part of a viable party in maintaining the refinery as an operating business in Canada."

Pursuant to the undertaking of 24 September 1990, Ultramar provided notice of material adverse change to the Director on 10 May 1994. The Director commenced an examination of the circumstances surrounding this decision and on 19 July 1994, issued a memorandum and supporting material setting out his initial views on the issue of material adverse change and seeking the views of interested parties on the issue.

On 2 September 1994, the Attorney General of Nova Scotia initiated an action in the Federal Court of Canada seeking an order of prohibition against the Director on grounds of reasonable apprehension of bias. A subsequent action by the Attorney General of Nova Scotia, commenced in October 1994 sought mandamus against the Director for allegedly failing to enforce the undertakings provided by Ultramar. These two actions were heard jointly by the Court and a decision was issued on August 31, 1995. The decision found there were no grounds to make either an order of prohibition or mandamus against the Director. In the view of the Court, the process used by the Director and the actions taken were reasonable and within the discretion available to the Director under the Act.

After an extensive examination of the matter and after resolution of litigation pursued by the Attorney-General of Nova Scotia, the Director determined that there had been a material adverse change and that continued operation of the refinery pursuant to the undertaking was not required. The Director also concluded in December 1995 that Ultramar had satisfied its undertakings of October 1993 to establish that there was no continuing interest in purchasing the Dartmouth, N.S. refinery as an ongoing operation.

The Atlantic Oil Workers Union sought leave from the Federal Court of Canada to file a motion for judicial review of the Director's decision, notwithstanding the expiry of the time period allowed by the Federal Court Rules within which such motions must be filed. The hearing for the application for extension was heard in the Federal Court (Trial Division) in February 1996, and further written submissions were made by both Ultramar and the union in early March 1996. At the end of the fiscal year, the Court's decision was pending.

Economics and International Affairs

Within the Bureau, economists of the Enforcement Economics Division provide advice and analysis regarding economic issues in a number of enforcement areas, including cases, interventions and enforcement policy. Internal economists help develop the economic theory of the case at hand; assist officers within the Branches in analysing the importance of particular evidence given the theory of the case; and, assist in preparing for litigation before the courts or Competition Tribunal. A similar role is played in respect of interventions before regulatory bodies. In total, Branch economists were involved in some 40 cases and regulatory interventions over the fiscal year. In one of these interventions, a Branch economist appeared as an expert witness for the Director. Economists were also called upon to help in the analysis, development and implementation of enforcement policies for the Bureau as a whole, and in reviewing any requirements for legislative reform.

Issues raised by network economics, particularly in respect of telecommunications, were an important area of research and policy development over the course of 1995/1996. In particular, the Bureau hosted the Telecom and Antitrust Symposium which brought together leading antitrust, economic and telecommunications experts to reflect on competition policy and regulation. The discussions also stressed the importance of network economies and vertical integration issues for competition policy's application to the telecommunications sector.

Independent economic research continues to form an integral part of enforcement economics within the Bureau. Economists within the Bureau undertook research in a number of areas; including, the empirical analysis of past resale price maintenance cases, exclusive contracting, and horizontal concentration in the central Canadian cement industry.

In the area of regulatory interventions, the electricity sector was an important focus of the Bureau's competition advocacy work during the year. The Bureau participated in two major reviews of the scope for pro-competitive reforms that were conducted at the provincial government level: the British Columbia Utilities Commission Electricity Market Structure Review, mentioned in last year's report; and a subsequent in depth study by an *ad hoc* Advisory Committee on Competition in Ontario's Electricity System. In its submissions to these review bodies, the Bureau put forward a case for major market-opening reforms as the most effective means for ensuring efficient and low-priced electricity supply in the respective provinces.

The Bureau's submissions incorporated a number of recommendations relating to elements of market structure and regulation in the electricity sector. These pertained to such matters as: *(i)* the structural requirements for effective competition among generators; *(ii)* the potential adoption of competition at the retail distribution level; *(iii)* the appropriate relationship between regulation and competition law disciplines; *(iv)* ways to ensure competing electricity suppliers of equal access to transmission and distribution facilities; and *(v)* mechanisms for ensuring the reliable and efficient operation of electricity systems under competition.

The report of the B.C. Utilities Commission, released in September 1995, endorsed key views expressed in the Bureau's submissions. In particular, it supported the adoption of wholesale competition where generators would compete to supply distribution utilities. Under this market structure, a competitive power pool would be created into which generators would bid electricity, generation assets would be transferred to separate corporations from those holding transmission and distribution assets, and B.C. Hydro's generating assets, where feasible, would be divested.

Internationally, the growing number and complexity of cross-border cases, especially with the U.S., highlight the international dimensions of the Bureau's enforcement activities and underline the need for enhanced international cooperation, consultations, coordinated enforcement actions where appropriate, and conscious efforts at dispute avoidance. As part of regular bilateral consultations, the Director and Bureau officials met with the Assistant Attorney General, United States Department of Justice, Antitrust Division, and the Chairman of the Federal Trade Commission, twice during the year. The discussions focused on ways and means to enhance bilateral cooperation on enforcement matters within the framework of the Mutual Legal Assistance Treaty and the 1995 Canada-US Agreement on the Application of their Competition and Deceptive Marketing Practices Laws.

Bilateral meetings were also held during the year with the Directeur Général of France's Direction générale de la Concurrence, de la Consommation, et de la Répression des Fraudes (DGCCRF), the President and other officials of Mexico's Comisíon Federal de Competencia, the Director General and other senior officials of the UK's Office of Fair Trading, the head of the Directorate General IV in the European Union (responsible for competition policy in the European Union), and with competition officials from Japan, Venezuela and Chile. Discussions are continuing on developing a Canada-European Union competition accord on co-operation and co-ordination.

At the case level, there was growing number and complexity of notifications and requests for assistance and other interactions between the Bureau and foreign competition authorities. During the fiscal year, the Bureau received 23 notifications from foreign competition authorities and sent nine notifications to foreign authorities or governments under the Canada-US Agreement and the Revised OECD Recommendation. The majority of the notifications were with the United States.

Multilaterally, the Bureau continued to participate actively in the work of the OECD's CLP and Trade Committees, focussing on the interrelationship between trade and competition policies, on competition and regulation and on international cooperation. As well, it participated actively in the Intergovernmental Group of Experts on competition policy of the United Nations Conference on Trade and Development (UNCTAD).

The Bureau has also been providing technical assistance for many years, both bilaterally and in support of UNCTAD and OECD multilateral programs. During the past year, technical assistance was provided to Venezuela, Vietnam, China, Malaysia, Ukraine, Lithuania, Latvia, and Estonia.

Compliance and Education Activities

Our programs to encourage compliance with the Competition Act continue to be a key activity of the Bureau.

In October 1995, the Bureau published an Information Bulletin entitled *Strategic Alliances Under the Competition Act*. We undertook wide consultations in the preparation of a Bulletin on Corporate Compliance Programs which will be published during the next year.

We continue to emphasize the importance of compliance and education with a particular emphasis on our Public Education Initiative (PEI). The PEI program, in cooperation with several other agencies, issued a four-part video called "Scam Alert!" designed to help consumers and businesses protect themselves against fraudulent and deceptive activity conducted over the telephone and through the mail. The PEI program publishes a series of informative pamphlets on the Bureau, and on various aspects of its

work. It also arranges for participation in trade shows, as well as seminars to business and consumer organizations.

The Director and other Bureau officials regularly address business and professional gatherings both in Canada and abroad, on various topics related to Canadian competition law and the Competition Bureau's activities.

Looking Ahead

We anticipate that activity related to amending the *Competition Act* will continue and that recommendations will be made to the Minister.

The trend towards increased deregulation in a number of sectors, notably Telecommunications, Energy and Finance shows every indication of continuing, and indeed accelerating. For the Bureau, there will be a continuing challenge to balance the need to ensure a smooth transition to the competitive environment, with our other enforcement and compliance activities. This will take place in an environment of ever tightening resources.

The Competition Bureau, however, continues to respond to the challenge with innovation and persistence, ensuring Canada's place as a leader in the global economic marketplace.

The Director of Investigation and Research, George N. Addy, resigned from the Canadian Public Service effective on 30 June 1996. As of the end of September 1996, his successor had not been named. At that time, Francine Matte continued to occupy the post on an acting basis.

Annex I

Statistical Data

Table 1. Civil matters - selected activities

	1993-1994	1994-1995	1995-1996
Number of Complaints, Examinations and Inquiries			
Total complaints/information contacts	507	331	456
Examinations commenced (two or more days of review)	21	21	28
Application for inquiries under section 9[1]	2	5	4
Inquiries in progress at year end	8	10	13
Written Advisory Opinions	2	0	4
Disposition of Inquiries			
Inquiries resolved by Alternative Case Resolution	2	2	3
Applications to the Competition Tribunal	1	3	3

1. Refers to six-resident application to the Director for inquiry.

Table 2. criminal matters - selected activities

	1993-94	1994-95	1995-96
Number of Complaints, Examinations and Inquiries			
Total complaints/information requests	775	1048	968
Examinations commenced [1]	56	53	55
Application for inquiries under section 9[2]	9	2	2
Inquiries in progress at year end	42	31	24
Disposition of Inquiries [3]			
Matters referred to the Attorney General of Canada	6	7	4
Matters where charges were laid	8	3	4
Matters where Attorney General declined to proceed or withdrew charges[4]	2	0	1
Matters before the courts[4]	12	16	14
Disposition of prosecutions (findings of guilt, guilty pleas, acquittals,stay of proceedings, orders of prohibition)[4]	7	16	8
Other Activities			
Examinations resolved by information contacts	14	23	16
Written Advisory Opinions	30	28	14
Mutual Legal Assistance Treaty (MLAT) requests	2	2	3
Searches	4	5	4

1. Examinations in 1992-93 and years prior were defined by 2 or more days of review. In 1993-94 and 1994-95, 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 inquiry.
3. Alternative Case Resolutions include; investigative visits, orders on consent and written undertakings.
4. May include matters referred during previous years.

Table 3. Merger examinations

Merger Examinations	1992-93	1993-94	1994-95	1995-96
Examinations commenced[1] (2 or more days of review)	204	192	193	228
Notifiable transactions	62	65	74	100
Advance ruling certificate requests	125	124	139	142
Examinations Concluded				
As posing no issue under the Act	198	185	183	198
With monitoring only	4	1	2	4
With pre-closing restructuring	0	0	0	0
With post-closing restructuring/undertakings	0	0	0	0
With consent orders	2	0	1	0
Through contested proceedings	2	0	1	0
Parties abandoned proposed mergers in whole or in part as a result of Director's position	3	2	3	3
Total examinations concluded[2]	207	188	189	215
Advance ruling certificates issued[3]	101	114	106	120
Advisory opinions issued[3]	27	10	11	10
Examinations ongoing at year end	31	35	39	52
Total examinations during the year	238	223	228	267
Applications and Notices of Application before Tribunal				
Concluded or withdrawn	2	0	1	1
Ongoing	1	2	1	2

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 4. Misleading advertising and deceptive marketing practices offences: selected activities[1]

	1991-92	1992-93	1993-94	199495	1995-96
Number of complaints, examinations and inquiries					
Total complaints received	15 130	13 657[2]	11 000[2]	8 500[2]	6 751
Number of files opened	14 557	11 095[2]	10 500[2]	8 145[2]	324
Applications for inquiries under section 9	4	0	5	2	5
Inquiries commenced	82	41	46	38	8
Disposition of Inquiries					
Completed examinations/inquiries	407	196	399	349	278
Information contacts	1 511	1 174	654[3]	762[3]	6
Inquiries formally discontinued					
Cases involving undertakings[4]	2	3	38	10	9
Other cases	1	10	3	16	10
Undertakings received	24	20	5	4	4
Matters referred to the Attorney General of Canada	55	16	36	23	7
Matters where further action is not warranted[5]	9	19	2	0	3
Prosecutions commenced[5]	44	18	29	22	7
Prohibition orders without conviction[4]	1	2	0	0	1
Prosecutions concluded[5,6]					
Convictions	43	29	11	24	14
Non-convictions[7]	44	22	15	8	4
Total of penalties	1 353 400 $	692 700 $	200 700 $	407 400 $	1 879 850 $

1. Competition Bureau Regional Offices were closed during the 1994-95 fiscal year and all Marketing Practices activities consolidated at Headquarters. Many figures will therefore show a considerable difference from the previous year's.
2. These figures are estimates. They are accurate within 5 percent.
3. Prior year statistics included written, oral and in-person information contacts. This year's statistic includes only written contacts.
4. Discontinued inquiries 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.
5. May include matters referred during previous years.
6. These statistics were not reported prior to fiscal 1990-91 on a "prosecution" basis.
7. 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.

CZECH REPUBLIC*

(1995)

I. Introduction

Institutional framework for the protection of economic competition in the Czech Republic

In accordance with the relevant legislation, the Ministry of Economic Competition of the Czech Republic with a seat in Brno (hereinafter "Ministry") was entrusted with the protection of economic competition on 31 October 1992. It continued the activities of the Czech Office for the Protection of Economic Competition which was established in May 1991.

The Ministry is a central body of state administration. It is presided over by a minister who is a member of the government. The Ministry currently has a total of 86 staff, of that 12 work in a department of public procurement surveillance.

The support and protection of economic competition includes the enforcement of the competition protection act with respect to agreements restricting competition, abuse of dominant position and control of concentrations between undertakings.

The Ministry also performs surveillance of the activities of other bodies of state administration, as well as local self-administration, who must not through their own measures, apparent support or otherwise restrict economic competition.

The Ministry plays an important role in the process of privatisation in connection with the creation and further development of a competitive environment and abolition or restriction of former monopolistic or dominant companies.

The Ministry's scope of operation was expanded as of 1 January 1995 when it was entrusted with the surveillance of public procurement by virtue of Act No 100/1994 Sb. on Public Procurement. This surveillance involves:

- -- review of objections raised by bidders against steps taken by the commissioner;
- -- review of procedures employed by the commissioner in the invitation to a public tender;
- -- participation of representatives of the Ministry in the opening of envelopes containing the bids;
- -- collection of data pertaining to public procurement and their publication;
- -- imposition of fines in cases of grave or recurrent violation of the relevant legislation.

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* The original language of this report is English.

Legal norms governing economic competition

No changes in the legislation governing economic competition occurred since the presentation of the annual report for 1994. The Act No 63/1991 Sb. on Protection of Economic Competition, in the wording of Act No 495/1992 Sb which took effect on 29 October 1992, and Act No 286/1993 Sb. which took effect on 29 November 1993, therefore continues to apply.

As the Czech Republic is under the obligation to harmonize its competition law with that of the European Union, contained in the Europe Agreement establishing an association between the Czech Republic and the European Communities and their member states, analytical work has been initiated to determine to what a degree the two competition laws are compatible. Following the completion and evaluation of expert studies, an amendment of the competition act shall be drafted which shall then be adopted by the Parliament and shall enter into force in January 1998.

Main tasks of the Ministry

The main tasks tackled by the Ministry in the area of economic competition in 1995 included:

-- active application of powers lent to the Ministry by law - severe action against anticompetitive behaviour engaged in by chambers, unions and trade associations. Specific examples include the Ministry's decision concerning the Czech Pharmaceutical Chamber, Union of Sugar Beet Producers and Union of Oilseed Producers and Processors;

-- participation in the ongoing process of restructuralisation and privatisation and promotion of the competitive approach. This is made possible thanks to the monitoring of the status and development of market structures from the perspective of competition protection by means of the COMP methodology for review of the quality of the competitive environment. In 1995, this methodology was used to analyse the construction technology market, timber from coniferous trees, knitting machines, agricultural tractors, etc.

-- the Ministry of Economic Competition was particularly careful in the case of regional and local monopolies which may play an important role in the distortion of economic competition. The cases of refusal to supply electricity on part of Prazska energeticka a Vychodoceska energetika can be mentioned in this context;

-- the Ministry further endeavoured to introduce at least some degree of competition in key sectors of public services, particularly electrical energy and telecommunications;

-- a fundamental position pertaining to the mass media market was formulated: when evaluating concentrations in the media, particularly in the cases of cross-ownership, freedom of information and competition in advertising on the mass media market shall be promoted;

-- several important decisions on mergers were issued last year; to name just a few, these included mergers between SPT Telecom and Eurotel Praha, Consil Gmbh and Polymer Institute Brno, Chemapol Lachema Nutricia International and Deva a.s., Welsh Water International Lmtd and Severoceske VaK;

-- on 18 May 1995, the annual report on competition policy in the Czech Republic in 1994 was presented at a meeting of the OECD Committee for Competition Law and Policy in Paris;

-- signature of implementation rules for application of competition rules applying to undertakings within the meaning of Article 64 of the Europe Agreement between the European Union and the Czech Republic;

-- proposal of amendment of the Public Procurement Act (October 1995).

II. Application of the Ministry's power in the area of protection of economic competition

General

Substantive rules

The substantive rules of the Act No 63/1991 Sb. on the Protection of Competition as amended (hereinafter "Act") are based on the principle of prohibition and invalidity of agreements between undertakings, decisions by associations of undertakings and concerted practices disturbing competition (article 3 of the Act) (hereinafter "Agreements"), as well as the principle of prohibition of the abuse of a dominant position.

Under article 3(4), there are lawful exemptions from the prohibition of agreements disturbing competition as defined in article 3(1), applying to the following three kinds of agreements:

-- agreements on uniform application of commercial, supplier or payment terms, with the exception of agreements on prices or their components ;

-- agreements on rationalisation of economic activity, particularly on its specialisation, where these do not result in a significant restriction of competition,

-- agreements of "minor importance", i.e. agreements pertaining to a volume lower than five per cent of the national market or 30 per cent of the local market.

An individual exemption from the prohibition of agreements disturbing competition may be granted under article 5 of the Act for a limited period of time.

A block exemption from the prohibition of agreements disturbing competition, as defined in article 3(1) of the Act, may be granted in the form of a by-law under article 6a of the Act. Such an exemption has not been granted by the Ministry so far.

Concentrations exceeding a 30 per cent share on the relevant market are subject to approval by the Ministry under article 8a of the Act. The Ministry shall approve the concentration if the companies in question manage to demonstrate that the potential harm to competition shall be outweighed by economic benefits.

When issuing an approving decision, the Ministry may impose some restrictions and obligations it deems necessary for the protection of economic competition.

Administrative procedure

Where anticompetitive agreements, abuse of dominant position and mergers are concerned, the Act is enforced through administrative proceedings which are usually instituted by the Ministry itself or initiated upon an external application. The procedure is defined in Act No 71/1967 Sb. on Administrative Proceedings, and partly also in the Competition Protection Act.

The first instance decisions are issued by executive departments which are organisation units of the Ministry. The decision may be appealed to the Minister of Economic Competition within 15 days of its receipt. The appeal has a dilatory effect.

The minister may in the appeal proceedings:

-- uphold the decision and turn down the appeal; or
-- change the first instance decision; or
-- abrogate the first instance decision and refer the case back to the relevant department for reconsideration and new decision.

The Ministry's decisions may be reviewed by court. The court decision is final. The relevant court was first the High Court in Prague (from January 1993), presently the High Court in Olomouc (from 1 January 1996).

Decisions adopted by the Ministry

As part of the enforcement activities in 1995, decisions on 28 agreements, decisions by associations of undertakings and concerted practices, 29 cases of abuse of dominant position and 53 mergers were adopted in the first instance (see Table 1).

Decisions adopted by the Minister

34 appeals were filed against first instance decisions in 1995. The Minister decided on eight appeals.

Suits filed against the Ministry´s decision

In 1995, 11 suits were filed against the Ministry's decisions adopted in 1994 and 1995.

The High Court in Prague decided on a total of three cases in 1995. In two cases, the proceeding were terminated, while in one significant case, described below, the court awarded the suit to the Ministry and thus upheld the Ministry's decision.

Overview of administrative proceedings

Table 1

Administrative proceedings	**1992**	**1993**	**1994**	**1995**
Agreements disturbing competition (cartels)	15	9	15	28
Abuse of dominant position	20	20	16	29
Mergers	27	83	36	53
Other	14	13	6	9
Total	76	125	73	119

Number of applications

1992	1993	1994	1995
169	312	601	651

Important decisions adopted by the Ministry

1. Agreements disturbing competition

In 1995, the Ministry issued 28 decisions concerning agreements disturbing competition under article 3 of the Act.

Most typical, and at the same most significant, were decisions adopted by associations of undertakings who limited market access and fixed prices.

i) Professional services

Czech Pharmaceutical Chamber (Ceska lekarnicka komora)

In 1995, The Ministry of Economic Competition decided that the decision (in the form of "CLK's Code for the Issuance of Certificates Required for the Private Pharmaceutical Practice") adopted by the Czech Pharmaceutical Chamber (CLK) in June 1994 was a decision by an association of undertakings which was in contravention of article 3(1) of the Act, and as such was prohibited and invalid because it obstructs access to the market by imposing unequal and inappropriate conditions on CLK's members - applicants for certificates required for private practice.

Any member of CLK who wanted to work as a representative - specialist in a pharmacy run by a natural person who was not a pharmacist had to meet more stringent requirements (length of relevant work experience, levels of education obtained, etc.) than those CLK members who run a pharmacy themselves. This meant that, for a non-pharmacist, the possibility of running a private pharmaceutical practice was significantly restricted.

The above-mentioned decision by CLK also reduced the age limit for provision of pharmaceutical services by natural persons to 65 years. This condition excluded some members of CLK from economic competition for no other reason than this artificially set age limit.

A fine of Kc 1 000 000 was imposed on CLK. When deciding on the amount, the Ministry considered the fact that by approving the decision (the Code), CLK significantly restricted access to the market for further potential applicants. Another fact considered in the process was that administrative proceedings had already been instituted against CLK once before. The previous administrative proceedings also concerned a decision adopted by this association of undertakings which restricted market access to new entrants interested in establishing their own private pharmaceutical practices. An appeal was filed which was turned down by the Minister.

ii) Agricultural sector

Union of Sugar Beet Producers (Svaz pestitelu cukrovky)

In May 1995, the Ministry of Economic Competition decided that a decision by the Union of Sugar Beet Producers (SPC) (in the form of a resolution adopted by the General Assembly of SPC) of December 1994, pertaining to a recommended minimum price to be required by sugar beet producers when negotiating contracts of 1995 sugar beet supply with sugar plants, was a decision by an association of undertakings which was in contravention of article 3(1) of the Act on Protection of Economic Competition. The Ministry reached this conclusion particularly because the relevant price recommendation by SPC coordinated prices for which sugar beet producers supplied sugar beet to buyers (sugar plants).

When assessing the case and the fine to be imposed, the Ministry considered the fact that SPC's decision did not result in a serious harm to economic competition because the recommended minimum price was not widely accepted by producers. Notwithstanding that, the Ministry took the anticompetitive nature of the above price recommendation into account because it could have resulted in an overall fixing of prices of sugar beet in a greater part of Bohemia in 1995 and a subsequent significant harm to competition, had the producers respected it. A fine of Kc 20 000 was imposed on the union.

Union of Oilseed Producers and Processors (Svaz pestitelu a zpracovatelu olejnin)

In November 1995, the Ministry of Economic Competition ruled that a decision by the Union of Oilseed Producers and Processors which set minimum prices of and mark-ups on the prices of rapeseed, sunflower seed and linseed was in contravention of article 3(1) of the Act on Protection of Economic Competition because it co-ordinates the prices charged by producers for goods supplied to their buyers.

This was another case where the fixing of minimum market price did not distort economic competition to a substantial degree because no overall price fixing occurred in the whole territory of the Czech Republic. A fine of Kc 15 000 was imposed on the union.

iii) Crude oil products

Benzina, a.s., Benzina, s.p., Ceske produktovody a ropovody, a.s.

In the summer of 1995, the House of Representatives of the Czech Parliament adopted a bill proposing to withdraw tax reliefs on unleaded petrol. The increase of consumer tax on unleaded petrol would, however, mean that unleaded petrol would become the most expensive fuel available because of its higher production costs. In December 1995, the Minister of Trade and Industry called a joint meeting with Czech producers and distributors of fuels (Benzina, a.s., Benzina, s.p., Cepro a.s.). The Minister of Trade and Industry announced after the meeting that a new way of spreading the consumer tax levied on

unleaded petrol by charging portions of it on top of prices of other kinds of fuel, so as not to make unleaded petrol the most expensive kind. Based on the above information, the Ministry instituted administrative proceedings in January 1996 in the matter of possible distortion of economic competition within the meaning of article 3 of the Act by the companies Benzina, a.s., Benzina, s.p. and Cepro, a.s., who concluded an agreement on uniform procedure and co-ordination of petrol prices for the end consumer.

It was established during the course of the administrative proceedings that an anticompetitive agreement on co-ordination of petrol prices was concluded by the companies.

The Ministry decided to impose the following fines for conclusion of an agreement on uniform procedure in the setting of fuel prices: Kc 50 000 000 on Benzina, a.s.; Kc 10 000 000 on Benzina s.p. and Kc 250,000 on Cepro, a.s. All participants in the administrative proceedings filed appeals against the decision. The appeal proceedings are still under way.

iv) Trucking

Cechofracht, Centrumsped

In June 1995, the Ministry instituted administrative proceedings in the matter of a possible distortion of economic competition by a conclusion of a prohibited agreement on uniform pricing of carrier services on the premises of the Brno Trade Fairs and Exhibitions (BVV). The companies involved were Cechofracht, a.s. and Centrumsped spol. s r.o. It was established during the proceedings that there was a trilateral agreement between the above companies and BVV which contained provisions prescribing uniform tariffs for activities conducted on the premises of BVV. The Ministry prohibited enforcement of the agreement and imposed a fine of Kc 327,000 on both undertakings.

2. Abuse of Dominant Position

In 1995, the Ministry issued 29 decisions concerning abuses of dominant or monopolistic positions within the meaning of article 9 of the Act.

These cases pertained to refusal to supply on part of local monopolies - electrical energy suppliers, as well as termination of car spare parts production, differential pricing applied in milk purchasing and tied selling of alcoholic beverages where the buyer was required to buy other products, not customarily sold together with the products of his choice.

i) Electricity

Prazska energetika

Prazska energetika a.s. is a local monopolistic supplier of electrical energy. In June 1995, it refused to supply another company with electricity, claiming that the former tenant in the building in question had not paid the amount owed for previous electricity supply. This made the utilisation of the rented property (a hall) very difficult. The Ministry of Economic Competition issued a decision in October 1995 in which the actions of Prazska energetika a.s. was labelled as an abuse of monopolistic position. A fine of Kc 250 000 was imposed on Prazska energetika a.s.. The company appealed the decision; the Minister of Economic Competition has not reached a decision on the appeal yet.

Vychodoceska energetika, a.s.

The case is very similar to that of Prazska energetika. Vychodoceska energetika, a.s. is also a local monopolistic supplier of electrical energy. In August 1994, it refused to supply another company with electricity, claiming that the former tenant in the building in question had not paid the amount owed for previous electricity supply. The Ministry of Economic Competition issued a decision in June 1995 in which the actions of Vychodoceska energetika a.s. was labelled as an abuse of monopolistic position. A fine of Kc 250 000 was imposed on Vychodoceska energetika a.s.. The company appealed the decision; the Minister of Economic Competition has not reached a decision on the appeal yet.

ii) Motor vehicles

Skoda, automobilova a.s.

In March 1995, the Ministry of Economic Competition instituted administrative proceedings because of a suspected abuse of dominant position by Skoda a.s., Mlada Boleslav. This company supposedly abused its dominant position by failing to make sure there was a sufficient quantity of spare parts for its cars Skoda Favorit and Skoda Forman for a period of time in excess of 6 months. It was established during the course of administrative proceedings that Skoda a.s. terminated its production of the above-mentioned spare parts in August 1994 and assigned it to a domestic subsupplier. The whole transfer was not properly done on part of Skoda, some goals set out in the transfer schedule were not accomplished on time and the ability of the subsupplier to produce and deliver spare parts in the required quantity and quality was not properly examined. The producer began to co-ordinate with the subsupplier only when the first production problems appeared (such as a shortage of sheet metal or a low quality production).

The Ministry of Economic Competition examined the facts established in the course of administrative proceedings and arrived at the conclusion that Skoda's conduct, i.e. the fact that it terminated production of metal spare parts for cars in production at the time without first making sure there was another source of these parts, and their production by another producer, resulted in a substantial shortage of these spare parts on the market between October 1994 and March 1995. This amounts to an abuse of the company's dominant position on the market of sheet metal spare parts for the above-mentioned vehicles within the meaning of article 9(3). The Ministry therefore prohibited this conduct and imposed a fine of Kc 5 000 000 on Skoda a.s. for a violation of the Act. Skoda a.s. filed an appeal; the Minister of Economic Competition has not reached a decision on the appeal yet.

iii) Milk

Olesnice Dairy Plant (Mlekarna Olesnice)

In March 1995, the Ministry of Economic Competition issued a decision according to which the Olesnice Dairy Plant abused its dominant position on the relevant market, i.e. the purchasing of raw cow milk, by paying differential purchasing prices for the supplied milk depending on whether the supplier is or is not a partner to Dairy Plant Olesnice. A fine of Kc 10 000 was imposed on the plant for the abuse of its position.

iv) Alcoholic beverages - spirits

Likerka STOCK Plzen - Bozkov

In April 1995, the Ministry of Economic Competition instituted administrative proceedings pertaining to the possible abuse of dominant position by Likerka STOCK Plzen - Bozkov (hereinafter Likerka). Likerka was to abuse its dominant position by practicing tied selling - one of its products, Fernet Stock, had to be bought together with some other kinds of spirits.

When defining the relevant market, the Ministry reached a conclusion that the relevant product market were alcoholic beverages - spirits - of the Fernet type. The Ministry arrived at this conclusion after it had conducted its own research and studied some decisions issued by the European Commission and the European Court of Justice. The relevant geographic market was deemed to be the national market because Likerka regularly supplied the whole territory of the Czech Republic.

An analysis of data concerning the supplies of spirits of the Fernet type in the Czech market in 1994 revealed that Likerka enjoyed a dominant position under article 9(2) of the Act, on the relevant market defined above.

The assembled documents, data, proposals, as well as statements made by Likerka, made it apparent that Likerka attempted to prevent any potential sales problems by practicing tied sales. The sales of the traditional, well established, popular and very much in demand Fernet Stock were tied to the sales of other spirits, exposed to fierce competition on the market (rum, apricot brandy, vodka, plum brandy, etc).

The Ministry of Economic Competition issued a decision whereby this conduct of Likerka was declared to be an abuse of dominant position on the market of alcoholic beverages of the Fernet type within the meaning of article 9(3 b)). This abuse was prohibited and a fine of Kc 5 000 000 imposed on the company. Likerka appealed the decision; the Minister of Economic Competition has not reached a decision on the appeal yet.

3. Concentrations

In 1995, the Ministry issued 53 decisions approving concentrations between undertakings.

Only one concentration was not approved. The companies in question appealed the decision; the Minister of Economic Competition has not reached a decision on the appeal yet.

Most concentrations were effected through acquisition of control over a company by another company, typically through the acquisition of a controlling interest in the company in the form of shares or stocks.

i) Telecommunications

SPT TELECOM - EuroTel Praha

By its decision of September 1994 the Ministry of Economic Competition enabled the company SPT TELECOM a.s. to acquire control over a part of EuroTel Praha, spol. s.r.o. which enjoyed a dominant

position on the service market, specifically on the market of data transfer in public and non-public networks. This control was acquired through a transfer of a part of the company. The company was therefore no longer an exclusive operator of all data networks in the Czech Republic. Aside from losing its exclusive position, EuroTel Praha also had a weaker position on the market as a result of removal of barriers to market entry. Other undertakings, among them many operators of non-public data networks, could thus apply for license required for the operation of a public data network. The Ministry's decision therefore promoted the development of the market of data transfer through public data networks. The consumer shall be the one to obtain a clear economic benefit from this change.

SPT TELECOM - TELSOURCE N.V.

By its decision of August 1995 the Ministry of Economic Competition approved a merger between Telecom a.s. and TelSource a.s., a subsidiary company of the Dutch company TelSource N.V. As a result of this merger, the company TelSource N.V. acquired 27 per cent of stock of SPT Telecom a.s. As soon as the merger was effected, SPT Telecom's equity was augmented by an amount proportionate to the price paid by TelSource for the stocks.

The agreement between shareholders contained specific arrangements concerning the development goals of SPT Telecom a.s., including its more customer-oriented approach. SPT Telecom plans to meet the demand, i.e. to radically reduce the number of applications for hook-up and to shorten the period of waiting for hook-ups or transfers of lines. It was further agreed in the shareholders' agreement that TelSource N.V. shall provide training, marketing and other similar services to SPT Telecom in addition to the financial consideration paid for the stocks.

The Ministry considered the matter in great detail and examined the situation on the market of telecommunications services very thoroughly. At the time of issuance of the decision, SPT Telecom a.s. had a dominant position on the relevant market and was the only undertaking on the market in the area of decisive communication services. The respective positions of the companies in question, however, have not changed by the merger, because aside from SPT Telecom, there was no other undertaking on the market at the time. The Ministry therefore approved the transaction in the light of these facts, as well as apparent economic benefits.

ii) Chemicals

Consil GmbH - Polymer Institute Brno

By a decision of May 1995, the Ministry of Economic Competition approved a transaction whereby CONSIL Verwaltungs and Beteiligungsgesellschaft mbH (Germany) acquired control over Polymer Institute Brno, spol. s.r.o., which enjoyed a dominant position in the area of testing and research of catalytic systems of olefin polymerization. The control was acquired by a purchase of 70 per cent of shares.

Grinsted Bohemia - KOLI Holding (Pektin Smirice)

By a decision of April 1995, the Ministry of Economic Competition approved a transaction whereby Grinsted Bohemia a.s. acquired control over a part of KOLI Holding a.s., i.e. over its plant Pektin Smirice which is a dominant producer of pectin. The company's output in 1993 and 1994 was in excess of 30 per cent of the national pectin production. The remaining portion of the market was supplied by import because KOLI Holding, or, more specifically, its Pektin Smirice, is the only pectin producer in the

country. However, Pektin Smirice has not been producing at full capacity and its pectin production was therefore not economical. The Ministry considered the fact that the production capacity of the plant shall increase and the range of products produced there shall be expanded as a result of the merger, and it therefore approved the transaction.

iii) Water

Welsh Water International Limited - North Bohemian Water and Sewage Company (Severoceske vodovody a kanalizace)

By a decision of July 1995 the Ministry of Economic Competition approved a transaction whereby Welsh Water International Limited (UK) acquired control over the North Bohemian Water and Sewage Company (Severoceske vodovody a kanalizace, a.s.) which enjoys a local monopoly in the markets of drinking water, as well as collection and treatment of waste water. The control was acquired through a purchase of 36 per cent of stock.

iv) Foodstuffs

Nutricia International - Deva

By a decision of May 1995 the Ministry of Economic Competition approved a transaction whereby Nutricia International B.V. (The Netherlands) acquired control over Deva, a.s. who has a dominant position on the market of baby and children's nutrition of non-dairy type. The control was acquired through a purchase of 50 per cent of stock and by agreement. The above-mentioned transaction should result in an increase of the production capacity in the company Deva, as well as an expansion of the range of baby and children's nutrition. Last but not least, it will help Deva export its products through the established commercial network of Nutricia. Deva's position on the market shall not change to a significant degree because Nutricia is not a direct participant in the relevant market, i.e. it does not import any baby and children's nutrition of non-dairy type to the Czech Republic.

Decisions issued by the High Court

A suit can be filed against an effective decision issued by the Ministry with the High Court within two months of the receipt of the decision on the appeal to the Ministry. The suit does not have a dilatory effect.

The High Court shall consider errors only if those could affect the legitimacy of the decision in question. Otherwise the High Court examines only the lawfulness of the decision in question. The proceedings are governed by Chapter II of the Act No 99/1963 Sb of the Civil Court Code as amended.

Czech Pharmaceutical Chamber (Ceska lekarnicka komora - CLK)

The High Court in Prague turned down the suit brought by CLK who demanded that the decision issued by the Minister of Economic Competition in May 1994 be overturned. The Minister decided that the decision of October 1992 is a decision adopted by an association of undertakings and is prohibited and invalid under article 3(1) of the Act, because it restricts entry to the market of pharmaceutical services. The restriction was effected through a discriminatory and several times higher fee for the issuance of a license required for the running of a pharmacy to a natural person who was not a pharmacist, or to an artificial person not composed exclusively of pharmacists (i.e. to persons running the

pharmacy through a representative - specialist), as opposed to the fee charged to pharmacists or artificial persons composed exclusively of pharmacists.

CLK in its suit filed with the High Court disagreed particularly with the application of the Act on Protection of Economic Competition and argued that the personal operation of the Act does not allow for its application, and neither can any provisions of the Act be used in an analogous manner because CLK does not associate undertakings and its activities therefore do not have any impact on economic competition. CLK further argued that there is a special regulation governing the activities of chambers and all its provisions are special in relation to the generally valid principles of economic competition. The court in its justification stated that the personal operation of the Act is defined in broad terms and generally applies also to chambers (the definition of the personal operation of the Act therefore does not exclude professional or other chambers), provided that the activities of a chamber have an impact on economic competition. The court further stated that it is apparent from the purpose of the Act that its also applies to any undertaking who may not have an obvious profit from his activities but whose goals may be only partly of economic nature, and who, in order to attain these goals, may engage in activities which have an impact on economic competition. The court refused the claim that the relevant act which addresses the establishment and operation of chambers (Act on Chambers) is a special regulation in relation to the Act on Protection of Economic Competition, and that as such it enables the chambers to conclude agreements which may result in distortion of economic competition (article 3(1) of the Act). The court concluded the justification contained in the decision by saying that CLK has no right to impose conditions on potential market entrants surpassing those provided for by the law.

III. International relations

Fulfillment of requirements implied by the Europe Agreement

On 1 February 1995, the Europe Agreement constituting the association between the Czech Republic and the European Communities and its member states (hereinafter Europe Agreement) entered into force. The Europe Agreement thus became an integral part of the legal system of the Czech Republic, as well as the primary law of the European Communities.

As the Europe Agreement took effect, the co-operation between the Czech Republic and the European Union was expanded by many areas which were not covered by the Interim Agreement on Trade and Related Matters. This newly covered areas include particularly:

- -- free movement of capital and current payments;
- -- free movement of labour;
- -- free movement of services;
- -- business;
- -- harmonization of the Czech law with the EC legislation.

An important aspect of the Europe Agreement in the area of economic competition is the emphasis placed on effective enforcement of competition rules (Article 64 ED) which guarantee that the benefits related to the establishment of a free trade zone by gradual removal of tariff and non-tariff barriers to trade between the Czech Republic and the European Union will not be eliminated through anticompetitive behaviour on part of undertakings, e.g., in the form of price agreements or market sharing.

The tools to be used to this end include substantive competition rules contained in the Europe Agreement, as well as Implementing Rules for the application of competition rules whose adoption is presumed in Article 64(3) of the Europe Agreement.

The Implementing Rules were signed in February 1995 by the Minister of Economic Competition of the Czech Republic, and the Director General for Competition of the European Commission. The Implementing Rules were adopted by the Association Council between the Czech Republic and the European Union.

The Implementing Rules imply what cases shall be discussed, what principles shall be applied to resolve them, which bodies shall be competent to deal with them, how conflicts of competence shall be settled and how the confidential character of information provided shall be protected.

The obligation on part of the Czech Republic to harmonize legislation is implied in Article 69 of the Europe Agreement. This provision is further specified in Article 70 which states that one of the priorities of harmonization is competition law.

The necessity to harmonize competition law arises particularly from the need to make sure there is fair and equal competition for all undertakings as a fundamental prerequisite for the integration of the Czech Republic in the unified internal market.

A comparison of the current legislation with the ES legislative acts suggests that the Act on Protection of Economic Competition may be considered compatible with EC law in most parts.

In 1995, the compatibility of the Act with the requirements set forth in the White Paper, prepared by the European Commission, had to be assessed. This document contains and details the main measures in all sectors of the internal market and suggests the sequence of steps to be taken in order to tackle harmonization of the legislation.

We can say that the Act contains all the institutes listed in the respective provisions of the White Paper (restrictive agreements, abuse of dominant position, merger control). The only area not addressed by the Act are block exemptions. The Ministry intends to prepare block exemptions based on the outcome and recommendations of expert studies.

We expect that the work required to accomplish a full and complete harmonization of the Act with EC law shall be completed by the end of the first half of 1997 when the structured wording of the draft law shall be presented to the Parliament. The result should be a full compatibility of the regulations governing the protection of economic competition with European legislation.

Presentation of competition policy and relations with other competition authorities

In connection with the admission procedure and the subsequent recent admission of the Czech Republic in the OECD, the Ministry of Economic Competition in 1995 focused its attention on the participation in and presentation of its activities at the sessions of the OECD Committee for Competition Law and Policy in Paris.

The Minister of Economic Competition presented an annual report on the status of competition policy in the Czech Republic at the Council session in May 1995. The report focused on the analysis of

the status and development of the competitive environment in the Czech Republic, as well as an overview of then relevant legislation and the role played by the Ministry of Economic Competition in the process of privatisation. Issues pertaining to the processes of privatisation and demonopolisation, as well as methods of market analysis and competitive environment analysis, co-operation between bodies of state administration in this area and legal and procedural aspects of proceedings at the Ministry seemed to be of particular interest to the audience.

The Ministry's staff members regularly participated in international seminars organised by the OECD for the staff of various antimonopoly offices. These seminars serve as valuable platforms for discussions on specific cases, as well as exchange of precious experience from the area of application of competition policy.

A great deal of attention is devoted to the relationship with the European Commission, specifically the DG IV. The most important event organised jointly by the Ministry and DG IV was a seminar entitled "Competition Policy", held on 14 February in Brno. The seminar aimed to explain the importance and need of competition policy with a special emphasis on the position of economic competition in the context of the Europe Agreement. The event met with great interest on the part of professional public. Aside from representatives from DG IV, led by the Director General of the European Commission for Economic Competition, Mr. C.D. Ehlermann, there were also delegates from the Slovak, Hungarian and Polish antimonopoly offices, as well as representatives of the academia, advocacy and business community.

The Ministry maintains contacts with other antimonopoly institutions, particularly in Slovakia, Poland and Hungary. We ought to mention a conference on competition policy, organised jointly by DG IV and the Hungarian office and held between 19 and 21 June 1995 in Visegrad in Hungary. This conference was the first opportunity the representatives of antimonopoly offices from all the Central and East European countries and the European Commission had to discuss competition policy and state aid. The participants agreed that the next conference would be held in 1996 in the Czech Republic.

Another opportunity to develop the Ministry's activities was at a one-week seminar on the establishment of a dominant position which was presented by American experts from the U.S. Federal Trade Commission and Department of Justice. There was another seminar in March 1996, this time on investigation techniques applied to cases of cartel agreements.

The co-operation with the German anticartel office was also very important for the practical activities of the Ministry in 1995.

Closer links were established with the Bulgarian office and formalised in the Agreement between the Commission for Protection of Economic Competition and the Ministry of Economic Competition in the Area of Protection of Economic Competition. A similar agreement to be concluded with Russia is under preparation.

DENMARK*

(1 August 1994 - 31 December 1995)

Executive summary

In 1995 the Competition Act was amended with the purpose of extending access to appeal cases concerning concealment of information.

A Committee appointed by the Minister for Business and Industry issued in August 1995 a report containing a draft on a new Danish Competition Act. The main intention of the draft bill is to bring Danish competition legislation more closely into line with Community competition law while taking into consideration the Danish industrial structure with few large and many small businesses, and the Danish tradition of competition law. Thus, the draft bill combines the principle of prohibition with the principle of control.

The Competition Council has proceeded in bringing anti-competitive agreements within the professional services to an end. During the period under review, the Competition Appeals Tribunal has in several cases confirmed the Competition Council's decisions in that respect, stating i.a. that the professional services do not take an exceptional position under the competition law.

The invitation to submit tenders for a bridge/tunnel connection between Sweden and Denmark gave rise to two cases concerning co-operation between Danish and Swedish companies on joint bidding. One of the agreements was accepted by the Competition Council, and the Competition Appeals Tribunal overruled the Council's decision on cancellation of the other.

The Competition Council continues to attach great importance to the termination of restrictive practices subject to public regulation, and to the ensurance of equal competition between public and private enterprises on the same market. In that respect, the Council has taken a new initiative. In order to strengthen the impact of the Council's recommendations to the competent authorities, it has decided to publish the authorities' responses to these recommendations. Based on the practice which the Competition Council has now established in this area, the Council has published a number of leaflets concerning competition on markets subject to public regulation, and how to ensure optimum competitive conditions on these markets.

Legislation

An amendment of the Danish Competition Act has been passed during the period under review. The amendment implies an extended access to appeal cases concerning concealment of information.

A report containing a draft of a new Danish Competition Act was released on August 1, 1995. The report was issued by a Committee appointed by the Minister for Business and Industry, and the terms

* The original language of this report is English.

of reference of the Committee were to analyse the advantages and disadvantages of introducing the principle of prohibition into Danish competition law.

The Committee's draft combines the principle of prohibition with the principle of control. It contains prohibition against anti-competitive agreements, decisions or concerted practices between enterprises with an aggregated global turnover exceeding DKK 1000 million and a market share of more than 10 per cent (where the enterprises are part of a group, the threshold value is based on the group turnover). Other agreements, as well as abuses of dominant position, are subject to a control provision which empowers the competition authority to take measures against harmful effects. The Committee recommends that the assessment of restrictive practices - whether based on the prohibition rules or the control rules - be harmonized with the application of the EC competition rules. The rules shall apply equally to public and private business activity. The penalties are increased. No rules on merger control are introduced. The special Danish rules on transparency laid down in the present Act are repealed. Also, the draft Bill envisages a "one-stop-shop" principle, in accordance with which a matter is dealt with by a single authority, either the Danish competition authority or the EU-Commission.

Proposal for a new Competition Act has not yet been introduced to the Danish Parliament.

Enforcement

Statistics on activities

The Competition Council has held 15 meetings and settled 57 cases.

From January 1, 1990, to December 31, 1995, 154 cases have been brought before The Competition Appeals Tribunal (31 cases in 1990, 28 cases in 1991, 28 cases in 1992, 32 cases in 1993, 16 cases in 1994, and 19 cases in 1995).

	1 January 1990-31 December 1995	1 August 1994-1 December 1995
Cases appealed	154	25
Appeals dismissed	77	17
Cases withdrawn	34	2
Competition Council's decisions overruled	27	11

As on January 1, 1996, 16 cases were still pending before the Appeals Tribunal.

Significant cases

Transparency

Transparency of market structures and competitive conditions has a high priority in the Competition Act. Therefore, it is an important task for the Competition Council to contribute to creating transparency of competitive conditions. Increased transparency may be obtained in several ways, and as

examples of such efforts during the past year can be mentioned the publication of a report on the steel market and a quarterly issue of selected prices of ready-mixed concrete.

Horizontal agreements

The Danish petroleum industry has established an environmental pool with the purpose of creating a financial basis of cleaning up polluted grounds, where filling stations have been situated. After negotiations with the Competition Council, and on account of a discomfort letter from the European Commission, the industry has chosen to cancel a reopening fee of DKK 250 000.

The Commission found that the reopening fee restrained the access to reopen filling stations on cleaned-up grounds, and that only rules on repayment of reasonable costs involved in the clean-up would comply with Article 85 of the EC Treaty. The industry consequently changed the agreement in accordance with the Commission's statement.

The Competition Council has ordered a co-operative factory producing offal-based animal feed to change some discriminatory rules. The Council's intervention was occasioned by a complaint from a privately owned factory which was unable to get supplies of offal from the slaughterhouses. The offal is e.g. used for animal feed, and the rules have been changed to the effect that an obligation to supply to the co-operative factory, which was imposed on the slaughterhouses, only concerns high-risk offal, while low-risk offal can be supplied to other destructors as well. The Competition Council has refused a subsequent request from the complainant to abolish the obligation concerning high-risk offal.

The case has been brought before the Competition Appeals Tribunal

As a result of negotiations with the Competition Council, four Danish slaughterhouses have terminated a price co-operation, consisting in exchange of information about prices on the home market and calculations to be made in that respect. In practice, one of the slaughterhouses issued a recommended price list, which was submitted to the other slaughterhouses before publication.

The Competition Council found that the co-operation, which covered 70-80 per cent of the total sales of pork in Denmark, unified the price formation and eliminated price competition. Consequently, the co-operation was regarded as a curb on the incentive of the individual slaughterhouses to fix their own prices based on their own costs and their own assessment of the market conditions. The agreement on joint calculation may curb the enterprises' attempts to find new methods and other cost structures and, accordingly, restrain a development of the market structure which is based on efficiency.

The Competition Council has decided that the association of bacon factories shall terminate the granting of subsidies to a specific breeding scheme, or at least change the rules so that other breeding arrangements may obtain equal financial aid. The members of the association cover 95 per cent of all slaughterings, and the reason for the Council's intervention is that competing breeding arrangements are exposed to unequal competitive conditions. The subsidies are financed through a standard charge onporkers, payable by all breeders whether they use the breeding scheme or not - in other words, a question of cross subsidising which the Competition Council considered as an anti-competitive measure, i.e. because the subsidies sustain unprofitable enterprises.

The Competition Council also ordered the association to stop issuing recommended prices, as such prices curb the incentive of the individual breeders to be more efficient and to develop new methods.

The Competition Council decided not to intervene against an agreement between the largest Danish cement manufacturer and the largest Swedish cement manufacturer on establishment of a joint consortium with the purpose of obtaining the supply of cement to the coming bridge between Sweden and Denmark. Although the agreement was found to have a dominant influence on the market, the Council did not consider it to entail harmful effects on competition. Consequently, the agreement is legitimate, but subject to notification according to the Danish rules on transparency. The Swedish competition authorities, on the other hand, prohibited the agreement. The European Commission issued a negative clearance, as it found that the agreement had no appreciable effect on trade between member states. The result is that the agreement is permitted in Denmark but prohibited in Sweden.

The Competition Council ordered the parties of an agreement - the two largest Danish and the two largest Swedish manufacturers of ready-mixed concrete - to terminate an agreement on establishment of a joint company with the purpose of making a bid for the supply of ready-mixed concrete to the bridge building between Sweden and Denmark. The reason for the decision was that the agreement included all major manufacturers of ready-mixed concrete which could be expected to bid for the supplies. As the agreement eliminates competition between all potential contractors, there might be a reasonable doubt that the work would not be assigned to the most efficient enterprise, and this could have a short-term as well as a long-term effect on the market concerned and, consequently, an effect on future major construction projects.

The Competition Appeals Tribunal overruled this decision, stating that it is regarded as common practice in connection with bridge building that the general contractors are responsible for the supplies of concrete, and it has been decisive for the parties of the agreement to create a commercial alternative to the self-production of the three general contractors. Therefore, the Appeals Tribunal could not reject the parties' argument that, in order to attain this object, it has been necessary to establish a company involving both Danish and Swedish interests on a solid economic foundation, and utilising the professional resources of each participating enterprise. As there would be substantial competition between each of the general contractors and the joint company, the agreement would have no influence on the competitive conditions.

The Competition Council has continued its analysis of collegiate rules laid down by the organisations of the professional services. This has led to the termination of a number of anti-competitive rules, either as a result of negotiations or by order from the Council.

By way of example, it can be mentioned that the Competition Council has ordered the Danish Law Society to cancel what was left of the society's recommended fees, and to cancel a rule on price advertising.

It is now up to the individual lawyer to fix his own fees in consideration of his own costs and his own assessment of the competitive conditions, and this is expected to improve the possibility of a structural development of the lawyers' profession which can contribute to more efficiency.

The intervention against the rules on price advertising was due to some very restrictive demands which in practice made advertising impossible.

The case has been brought before the Competition Appeals Tribunal.

The Competition Council has ordered the pharmacists' association to cancel a large number of rules on collegiate behaviour, i.a. rules on marketing and price fixing, and rules on the rights of other shops than pharmacies to receive prescriptions. These parts as well as an order to stop issuing a price list for non-pharmaceutical products have been brought before the Competition Appeals Tribunal.. Furthermore, as a result of negotiations, the association has accepted to cancel a prohibition against resale, rules on application of the name of the pharmacy and some advertising rules.

Vertical price maintenance and agreements

The Competition Council has ordered a distributor of high chairs for children to supply a specific branded high chair to a retailer, but has also accepted that the distributor refuses to supply to a chain of shops selling various kinds of factory-made wood products. The case came up because the distributor had changed his terms of sale when he took over the distribution on the Danish market of the chair concerned. This entailed a number of complaints from retailers who could no longer obtain supplies according to the new terms.

After negotiations, the distributor clarified the terms concerning shop equipment and appearance, and the Competition Council acceded to these clarifications. But the distributor continued to refuse to supply to the retailers mentioned above. In one of these cases the Council found that the refusal to supply could not be justified by the mere fact that the shop was situated in a village and had an extensive mail order business.

The decisions were subsequently confirmed by the Competition Appeals Tribunal.

The Competition Council has ordered a paint factory to cancel a demand in its terms of sale for two series of wood preservers, according to which the retailers could only obtain supplies if they stocked the whole range of colours and volumes of the products concerned. The Council found this demand to restrain the retailers' freedom of trade and to prevent a development based on efficiency. The Council's decision does not preclude the supplier from laying down other and more reasonable conditions in that respect. The Competition Appeals Tribunal has subsequently overruled the Council's decision as far as one of the series is concerned, because the demand for range of colours could be fulfilled by means of a colour-blending machine.

Other changes of the terms of sale, which the supplier had proposed, were accepted by the Competition Council. They concerned the supplier's customer priority in connection with supply problems and demands for technical education and exposure to be fulfilled in order to be accepted as a retailer.

The case was occasioned by a complaint from a discount chain of shops which were subjected to periodic refusals from the factory to supply the wood preservers concerned. The shops are based on a wide but not very deep range of goods, and extensive demands for the range to be stocked of each individual product are therefore not easily compatible with such business policy.

The Competition Council has ordered the largest Danish dairy MD Foods to change its price policy. MD Foods has made a co-operation agreement with another dairy, Kløver Mælk, which implied that Kløver Mælk was allowed a disproportionate discount on branded products, although the purchases of this dairy are minor compared to other buyers. The Council's decision entailed that the purchase conditions of Kløver Mælk are now equal to the conditions of other buyers.

As a result of negotiations, MD Foods also accepted to change its general trade conditions, to the effect that all buyers are subjected to equal conditions. Previously, other dairies were allowed a higher discount than wholesalers, irrespective of the amount of their purchases. The Council found that this policy entailed harmful effects on competition.

Discriminating behaviour/anti-competitive discounts

The Competition Council has ordered a pharmacists' purchasing company to change some exclusive rules in the company's trade conditions and to withdraw its requests to boycott those suppliers who would not conform to these rules. The Council found that the company had a dominant position on the market for non-pharmaceutical products to the pharmacies, i.a. because the company deliberately markets the products as real pharmaceutical specialities and because of the company's close connection to the pharmacists' association.

The company had requested the pharmacies not to buy from suppliers who would not conform with the exclusive rules of the company's trade conditions.

The company withdrew this approach after negotiations with the Competition Council. Furthermore, the company has changed the exclusive rules to the effect that they apply to such products only, which are reserved for pharmacies, i.e. products which in equipment, packing, brand etc. appear as such.

The Competition Council also ordered the company to stop issuing a price list for these products, but this decision has been brought before the Competition Appeals Tribunal.

The Competition Council has ordered two suppliers of specific brands of spectacle lenses and certain visual aids to supply to an optician. The case came up after the complainant had bid for and obtained an agreement with a local authority for sole distribution of such visual aids, which are granted to visually impaired persons according to the Social Security Act. The sole distribution agreement caused a great deal of dissatisfaction among other opticians who threatened the suppliers to expose them to boycott if they continued to supply to the optician concerned. By way of justifying the refusals to supply, one of the suppliers referred to these threats, while the other referred to the optician's business methods and low-price profile.

The effect of the refusals to supply was that it became difficult for the optician to fulfil his contractual obligations and to run his business according to his own principles.

The Competition Council also submitted a formal protest to the opticians' trade organisation against the anti-competitive behaviour of the opticians - their threats of taking up boycott measures.

The Competition Council has ordered two producers of electrical equipment to stop issuing price lists containing electricians' net prices (resale prices for the downstream market - the wholesale stage), because they unified the wholesalers' pricing and restrained competition.

The issuing of price lists opposed a previous decision made by the Competition Council. In order to create a more active price competition in this trade, the Council had ordered the termination of a wholesalers' price list which was issued by the suppliers' trade organisation. In connection with the new decision the Council attached importance to the fact that in practice the prices contained in the net-price

list did not correspond to the suppliers actual selling prices, and therefore the list had no real informative value for the suppliers' customers.

The Competition Council also ordered the termination of the suppliers' discount to wholesalers, because it concerned a loyalty bonus which could not be justified by cost-saving considerations, and which in addition restrained new producers' access to the market and exposed the wholesalers to unequal purchasing conditions.

The decision was subsequently confirmed by the Competition Appeals Tribunal.

The Competition Council has requested a company which erects city facilities (bus passenger shelters, information boards, advertisement display pillars etc.) to change an agreement with a local authority, to the effect that the local authority is free to give access to other suppliers of such facilities. The claim for an exclusive right had not been included in the draft agreement, which had previously been subject to negotiations and accepted by the Council.

Influence on other policies and legislation

The Competition Council has approached the Minister for Employment and recommended an amendment of the rules which stipulate who is responsible for certain labour market educations, so that education offered by private instructors can be approved on equal terms with the various educations under public management.

The Council found that equal competitive conditions between public and private educators will meet the socio-economic consideration which is to produce the best qualified education in the most efficient way and to give better options to the users.

Private educators have only limited prospects of obtaining an approval to run supplementary courses on the same privileged terms as the public educational centres. Consequently, private educators are restricted in practising their traditional profession by the increased number of labour market educations offered by public authorities.

The Competition Council has treated a complaint against distortion of competition, which had been raised as consequence of two local authorities' financial engagement in a company running a ferry service between Jutland and Sealand. The local authorities are shareholders in the operating company and they have also undertaken to put up a free security for deficits on the ferry service. The question, whether the engagement of the two authorities is legal, comes within the jurisdiction of the Ministry of the Interior.

The market of ferry services between Jutland and Sealand is characterised by severe competition, and the Council found that the guarantee against deficits might distort competition between the individual players on the market.

The operating company and the two authorities have subsequently changed the terms of the guarantee to the effect that it is based on normal market conditions. As there were not sufficient grounds to override the estimates, on which the company's budget had originally been calculated, and on which the authorities' engagement was based, and as the company now pays for the security, the Competition Council did not find that distortion of competition was provable at the time when the arrangement was initiated.

Subsequently, and based on operational experience, the Competition Council was asked to reconsider the question of possible distortion of competition, as a result of the local authorities' engagement.

The Council stated that it is still of the opinion that there are not sufficient grounds to override the budget estimates. The Council did, however, recommend that the Ministry of the Interior takes the initiative for an impartial assessment of the market value of the local authorities' interests in the operating company, in order to get an indication whether competition is distorted as a result of public subsidies.

The question whether the local authorities' engagement in the company implies a violation of the EC competition rules, in particular the rules on state aid in Article 92 of the EC Treaty, comes within the jurisdiction of the European Commission.

After thorough discussions with the Ministry of Transport, the Competition Council has taken note of a set of regulations for Post Denmark, containing rules on accounts presentation and appurtenant guidelines on matters concerning competition law.

The rules which apply to the control of the competitive activities of Post Danmark are laid down on the basis of discussions between the Ministry of Transport and the Competition Council. The rules are issued by the Minister for Transport.

The rules aim at establishing precautions against distortion of competition through cross subsidising, and at securing that Post Danmark does not abuse its exclusive right and dominant position on the postal market to the prejudice of competition on that part of the market which is open to competition.

In particular the rules aim at:

-- securing that means from those activities which are subject to the exclusive right and to the obligation to perform postal services are not transferred to activities performed in competition with other enterprises,

-- securing that transfer of means from exclusive-right activities to compulsory activities are limited to such additional costs which are necessary to fulfil the obligation ("permitted cross subsidising which does not distort competition"), and

-- preventing discrimination of other postal firms which use those exclusive-right and compulsory services of Post Danmark.

The purpose is achieved through rules on *(i)* the separation of accounts for the three main activities (exclusive-right activities, compulsory activities and competitive activities), *(ii)* the publication of aggregated partial accounts for these fields of activity, *(iii)* statement of permitted cross subsidising which does not distort competition, *(iv)* exchange of services between the individual fields of activity, and *(v)* transfer of capital between the fields of activity, and *(vi)* non-discrimination.

FINLAND*

(1995)

I. Changes to Competition Laws and Policies Adopted or Envisaged

Summary of new legal provisions in competition law

After Finland had joined the European Union on 1 January 1995, two amendments were made in Finland's Act of Competition Restrictions in 1995.

A technical amendment was made in the Act on Competition Restrictions, Article 2, pertaining to the application of the Act on the arrangements concerning the primary products of agriculture.

Article 20 was also amended to the effect that the previous obligation of the Office of Free Competition and the provincial governments to assist the EFTA Surveillance Authority in its investigations now reads as an obligation by the competition authorities to assist the European Commission in its investigations conducted in companies.

Envisaged changes to competition law

The Ministry of Trade and Industry established a working party on 13 December 1995, the task of which is the reform of the Act on Competition Restrictions. The group is set to finish its work by 31 December 1996.

Since Finland's current Act on Competition Restrictions does not include provisions on merger control, one of the main objectives of the working party is to investigate the necessity of national merger control and, if so required, to prepare a draft proposal on rules for such merger control.

In addition to the necessity of merger control, the working party examines ways of eliminating competition restraints of minor importance from the duties of the Office of Free Competition or from the field of application of the Act on Competition Restrictions (cf. the *de minimis* rule). One further task is to examine whether the Act on Competition Restrictions should contain provisions on negative clearance, i.e. provisions on the basis of which an entrepreneur may ask the competition authorities for a statement on the acceptability of a specific arrangement.

The working party reforming the Act on Competition Restrictions is also set to revise both the procedural provisions and the jurisdictional provisions between the different competition authorities contained in the Act. Due to the procedural inadequacies within the application procedure of the present Act, several amendments, albeit of a technical nature, are to be expected in these provisions.

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* The original language of this report is English

In addition to the above-mentioned concerns, the national application of EU competition rules is also under investigation. So far, the Finnish competition legislation does not contain such a provision, on the basis of which the competition authorities would be empowered to directly apply Articles 85 and 86 of the Treaty of Rome, nor does Finnish competition legislation include the necessary procedural provisions.

II. Enforcement of Competition Laws and Policies

Action against anti-competitive practices by competition authorities

In 1995, 269 new matters involving competition restraints came up before the Office of Free Competition, compared to the 268 in 1994. Of these, 52 per cent were requests for action received from undertakings, eight per cent applications for exemptions and 14 per cent inquiries; 11 per cent of the cases were opened on the Office's own initiative.

Of the new cases, 36 per cent involved horizontal competition restraints, 25 per cent vertical competition restraints, 22 per cent abuse of a dominant market position and 16 per cent competition restrictions concerning public authorities.

In 1995, the Office resolved a total of 270 competition restraint issues. In 96 cases, the Office issued a formal decision; of these, 16 concerned applications for exemptions. The other cases were either resolved by means of an administrative letter or did not lead to further measures.

The Office of Free Competition referred four cases to the Competition Council for a resolution, and the Council issued five decisions in 1995. The Supreme Administrative Court issued a decision in four cases.

As part of the policy of management by results, the Ministry of Trade and Industry had an evaluation made in 1995 on the operations of the Office of Free Competition: on their effectiveness, relevance and importance. Hence, to increase the efficiency of its operations, the Office of Free Competition decided to adjust its prioritisation by defining its major strategic projects. In the conjunction, the Office of Free Competition was reorganised as of 1 March 1996, and the previous division based on the type of competition restriction was abandoned.

In the new organisation, Task Force 1 handles three strategic areas: the relations between the industrial sector and the wholesale trade; the forest sector; energy and other public service facilities. Task Force 2 is likewise responsible for three strategic areas: the finance and insurance business; communications and health care. The defining of these strategic projects shall be revised when necessary.

In the new organisation, the Complaint unit is responsible for competition restraints on other fields. The Research and Development unit is involved in the strategical development within competition policy and the Office; industrial and company research and the follow-up of the latest trends within competition law and theory. The External Relations unit handles international issues; the instruction of provincial governments in competition-related matters; public relations and information services.

Cases handled by the Supreme Administrative Court

Abuse of a dominant market position by Neste Oy in the wholesale of motor fuels

On 11 November 1995, the Supreme Administrative Court issued a decision on the abuse of a dominant market position by Neste Oy in the wholesale of motor fuels. In most parts, the Court confirmed the decision made by the Competition Council, and dismissed the appeals of Neste Oy and SEO. In the autumn of 1993, the Office of Free Competition had presented to the Competition Council a proposal on the terminating of the abuse by Neste Oy, and the Competition Council had issued a decision in June 1994, forbidding Neste Oy to apply pricing models which led to the discrimination of one of its customers: SEO.

By its decision, the Supreme Administrative Court confirmed that the client-specific price-differentiation exercised by a company occupying a dominant market position should be based on genuine client-specific differences in costs. A company in a dominant market position shall not artificially affect the competitive scene between its clients who are possibly following differing operational strategies.

The Court considered the dynamic nature of market-dominance and confirmed that even a company occupying a dominant market position may apply other price-differentiation methods than ones strictly conforming to cost-accountability, if it, in view of the company's market position and the evolving features of market competition, is objectively justifiable in oder to secure competition. The Court also confirmed that reasonable volume discounts which do not distort competition are allowed even to a company in a dominant market position.

The Supreme Administrative Court referred the matter back to the Competition Council for the imposition of a competition infringement fine to Neste Oy. In this context, the Office of Free Competition proposed to the Competition Council in January 1996 that it impose a penalty payment of 100 million FM to Neste Oy. Proceedings on the fine are still in progress.

Cases handled by the Competition Council

Administering of copyrights

In January 1995, the Office of Free Competition granted a ten-year exemption to the copyright associations Gramex Oy and Teosto Oy concerning horizontal co-operation in the determining of copyright compensations related to the mass use of tape recordings and other artistic works.

On the applications of Teosto Oy and Gramex Oy, the Competition Council issued its decisions on the copyrights issues in October 1995. The Council annulled the decisions of the Office of Free Competition and stated that Gramex Oy and Teosto Oy do not require an exemption. The two shall be considered as independent entrepreneurs who determine the level of the compensations requested and other contractual terms themselves. According to the Council, there exists a vertical client relationship between the copyright associations and the assignees who have given them power of proxy. The basic structure of the collective administering of copyrights thus cannot be considered as such co-operation between entrepreneurs or associations of entrepreneurs operating on a same production level (cf. Article 6 of the Act on Competition Restrictions) which would require an exemption.

Cases handled by the Office of Free Competition

Horizontal competition restraints

Co-operation between forest industry companies on the paper markets

In December 1995, the Office of Free Competition presented to the Competition Council a proposal on the terminating of a practice violating Article 6 of the Act on Competition Restrictions and the imposing of a competition infringement fine to the sales organisation Finnpap and its member companies, paper producers Metsä-Serla Oy, Myllykoski Oy, Veitsiluoto Oy and Yhtyneet Paperitehtaat Oy.

In an investigation conducted by the Office of Free Competition regarding the Finnish magazine a nd fine paper markets, it transpired that the member companies of Finnpap have, during 1993 and 1994, behaved in a manner contrary to the Act on Competition Restrictions by fixing the prices of their products, limiting their production and dividing the markets. The decisions restricting competition were primarily made in the organs of Finnpap's marketing units, arranged according to the type of paper produced, and by the board of directors of Suomen Paperi Oy, the domestic sales outlet of Finnpap.

The member companies of Finnpap have jointly approved the sales budgets of Finnpap and Suomen Paperi Oy, which has been combined with negotiations on sales volumes and price fixing. In addition, the member companies have agreed on the pricing principles of paper, price differences between different paper qualities, additional charges and price increases. The companies have also jointly limited their production, for, until the end of 1993, Finnpap operated a so-called sanction procedure on new capacity, which decreased investments, and there were rules for the use of the existing capacity. The companies have also agreed on the dividing of markets, e.g. by jointly deciding on sales volumes and the principles of assigning orders. In addition to exports, the co-operation has concerned the domestic paper markets, and it has led to the limiting of the competition between the paper producers participating in the co-operation.

The handling of the case is pending at the Competition Council.

Exemptions: banks' co-operation on automated teller machines (ATMs)

In November 1995, the Office of Free Competition granted an exemption to the price co-operation conducted within the framework of Automatia Pankkiautomaatit Oy, established by four large Finnish banks: the shareholding companies of Automatia transferred all ATMs dispensing cash to Automatia and jointly decide on the prices of the ATM cash dispenser services charged for each transaction from the accounting bank. The non-competition clause contained in the shareholders' agreement, according to which the parties to the agreement shall not offer any competing services in Finland nor use any other ATM services than those of Automatia, was cut short until April 1997.

The Office granted another exemption to the price co-operation exercised within the scope of the banks' on-line computer network and the cash dispenser ATM agreement. The parties jointly decide on the transactional fees between the accounting bank and the receiving bank and also on the pricing related to the transactions. Furthermore, they decide on the grounds and size of the entry fee of a new party. The exemption is valid on the following terms: *i)* the provision contained in the agreement that the new contractual party should be a savings bank referred to in the Act on Credit Institutions was amended to the effect that the provision shall neither hinder nor complicate the joining of foreign credit institutions

comparable to a Finnish savings bank in the collective use of ATMs; and *ii)* the section in the agreement pursuant to which it is possible for new contractual parties to join in the joint use of ATMs only every two years was abolished.

The joint use of ATMs will benefit the clients only if each bank participating in the joint use may independently decide on the fees to be collected from its clients. The Office of Free Competition has also sought to guarantee that new companies may flexibly join in the common use.

Vertical competition restraints

Recommended prices of foodstuffs

The Office of Free Competition conducted an extensive investigation of the system of recommended prices of groceries during 1994-1995. All foodstuffs were targeted; bakery products, ready-made products, dairy products, sweets and processed meat products in more detail.

The recommended prices of groceries have been based on the wishes of the retail trade and the tradition of price regulation which ended in the beginning of the 1980s. In the investigation, no evidence could be found for the trade having concluded collective or other horizontal agreements or conducted negotiations on prices or gross margins.

The maintenance of recommended prices at the request of the retail level of trade suggested that the retail trade thereby hoped to establish the price level of products and, thus, to avoid price competition. There have been good opportunities for this, as the Finnish consumer goods trade is centralised, and the entry of new shops independent of the chains has been negligent. Recommended prices spread into all big chains in equal form, which contributed to the decrease in price competition, not only within the groups but also between them. The effects of the procedure were comparable to horizontal price co-operation.

All the foodstuff manufacturers participating in the investigation announced they would abandon their recommended prices in a manner requested by the Office of Free Competition, and there was no need to begin actual negotiations on the removal of the harmful restrictive practices.

Abuse of a dominant market position

Carriage rents of Valtionrautatiet Oy (VR)

In November 1995, the Office of Free Competition presented a proposal to the Competition Council relating to the carriage rent system of VR's freight traffic. VR may be considered to occupy a dominant market position in the freight transport conducted on railways. The carriage rent system of VR amounted, according to the proposal of the Office of Free Competition, to an abuse of a dominant market position, as the fees for different types of carriages were not cost-accountable. The payment system was not perfectly transparent either.

Proceedings on the matter in the Competition Council are still pending.

Wholesale of rental videos

In December 1995, the Office of Free Competition presented a proposal to the Competition Council on the abuse of a dominant market position by Finnkino Oy (previously Oy Europa Vision Ab) in the wholesale of rental videos and the imposing of a competition infringement fine. The companies were found guilty of forbidden price discrimination and, for certain parts, of applying unreasonable terms of delivery in their delivery contracts. The case professed close links with immaterial rights: a stand was taken to the grounds whereby a company occupying a dominant market position may withdraw from deliveries or which terms it may apply in its delivery contracts, eg. by an appeal to the copyrights administered. In this respect, however, the companies involved were not found guilty of an abuse.

Proceedings on the matter in the Competition Council are still pending.

Regional energy production and distribution

In July 1995, at the requests of action by the Suomen Yrittäjäin Keskusliitto (SYKL; the Finnish Entrepreneurs), the Office of Free Competition issued its decisions. SYKL had proposed that 71 electricity companies were guilty of an abuse of a dominant market position in the setting of the basic and connection fees of their tariffs. SYKL found that the charges were unreasonable and discriminatory of small- and medium-sized companies.

In its decisions, the Office of Free Competition defined the principles according to which the allegedly discriminatory nature of the pricing of the companies engaging in the retail sale and distribution of electricity is evaluated. The special requirement on a fair treatment set on companies occupying a dominant market position requires that, in constructing their tariffs, electricity companies follow, as closely as possible the principles of cost-accountability and the costs incurred. The prices and the pricing principles shall also be public, enabling users to monitor that tariffs which lead to unjustifiable and unreasonable price-differences with respect to clients of other electricity companies and other users of electricity are not applied to them.

Based on the requirement on fair trade practices set on a company occupying a dominant market position, the Office of Free Competition required that profits gained by the electricity company do not, in their entirety or on the part of a certain client group, significantly exceed the necessary expenses, ie. ones caused by the efficient deliveries of electricity to the said clients, nor shall they exceed a reasonable profit margin compared with other electricity companies or similar enterprises operating on relevant fields with respect to competition.

Sports activities

In 1995, the Office of Free Competition issued a decision on the applicability of the Act on Competition Restrictions in sports activities when it investigated the alleged abuse of a dominant market position by Suomen Koripalloliitto r.y. (Finnish Basketball Association) in the establishing and application of competition rules in men's National Basketball League. In its decision, the Office of Free Competition defined the characeristics of trade-like sports activities. Sports associations shall thus also consider competition legislation in their trade-like activities.

III. The Role of Competition Authorities in the Formulation of Other Policies: Deregulation

In this area, the Office of Free Competition focused, in 1995, in the abolishing of competition distortions caused by state aids and the activities of public authorities, particularly municipalities. The Office also took a stand on competition issues related to regulatory amendments, with respect to the foodstuff markets, traffic, city planning, construction and environmental issues. The Office made four deregulation initiatives to different ministries; it also issued 63 statements in regulatory matters.

IV. New Studies Relevant to Competition Policy

In 1995 and 1996 the Office of Free Competition has published the following reports:

Kuitunen,Tero. Elinkeinotuet ja kilpailuneutraalisuus (State aids and competition neutrality).

Manner, Maarika. Suomen ja EY:n kilpailusääntöjen rinnakkainen soveltaminen (The parallel application of the Finnish and EC competition rules).

Yli-Hankala, Jukka. Yrityshankintojen valvonnasta EY:n kilpailuoikeudessa (On merger control in the EC competition law).

Saajo, Veli-Pekka. Rovaniemen markkinoilla - tutkimus bensiinimarkkinoiden hintasodista vuosina 1992-1994 (On the markets of Rovaniemi - a study of the price wars on the petrol market during 1992-1994).

Pokela, Heikki. Vertikaaliset jakelukanavat: eri portaiden välisten sopimusten vaikutukset talouteen (Vertical distribution channels: the economic effects of agreements between the different trade levels).

Pulkkinen, Markku. Vähämerkitykselliset sopimukset Euroopan yhteisön kilpailuoikeudessa (Agreements of minor importance in the EC competition law).

Kojamo, Jussi (toim.). Puheenvuoroja kilpailusta. KIVI-päivä 1995 (Some remarks on competition. The Office of Free Competition Seminar 1995).

FRANCE*

(1995)

I. Changes or proposed changes to competition policy and legislation

New legislation on competition and other related issues

Several new pieces of legislation or regulations were introduced in 1995, further strengthening French competition law and, more specifically, clarifying or specifying the conditions of application of the basic French legal text, which is Ordinance No. 86-1243 of 1 December 1986 on freedom of prices and competition. The first two new texts concern local public authorities and specifically aim to improve transparency, whereas the third focuses on controlling concentrations.

The law of 29 January 1993 introduced publicity and tendering rules to govern public service delegation agreements, although it did not touch on the *intuitu personae* principle. This law was subsequently improved upon by the law of 2 February 1995 on the environment, and by the law of 8 February 1995 on government procurement contracts and public service delegations. Said improvements include one measure which provides that any delegation agreements to be entered into for more than 20 years in some specific industrial sectors (drinking water, purification, household waste collection, or other waste disposal services) shall be subject to prior, systematic examination by the Accountant General (a state accountant and the local representative of the Ministry of Finance) of supporting documents. His conclusions will be sent to the members of the relevant authority (local government). Any payment of "qualifying fees" by companies to the contracting local authority is prohibited in all four above-mentioned sectors.

A significant consequence of the law of 8 February 1995 was to add a provision to the 1993 law, whereby it is now compulsory to produce a report annually, before 1 June, on all public service-related operations, which shall include an analysis of the quality of service provided. This applies to all public service delegations. Moreover, the law also requires that prices to be paid by users and the impact of key elements on said prices must be included in delegation agreements. The criteria conditioning access to the simplified procedure have been revised, and the concessionaire must not receive more than 700 000 francs (excluding tax) throughout the term of the agreement, or 450 000 francs (excluding tax) when the agreement's term is less than three years. Finally, any proposed rider which would result in an aggregate price increase of more than five per cent must be submitted for approval by the public service delegation commission.

The purpose of these measures is to ensure that local authorities are adequately informed and to improve transparency of procedures. For the first time, they include the concept of the quality of services provided, which is becoming increasingly important and cannot be disassociated from the cost of said services.

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* The original language of this report is French.

The Decree of 9 August 1995 amends Article 28 of the Decree of 29 December 1986 on the information which must be provided when notifying a concentration.

Previously, the information required was not specified in sufficient detail, which led to further exchanges between the authorities and the companies, and consequently lengthened the examination procedure, which was at times prejudicial to the operators. The new decree eliminates the ambiguities of the old Article 28, while clarifying other points relating to the examination procedure (description of all companies involved in the operation, definition of the market for the products or services, geographical scope of said markets, possible objections, etc...). Moreover, a provision was introduced to guarantee the confidentiality of some of the information provided.

This decree was drawn up after consulting the business community, in agreement with the Competition Council. Its purpose is to facilitate the examination of applications and speed up the procedure, without putting any additional burden on companies. The fifteen notifications since implementation of this decree constitute sufficient proof that its purpose has been achieved.

Other related measures (recommendations and directives)

Nothing to report.

Changes to competition policy and legislation proposed by the government

The amendment of the Ordinance of 1 December on freedom of prices and competition, the reform of the Government Procurement Code, and the opening of the telecommunications market, were all examined in 1995. In addition, the situation as regards public sales and auctions is also now under review.

Amendment of the Ordinance

Following extensive public debate, the government submitted a bill on the reform of the Ordinance of 1 December 1986 on competition, to reflect developments in business practice. This bill was adopted by Parliament, and became law on 1 July 1996.

It clarifies invoicing rules, proposing that rebates, in other words, any financial benefits granted by the manufacturer which relate to the act of buying and selling, shall only be indicated on invoices once they have been definitively acquired. The minimum amount below which sales will be considered as prohibited sales at a loss is now officially the amount indicated on the invoice, whereas previously this was simply presumed. The bill also increases the range of applicable sanctions and, more specifically, provides the courts with the possibility of banning all advertising campaigns promoting the operation which qualifies as selling at a loss.

Moreover, the bill prohibits a manufacturer or processor from practising or offering the consumer prices which are abnormally low as compared to production and marketing costs, and which could force a competitor to withdraw from the market. Previously, such practices were not covered by the criminal law rules prohibiting the sale at a loss of goods on an “as is” basis.

Furthermore, an innovative measure is the introduction of civil law rules for the control and punishment of abusive practices which are indicative of an unbalance in the business relationship. More

specifically, in order to forestall abusive practices which may arise from a dominant buying or selling position, and which may entail a threat to break off business relations or the refusal to stock all or some products, the bill proposes that such practices should be banned as such, without any prior need to prove their effect on the market.

Finally, rules governing the refusal to sell will be liberalised, to be used as a deterrent by manufacturers.

Government procurement contracts

In 1995 the Prime Minister specially commissioned a member of parliament (Mr. Trassy-Paillogues) to examine the possibility of an extensive reform of the law on government procurement contracts

The Government reiterated that the aim was to introduce a genuine plan for government procurement contracts and, in this connection, to examine all aspects of the conditions under which such contracts are concluded, so as to simplify the rules while respecting the principles of transparency and of a fair tendering process, in order to guarantee equality of access to government procurement contracts.

The DGCCRF (Directorate General for Competition, Consumer Affairs and Product Safety/Quality) played an active role in this review, relating its experiences in the field.

Following discussions with members of parliament, representatives of the construction, public works and speciality light construction industries, representatives of companies who regularly submit tenders for government procurement contracts, and the various public bodies involved, Mr. Trassy-Paillogues submitted the following findings and proposals:

a) There is a general consensus that the current rules governing public buying are far too complex and detailed, particularly as regards the procedure to be followed, and that they constitute a definite obstacle to the efficiency of the system.

b) Special procedures should be introduced or developed in order to give small and medium-sized businesses a better chance of winning orders (the more systematic use of apportionment, the introduction of a Europe-wide negotiated consultation procedure).

c) Moreover, proposals will be submitted in order to improve the quality of offers. The purpose being, firstly, to develop a system which will detect unusually low offers, the disastrous consequences of which, both for public buyers and the companies involved, are no secret: the last minute introduction of surcharges to make up for flaws and lack of quality, an increased risk of litigation, and undermining of small and medium-sized companies, who are the first to suffer from tenders that involve predatory pricing.

d) At the same time, steps will be taken to identify the best offer. When the conditions governing a contract are being drawn up, the public buyer shall draw up a list of criteria which will be principally based on quality, and not just on price, as is so often the case at present.

e) The main points identified in this review will be debated, and the Government will then draft a bill.

Telecommunications

Telecommunications: The French telecommunications monopoly has existed since 1837. The market will be completely liberalised in Europe by 1 January 1998. It is essential that we succeed in opening the market to free competition. During the autumn of 1995 progress was made in liberalising the sector both at a national and a community level. At a national level, work began on the forthcoming bill to regulate telecommunications, with the Government launching a public enquiry. At the same time, at a community level, negotiations began on draft directives relating to the applicable legal regime, licences and interconnectibility. The Directorate General has played an active role in all these exchanges.

The purpose of the new regulations in France is to reconcile an effective market with a quality public service, fair competition, and consumer protection.

In order to set up the telecommunications networks it will still, in principle, be necessary to obtain a license, but this will be issued by authorities with limited powers, and some independent networks will be exempt from this requirement. On the other hand, the supply of services will not be subject to any restrictions other than, possibly, a prior declaration, except for telephone services supplied to the general public, which will still require the authorisation of the Ministry of Telecommunications. The market will be regulated by a special authority. However, the principle of one single body of competition law will be preserved, and cohesion between the Competition Council and the Ministry of Finance (responsible for competition) on the one hand, and the regulating authorities on the other hand, will be ensured (*cf.* Law 96.681 of 26/07/96).

Finally, in November 1995 the French government announced that the legal regime governing public auctions was to be modified by 1 January 1998. This decision followed several years of discussions, and the receipt of a formal notice from the European Commission to introduce possibilities for community nationals to organise sales involving public auctioneers on French territory. In order to avoid litigation, which would further delay the opening of the market, the government has decided to set up a working group under the aegis of the Ministry of Justice, which will bring together all the concerned parties to examine and shape a reform which must develop the French art market, while opening it to free competition.

II. Enforcement of Competition Legislation and Policy

Action against anti-competitive practices and restrictive practices.

Activity of the Directorate General for Competition, Consumer Affairs and Product Safety/Quality (DGCCRF)

Although in this period of great economic change the Directorate General is particularly involved in examining and improving competition law to create an appropriate and effective regulatory tool, its role is also to ensure that the existing rules are respected and to monitor any abusive behaviour likely to distort competition.

In 1995 the Directorate General actively fought to eliminate anti-competitive agreements and abuse of dominant positions. Approximately 200 enquiries were launched or finalised, and the Ministry of Finance made forty-two referrals to the Competition Council.

Government referrals of contested cases to the Competition Council (prohibited agreements and abuse of dominant position)

1991	1992	1993	1994	1995
49	50	43	26	42

The increase in the activities of the Directorate concerned sectors which have been closely monitored over the last few years, such as government procurement contracts and public service concessions, the core industries, relations between suppliers and major distributors, private service companies and independent professionals, as well as sectors which have only recently come to the attention of the Council: the health sector, the activities of state-owned monopolies on the open market following their diversification or the modification of the scope of their monopoly (see point I above).

The Directorate General has closely monitored government procurement contracts.

In keeping with its aim to ensure that the principles of fair competition are respected in government procurement contracts and public service delegation agreements, representatives of the Directorate General sit on commissions on calls for tenders relating to government procurement contracts. They have both an advisory and a regulatory role.

The advice it dispenses on a daily basis to public buyers and, more specifically, small local authorities, is an essential part of the Directorate General's duties and is often a vital factor in understanding the rules of fair competition and equal treatment of candidates and, consequently, the legal validity of any decisions. However, this also facilitates the Directorate General's supervisory duties and increases efficiency, as the relevant parties are forewarned of the rules to be respected.

As in previous years, the regional departments of the Directorate General have been able to assist the local administrative authorities in monitoring the validity of contracts and delegations, because they operate as part of the local economic fabric and their officers are experts in the regulations governing government procurement contracts.

In 1995, the Directorate General played a vital role in identifying cases of favouritism, with more than ninety contracts being examined, the majority of which were then referred either to the intergovernmental board of enquiry on procurement contracts and public service delegation agreements (MIEM) or to the courts.

This figure demonstrates the state's concern that all public buyers comply with the principles of transparency and impartiality.

Given the predictability of government procurement contracts and the volume of business generated (11 per cent of the GDP), the temptation to enter into prohibited agreements is great, and the Directorate General has remained extremely vigilant in this area. The Ministry of Finance has referred ten cases of prohibited agreements between companies within the context of government procurement contracts to the Competition Council.

Activity of the Competition Council

1. Jurisdiction of the Competition Council

On referrals by various electricity companies concerning EDF, the Council ruled that the contested practices involved several separate electricity companies which sell electricity to EDF in consideration for a price. It consequently considered that the fact that the purchase price of the electricity is fixed by governmental decree and that any disputes arising between the independent companies and EDF are determined by the Ministry of Trade and Industry did not mean that the provisions of the Ordinance should not apply.

Similarly, following a referral by the French federation of billboard and poster companies concerning the situation caused by clauses in contracts entered into by the Jean-Claude Decaux group for the installation and operation of urban advertising spaces in public areas in several municipalities, which clauses provide for long-term exclusivity, priority rights and automatic renewal of the contracts, the Decaux company asserted that the Council did not have authority to examine agreements governing the use of public areas, as these are administrative agreements. The Council ruled that although the administrative courts had sole authority to verify the validity of said agreements, the Council had due authority to examine the practices of the Decaux group as regards poster advertising, which constitutes the provision of services and is consequently governed by Article 53 of the Ordinance.

A new case in the sports sector gave the Council the opportunity to further define its jurisdiction. In their referral and application for protective measures, thirteen manufacturers of sports items protested against the agreement entered into between the National Football League (LNF) and Adidas, whereby Adidas became the exclusive supplier of equipment for professional players, and the decision to make this compulsory for all football clubs, which led to the organisation amending Article 315 of the internal rules and regulations governing the French Championship for first and second division clubs, who are now "obliged to ensure that all players shall use equipment supplied by the LNF". The LNF asserted that the Council did not have authority to examine this application, given that the contested agreement could not be considered independently of the regulations, which constitute an administrative instrument. The Council pointed out that its role was not to appraise the validity of the amended provisions of the rules and regulations governing first and second division championships, but that, although, pursuant to an agreement entered into with the French Football Federation, the LNF was responsible for organising first and second division championships, promotional operations and, more specifically, the exclusive supply of equipment for players could not be considered as an activity falling within the scope of its rights as a public authority, and did indeed constitute the provision of services within the meaning of Article 53 of the Ordinance. Furthermore, the Council stated that the agreement entered into between the League and Adidas constituted a prohibited agreement within the meaning of Article 7 of the Ordinance. The conditions defined in Article 12 of the Ordinance having been met, it instructed the LNF to suspend application of Article 315 of the rules and regulations governing first and second division French championships and, secondly, instructed Adidas and the League to suspend their agreement for the supply of equipment to professional first and second division clubs.

Adidas and the LNF lodged an appeal against this decision with the Paris Court of Appeals, which was asked to rule on the objection of jurisdiction submitted by the Prefect for the Ile-de-France area and Paris, requesting the Court to declare it did not have due authority to suspend application of Article 315 of the LNF's rules and regulations, and to examine the validity of said provision. The Court accepted the objection, stating that "in view of the LNF's duties, as defined by law, the provisions of Article 315 of the rules and regulations governing professional first and second division championships in France, as amended (...) fall within the scope of the rights of a public authority and can be classified as an

administrative instrument; that the power to instruct all clubs to use equipment provided by the LNF falls within its general powers to organise competitions, as conferred upon it, and does not constitute a manufacturing or distribution activity or the provision of services within the meaning of Article 53 of the Ordinance of 1 December 1986." The Court then concluded that "the Competition Council and the Court of Appeals do not have due authority to rule on the validity of this instrument, which falls under the jurisdiction of the administrative authorities", and continued as follows: "the Council and the Court do not have due authority to suspend the effects of said article, which would imply an implicit but unavoidable appreciation of its validity". It consequently cancelled Article 1 of the Council's ruling, but upheld the Council's decision to instruct the LNF to suspend application of the agreement for the supply of sports equipment which it had entered into with Adidas.

On a referral by Eda, which operates a network of car hire agencies under the trade name Ada, some of which are located in airports, relating to the practices of the Chamber of Commerce and Industry of Marseille-Provence, the Council stated that it had due authority to rule, and dismissed the arguments put forward by the consular body. The Chamber of Commerce asserted that the object of Eda's complaint was the withdrawal of a licence to occupy a public area from its agency in Marseille-Marignane airport, which decision constituted an act of public management which is exempt from the provisions of the Ordinance of 1 December 1986. The Council stated that, although the assessment of the validity of a licence to occupy a public area or the withdrawal thereof did not fall under its authority, as this constitutes an administrative instrument, the service activity which consists of the Chamber of Commerce conceding public sites at the airport for the operation of a commercial activity, namely the rental of cars, in consideration for a fee calculated, in part, on the turnover generated by the concessionaires, does fall under the jurisdiction of the Council.

2. Prohibited agreements

In 1995 the Council handed down thirty-five decisions which either solely or partially related to practices prohibited by these provisions. In eight of these decisions, the Council found that the existence of practices violating the provisions of Chapter III of the Ordinance had not been proved.

i) Concerted action or agreements concerning public or private calls for tender

The decision handed down by the Council involving several government procurement contracts in the civil engineering sector and, more specifically, the construction of bridges, including the "Pont de Normandie", and part of the northern and south-eastern networks and TGV links, is particularly interesting.

In 1988, Bouygues, Quillery and Dumez agreed to share markets relating to a certain number of bridges, the forthcoming construction of which had been announced. This concerted action was subsequently extended to include other companies, such as GTM-BTP, Ballot and Spie-Batignolles, resulting in a generalised concerted action throughout the sector. Similarly, the major companies in the sector decided to share the market for the construction of TGV networks and links. They created four groups, each of which would be entitled to one-quarter of any forthcoming work.

Following this generalised concerted action, the companies in question then organised agreements covering the conclusion of specific contracts. Thus, for the bid for tenders for the construction of the "Pont de Normandie", Bouygues, Campenon-Bernard and Fougerolle agreed that the Bouygues group would be the lowest bidder, that the group led by Campenon-Bernard would submit a slightly higher offer, in the hope that once the contract was awarded the project manager would accept the involvement of both groups, and that Fougerolle would submit a much higher offer, but would reap the

benefit in a subsequent contract. During the construction of the Rochefort bridges, the Gennevilliers bridge and the Plougastel bridge, similar agreements were entered into in order to select the lowest bidders before the tender procedure began. The enquiry also revealed similar agreements involving several contracts relating to the TGV network.

Finally, the Council recorded that Dumez had formalised agreements to share the market with GTM Entrepose in 1986 and Razel in 1990, at which time these companies were independent.

This decision provided the Council with the opportunity to reiterate several principles which had already been demonstrated by earlier cases.

It stated that when such practices occur within the framework of a tender procedure they fall under the basis of Article 7 of the Ordinance of 1 December 1986, and of Article 85 § 1 of the Treaty of Rome. *A fortiori*, the same applies to general agreements involving several foreseeable tender procedures, and to the bilateral agreements entered into by Dumez with Razel and GTM-Entrepose, respectively, which involved said companies' entire business activity.

The Council also pointed that all practices relating to either private or public contracts are prohibited when the result thereof is to enable or facilitate the co-ordination of tenders by candidate companies, or the exchange of information between said companies prior to the date on which the result of the tender procedure is or may be announced, whether such information concerns the existence of competitors, their identity, size, available personnel or resources, interest or lack of interest in the relevant contract, or their offer price. All such exchanges of information are likely to restrict the independence of tenders, which is a condition of free competition.

On the argument put forward by several public works companies on the nature of the works involved, whereby such meetings and exchanges of information were in view of the creation of unavoidable and legal groupings, the Council replied that groupings of companies could indeed become necessary in view of the scale of the work covered by a contract, and that the project manager could even require small companies to enter into such groupings, which would enable them to compete against much larger companies, thus stimulating competition. However, in the case under review, it found that no evidence had been provided in support of these allegations to prove that the companies in question had conducted genuine negotiations with a view to proper collaboration, and that, on the contrary, it could be established that the purpose of such concerted action was to divide up the work between them.

ii) Agreements and exchanges of information on prices and profit margins

Other than agreements involving government procurement contracts, which have been discussed above, ten cases of agreements or exchange of information on prices and profit margins involving companies offering identical or similar goods or services were examined by the Council in 1995. In nine of these cases, the Council considered that the existence of such practices had been established. In most of these cases, professional bodies or trade associations had been involved in implementing these agreements.

The main sectors involved were pharmacies, car repairs, the honey market, the distribution of oysters, electronic video games and the market for storage potatoes; in most cases professional associations were involved.

iii) Barriers to market entry

Two noteworthy cases came to light:

- The APSAD case:

  Various clauses of a set of certification rules in the fire extinguisher sector were contested. APSAD, an association of insurance companies which specifically acts on behalf of its members in safety matters, is also authorised by the Ministry of Trade and Industry to certify systems designed to prevent or protect against fire or theft and which are not otherwise covered by any applicable standards. In this connection, APSAD has drawn up a set of rules to govern the installation of portable extinguishers and the certification of fitters, which rules are used as a contractual basis by insurers and their clients, and as technical specifications for the installation of extinguishers. The APSAD certification rules governing fitters of portable extinguishers defines the procedure whereby APSAD certifies applicant companies, and the conditions it applies. The conditions laid down in paragraph 1 only entitle certain companies, namely manufacturers of extinguishers, trademark holders and their exclusive agents, to apply for certification. Moreover, any candidate must have its registered office in France, and "not have been the object of any complaints as regards its working methods and business practices". The Council stated that although APSAD is at liberty to subject certification to compliance with certain objective technical criteria which are justifiable for safety reasons, it cannot *a priori* exclude one or several categories of companies from said certification other than pursuant to such criteria. It considered that the conditions whereby only certain categories of companies were entitled to apply for the APSAD certification were not based on objective criteria, as they excluded agents other than exclusive agents and fitters who were not also agents. It reasoned along the same lines as regards the other conditions described above, and rejected APSAD's line of argument whereby the condition relating to the registered office was no longer respected and had not had any effect because of the different safety standards in other countries and, secondly, that the elimination of any company whose working methods could be considered unsatisfactory was necessary to guarantee a certain level of quality. The Council also noted, as regards past practices, that APSAD could not plead the specificities of national regulations, as companies could always comply with any applicable standards, and that, moreover, the criterion of the existence of a complaint was not sufficient to prove a candidate's poor standard of work, as the complaint could be ill-founded.

- The CSFA case:

  The CSFA, a trade association of billboard and poster companies, drew up a "code of fair conduct" governing the display of bills and posters, and a standard contract for the rental of advertising space, which the members of the trade association have undertaken to use in their contractual relations with lessors. Two clauses in this standard contract aim to confer a priority right upon the current lessee. The first of these clauses provides that the lessor may only rent other parts of the same property for advertising purposes throughout the term of the lease on condition that it initially offers the advertising space to the current lessee and that, for equivalent prices, it gives priority to the lessee's offer. In the event of non-renewal of the lease, the second clause provides that the lessor shall give priority to the previous lessee for one year.

The Council found that although it was legally acceptable for billboard and poster companies to collectively take measures to protect the integrity and efficiency of the rented space throughout the term of the lease, such measures are not compatible with the provisions of Article 7 of the Ordinance, in so far as they are necessarily inherent in the economic advantages the protective system aims to provide. As regards the priority clause applicable during the term of the lease, it was established that this corresponds to an economic need to protect the quality of the product offered to the clientele on the billboard and poster market, by preventing any "masking" which may arise from positioning boards too close together. However, as regards the priority clause applicable after expiration of the lease, the Council considered that this created an unbalance in the negotiation of advertising space, by enabling the current lessee to artificially limit the risk of losing the space. At the end of the lease, the current lessee is informed of the identity of any rival bidder and the amount of any offers made, and can consequently ensure that it retains the space by raising its offer to meet the highest rival bidder; however, a competitor who wishes to rent the space has no guarantee that it will obtain the said space, even if it raises its offer. This clause consequently restricts the turn-over of lessees, and is not necessary to ensure the quality of the products offered. Its effect is to artificially limit free competition on the billboard and poster market. The Council dismissed the argument whereby this clause is based on long-standing business practice, instructed the CSFA to inform all its members that this clause was prohibited, and instructed all companies involved to delete it from all contracts.

iv) Vertical agreements

The ruling on practices in the carbonates sector is also interesting. Several clauses between two manufacturers of calcium manure were contested, which covered exclusive rights to sell or purchase and obligations not to compete. Pursuant to the contract entered into by and between the two companies, Balthazard & Cotte was to exclusively supply Méac and S.C.E.E. with "the production of lime carbonate from Sassenage and, more generally, from any plant it controls or may control in the Rhone-Alpes area", whereas Méac undertook to "exclusively (deliver) from Sassenage all customers using lime carbonate of an equivalent type to that manufactured in the plant and located in the Rhone-Alpes area", to the exclusion of certain outlets such as road fillers. The Council pointed out that such clauses were not anti-competitive in themselves. However, in this particular case, it considered that the contract restricted the commercial freedom of the parties in the area in question as regards lime carbonates of the type produced in the Sassenage plant, whether they were intended for industrial or agricultural use. Application of the contract implied that Balthazar & Cotte agreed not to market any of the carbonates produced in its Sassenage plant or any other production unit in the Rhone-Alpes area which were intended for agricultural purposes. As far as Méac was concerned, it agreed not to market carbonates of this type in this area from any production unit other than the Sassenage plant, including any which might belong to Balthazard & Cotte. Therefore, this contract contained reciprocal undertakings of exclusivity, combined with undertakings not to compete, and consequently was much more than a simple supply agreement between Méac and Balthazard & Cotte, in that it restricted the latter company's commercial freedom, and was also much more than an agreement providing for the rationalisation of Méac's production, in that said company was compelled to obtain supplies from the Sassenage plant only, thus restricting its commercial freedom.

The Council underlined that the contract covered more than 10 per cent of calcium manure consumption in the area in question, and that the resulting impact on the market was all the greater because of the differentiation between types of carbonates.

The Council dismissed the grounds put forward by the parties, who considered that it had not been established that the purpose or effect of the contract was anti-competitive. They first asserted that

because Balthazard & Cotte did not have sufficient capacity to market carbonates on the agricultural market in this area it could not compete against Méac, which company is specialised in the production and marketing of carbonates for agricultural use. However, the Council found that Balthazard & Cotte marketed carbonates for agricultural use from its Gannat plant in the Rhone, and its subsidiary was actively engaged in sales and marketing in this sector and geographical area. Moreover, although the companies maintained that there still remained one or more manufacturers in each of the affected departments to compete with Méac, the Council found that in certain areas no serious competition was possible because of the weight and bulkiness of the products and that, in any event, the market's supply structure was oligopolistic and highly concentrated in all the departments covered by the contract.

It also considered that the parties to the case could not validly assert that the agreement would have enabled streamlining of production and marketing of a product for which Balthazard & Cotte did not have a sales team, or the promotion of quality products to agricultural customers. The restrictions on competition between the two companies would not appear to be essential to economic progress, and an ordinary long-term supply agreement would ensure Méac's presence in the area without having to invest in a production unit, and would enable Balthazard & Cotte to sell its production without limiting the commercial capacity of its other plants.

3. Abuse of dominant positions

i) Definition of the Market

In several cases involving discotheques, the Council based its decisions on the definition of the market it had already used in previous cases involving the practices of the *Société civile pour le recouvrement de la rémunération équitable de la communication au public des phonogrammes de commerce*, known as the SPRE. It defined the relevant market as consisting of the collection of royalties owed to artists/performers and producers of phonograms as fair payment, or "neighbouring rights". Similarly, in its ruling on a case brought by the Théâtre de la Renaissance concerning the practices of the SPEDIDAM, which company has been authorised to collect and distribute royalties owing to artists/performers other than those named on the label of the sound recording or in the credits of a video recording or programme broadcast live, the Council considered that the relevant market was the collection of royalties for artists/performers or players, other than soloists, who took part in the recording of a soundtrack or commercial phonogram subsequently used in a live show.

On the various practices of professional associations and of Sicli, a manufacturer of extinguishers, the Council was led to differentiate between two markets: one consisting of the fitting of extinguishers, and the other of the maintenance of such equipment.

The Council found that there are only approximately twenty manufacturers qualified to make extinguishers, which they fit directly or through a network of agents or "trademark holders", which companies affix their trademark on the equipment, although they are not qualified to manufacture them. It then found that maintenance of said equipment entailed regular checks and servicing, and that this was carried out by the same companies which install the extinguishers, as well as by many small companies, which have often been founded by ex-employees of the major manufacturers, as from a technical point of view the maintenance is fairly simple.

ii) Definition of a dominant position

The Council had to apply several criteria when assessing the position of three companies in the Sicli group engaged in the fitting and maintenance of extinguishers. As regards market shares, the Council found that in 1988, in which year the contested practices came to light, the Sicli group held a 27.6 percent market share in the fitting market and a 32.7 percent market share in the maintenance market. It also found that the fitting or maintenance of extinguishers does not require any material investments which would constitute significant barriers to market entry. Moreover, enquiries showed that the trade name was not a decisive factor in the customers' choice, which would limit the development of rival brands. The Council found that the market shares of the companies in the Sicli group had dropped significantly between 1986 and 1988, and that other companies had experienced growth, such as their closest competitors, Desautel and CRPI, who both experienced a large increase in business over the same period. The Council thus concluded that there was no proof that at the time of the events the companies in the Sicli group occupied a dominant position which would render them impervious to any competition on the markets in question.

iii) Abuse of a dominant anti-competitive position

The first of these cases involves the practices of the SPRE. The discotheques which referred the matter to the Council asserted that this company abused its dominant market position in the collection of neighbouring rights by implementing various discriminatory practices involving the application of royalty rates or the use of court proceedings against discotheques which are members of BEMIM-AFEDD and, finally, the collection of royalties owing to any French and foreign beneficiaries of the musical repertoire without due authorisation, thus preventing other companies entitled to receive royalties for French or foreign artists/performers but which are not one of its partners from collecting their share thereof.

The Council firstly noted that several of SPRE's contested practices, such as failure to appoint members of the commission pursuant to Article L 214-4 of the Code of Intellectual Property, application of the decisions of said commission, interpretation of Article L 131-8 of the Code, or the relevance of evidence submitted before the courts, falls under the authority of the administrative or ordinary courts. It then found that the special rates the SPRE offered discotheques pursuant to agreements entered into with their professional associations consisted of reductions in the basis of assessment in consideration for the performance of clearly defined obligations, which enable it to guarantee regular payments, protect itself against the risk of fraud, reduce its monitoring costs and encourage and develop live music.

The Council also noted that although the BEMIM-AFEDD had refused to enter into these agreements, the SPRE offered the same conditions to the members of this trade association if they complied with the corresponding obligations. As regards court proceedings, the Council found that no evidence had been submitted to establish any discriminatory practice. It also considered that the fact that the SPRE is the only company in France which collects and distributes royalties owing to artists/performers and producers of phonograms and does so without any direct authorisation from the beneficiaries could not, in itself, be regarded as abuse of its dominant position, and that this *de facto* monopoly does not imply that it would prevent any other companies from being formed, engaging in the same business, or asserting any rights in connection with which they may have received an authorisation. Finally, the Council found that the claimants had not provided any evidence in support of their allegation that the SPRE abused its dominant position by collecting on its own behalf royalties owing to foreign artists and performers covered by international agreements.

In its ruling on a referral by the Théâtre de la Renaissance, the Council also dismissed the argument put forward by the applicant, whereby the SPEDIDAM abused its dominant position by

unilaterally imposing its conditions through a document and applying prices which had no reasonable bearing on the benefit the user would derive from the music, and which failed to take account of the effective use of recorded music. The Council found that the prices applied by the SPEDIDAM had been fixed by its board of directors in accordance with its by-laws, comply with usual practice, contain various objective elements likely to encourage the promotion of live music, and are applied indiscriminately. It also found that the price conditions take into account the actual use of recorded music, by applying criteria such as the number of shows and the length of recordings. Finally, the Council emphasised that its enquiries had not established that the SPEDIDAM's prices are excessive as compared to those practised in other European countries, and consequently also ruled out the application of Article 86 of the Treaty of Rome.

4. Contribution to economic progress

In a case involving the competitive situation on the honey market, the trade associations in question asserted that the distribution of minimum price lists for various sorts of honey, which is contested, arose from the crisis in the apiculture sector over the last few years, which has led to a steady drop in prices, threatening the very existence of some businesses. However, the Council did not accept this argument, and considered that said associations were not justified in citing Article 10 of the Ordinance, as by these practices they had attempted to alter the market price of honey, without envisaging any structural changes, such as altering production methods or adding value to the products.

The companies in the carbonate sector also asserted that the contracts which contained the contested exclusive supply and no-competition clauses had the effect of guaranteeing economic progress, by rationalising the production and distribution of carbonates in an area in which one of the companies did not have a production unit, and of guaranteeing a quality product for agricultural use.

However, the Council considered that it had not been established that said targets could only be reached via these clauses, and that an ordinary long-term supply agreement would appear to be sufficient to create the desired supply and distribution conditions, or that the recorded restrictions on competition were necessary in order to obtain a quality product.

Activity of the Paris Court of Appeals

Thirty-five of the Competition Council's decisions were appealed to the Paris Court of Appeals in 1995. Among them, two decisions of the Paris Court of Appeal were the subject of an appeal to the Suprem Court . Most appeals were lodged by companies; the Minister only lodged two appeals. Moreover, the Court of Appeals handed down 23 judgements in 1995. It also handed down 4 orders to dismiss applications for stays submitted by companies pertaining to financial penalties ordered by the Council. The Court considered that the penalties fixed by the Council would not jeopardise the continuation of company business.

Most of the judgements handed down by the Court of Appeals concerned the following sectors:

- sport and related activities (football and ski insurance),
- construction and public works,
- health care (video advertising in pharmacies).

In the sports sector, the Council found that it had due authority to analyse the effect on competition of an agreement entered into between the National Football League and Adidas, whereby the company would supply the major sports clubs on an exclusive basis (which exclusivity resulted from the amendment of the League's internal rules and regulations). The Court dismissed part of the Council's detailed reasoning and findings on the rules and regulations, although it confirmed that competition law does apply to sports federations to the extent that the way in which the market operates is affected. [See above]

Out of the 28 judgements handed down in 1995, 80 per cent upheld decisions by the Council. In 1994 this percentage was slightly lower.

Activity of civil courts in competition matters

This is governed by the implementation of Chapter IV of the Ordinance of 1 December 1986, as cited above (See above). Chapter IV concerns the offences of restrictive practices and unfair competition.

i) More specifically, in 1995 more predatory commercial practices were referred before the civil and commercial courts

The concept of an abnormally low price, which is the focus of the reform of the 1986 Ordinance, was taken into consideration by the courts, as is evidenced by the rulings against supermarkets for discriminatory practices resulting in abnormally low prices.

The Dijon Court of Appeals confirmed all the provisions of an initial judgement which found against a distributor who compelled its supplier to sell at a loss, by obtaining discriminatory purchase conditions in order to offer abnormally low prices during a promotional campaign.

The decisions handed down in this connection recognised that the Minister has genuine powers to intervene in order to re-establish public economic order, and to initiate proceedings for invalidity of unlawful sales on the grounds of Article 36 and, consequently, obtain the repayment of sums improperly paid.

The Minister's ability to initiate proceedings for invalidity was once again confirmed by the Paris Court of Appeals when it applied the principles of its judgement in the Fauchon case to a baggage company which applied sales conditions which did not comply with the criteria of objectivity and lack of discrimination between sellers.

At the request of the Minister, on the grounds of Article 56 of the 1986 Ordinance, the Court declared that the contested clause was invalid and instructed the distributor to conduct its commercial relations in accordance with the provisions of economic legislation.

Consequently, despite some procedural requirements pursuant to Article 36 (the commercial courts shall have sole jurisdiction), the courts have not questioned the Minister's ability to act, independent of the interests of the parties. On the contrary, the judgements handed down have confirmed his scope for action.

The Minister was a party to fifteen cases in 1995.

ii) Activity of Criminal Courts

Price maintenance, which restricts distributors' independence in fixing their resale prices and is also prejudicial to consumers, was the subject of successful court proceedings involving selective distribution networks and franchises.

Selling at a loss has been carefully monitored: 3 106 inspections, as opposed to 1 759 in 1994. However, in view of the penalties usually incurred for selling at a loss, the state counsel's offices decided to take no further action in a number of cases, either in anticipation of or as a result of the amnesty law which provided for the closure of cases involving certain types of offences committed before 18 May 1995.

Moreover, the courts showed a tendency to extend the exceptions to parallel pricing: the parallel price does not need to be identical to the reference price: the comparison is made on the basis of prices practised within a specific sector, in view of the company involved and the relevant market. Finally, the right to align prices against the prices offered by competition is substantive defence which may be raised at any time during legal proceedings.

This easing up of restrictions on selling at a loss, and the risks involved for professionals, led to this concept being redefined and heavier penalties being introduced to ensure compliance in the law on fair and balanced business relations promulgated on 1 July 1996.

Mergers and acquisitions

Statistics on the number, size and type of notified or monitored mergers

536 merger and acquisition operations were recorded in 1995, of which 406 involved a European investor.

Amongst these, 20 were the subject of a notification to the Directorate General by companies (French law does not require compulsory notification).

They can be broken down into the following sectors:

- food and drink: 5
- construction,
- construction materials and public works: 1
- communications: 1
- mining industries: 3
- manufacturing industries: 9
- transport: 1

Five of these were referred to the Council:

- SENSORMATIC / KNOGO (manufacturing industries) on 22/02;
- TOTAL RAFFINAGE / DEPOT PETROLIER FOS (mining industries) on 23/03;
- NEWCO / DE DIETRICH FERROVIAIRE (transport) on 07/04;

- SEIKO SEIKI / S2M (manufacturing industries) on 18/10;
- NELLCOR INC / PURITAN-BENNETT (manufacturing industries) on 23/11.

Major operations

i) Sensormatic / Knogo

A merger agreement was entered into by and between two US companies, Sensormatic Electronics Corporation and Knogo Corporation.

The Council noted that the operation under review would enable Sensormatic France to take control of Knogo France which had been, until then, its major competitor, and to hold a market share of approximately 52 percent of the market of individual security devices, whereas its immediate competitors, Esselte Meto, Actron and Checkpoint, each held a market share of less than 10 percent. The Council also found that Sensormatic was a member of a powerful international group and was the only company possessing know-how relating to all the different manufacturing techniques for individual security devices, whereas, moreover, it is a difficult market to enter given the conditions under which the equipment is listed by large retail stores, the technical constraints surrounding the installation of such equipment, and the complex maintenance needs. These market features were confirmed by the fact that no new operator had entered the French market over the last few years. Finally, an analysis of Sensormatic's general sales conditions, maintenance contracts and rental agreements revealed several clauses which could vertically limit and distort the market.

The contributions to economic progress cited by Sensormatic consisted of the improvement its services would bring about in the systems installed by Knogo, a more efficient after-sales service by both companies, namely due to a new computerised management system, the creation of norms which would enable labelling at source and, finally, the creation of new jobs.

However, although the Council did not refute the positive consequences cited by the parties to the operation, it did dismiss their arguments on the grounds that Sensormatic had not provided any evidence to establish that this concentration was the only means of achieving the alleged progress.

In his ruling of 12 December 1995 the Minister confirmed the Council's analysis of the situation; he considered that the disappearance of Knogo France would not result in a return to the previous state of affairs, which the Council recommended. He consequently authorised the operation subject to two conditions. Firstly, Sensormatic and its subsidiaries should cease to sell products using the Superstrip technology, for so long as they had exclusive access to such technology and its launch on the market had not been authorised. Secondly, Sensormatic should delete from its business contracts all clauses which excluded travel expenses and maintenance and repair costs from any warranties or maintenance agreements, on the grounds that the user uses supplies or labels which are not supplied by Sensormatic or Knogo.

ii) Total Raffinage Distribution / Dépôt Pétrolier Fos

Total Raffinage Distribution was to acquire the interests held by companies in the Bolloré technologies group companies in the capital of Dépôts Pétroliers de Fos, which operates a 780 000 square metre storage site for petroleum products at Fos-sur-Mer (Bouches-du-Rhône). The operation also entailed

a draft firm agreement to swap products (domestic fuel oil and diesel fuel) and a draft firm agreement whereby Total would supply Bolloré Energie with domestic fuel.

The analysis of the situation as regards competition which was carried out in the course of the examination of the concentration in the petroleum sector led the Council to observe that the operation under review could distort competition. The operation, which consisted of taking control of a company which operated a petroleum storage site, could have repercussions on the upstream market of distribution of domestic fuel oil, diesel oil and other fuel, more specifically in the geographical area supplied by Dépôts Pétrolier de Fos and the Méditerranée-Rhône pipeline. Access to DPF's storage site on satisfactory terms is essential for independent traders and large retail chains, because of the site's location and its link with the Méditerranée-Rhône pipeline, which provides an economic means of access to the Rhone corridor. Whereas, the acquisition of Bolloré's interests in DPF by Total Raffinage Distribution modified the structure of DPF's shareholders, with the result that the French refineries such as Elf and Total would have a majority holding, which would consequently enable Total Raffinage Distribution, with the agreement of Elf, to push through modifications to price conditions for storage at this site, and to attribute storage capacities advantageous to the two refineries and prejudicial to independent traders or large retail chains, who are their competitors and have no equivalent alternative solution in the same area.

Total Raffinage Distribution asserted that this operation would enable it to improve logistics in the West of France by means of agreements entered into with Bolloré, would prevent the need for heavy investment in order to renovate its La Mède refinery, and would improve its competitivity. However, the Council considered that the company had not provided sufficient evidence that it could not have improved logistics in the West of France other than via the anticipated operation. The Council also considered that this particular operation could not meet this condition if the large retail chains and independent traders did not have alternative storage capacity in the geographical area in question similar or equal to their current storage capacity in DPF facilities. Until the alternative storage sites planned by large retail chains in Fos or Lavéra are operational, Total Raffinage Distribution should undertake not to cause or approve any measure liable to directly or indirectly result in restricted storage capacity being imposed upon the large retail chains or independent traders which are DPF customers, or in any modifications to existing financial conditions.

The Minister confirmed the Council's analysis of the situation and, considering that such facilities would only become operational in three years time, authorised the operation subject to the undertakings recommended by the Council being respected during such period of time.

iii) Newco / De Dietrich Ferroviaire

If ruling on De Dietrich's rail transport activities being transferred to a subsidiary, and the acquisition of interests in said subsidiary by Ferromeca and Gec Alsthom, the Council considered that the operation did not constitute any risks for competition. Firstly, it found that a major part of De Dietrich's business now consists of sub-contracting to or collaboration with Gec-Alsthom, in particular as regards TGV end carriages. Secondly, the Council considered that the two companies specialise in different areas and that the effect of the operation should be considered as regards mainly electrical and electronic equipment, on the one hand, and as regards mainly mechanical equipment on the other hand. In the first case, De Dietrich has no real know-how and cannot provide complete trains or traction equipment - which make up most of the market demand at present - without outside help. The Council concluded that the operation would have zero impact on the supply of this type of equipment. As regards mainly mechanical equipment, the market demand for which is dropping, the Council considered that De Dietrich Ferroviaire could only supply residual demand and that, in any event, it would have to compete against other specialised companies such as ANF Industrie, or companies which are able to produce complete trains,

including major international groups such as ABB, Siemens, AEG or Bombardier, following the opening of the markets to European competition.

The Minister unreservedly approved this operation.

iv) Seiko Seiki / S2M

The Société Européenne de Propulsion intended to sell its majority holding in Société de Mécanique Magnétique (S2M) to Seiko Seiki Belgium. S2M manufactures magnetic bearings, which are used as sub-components in various industrial applications, and is the only company on the national market to offer magnetic bearings for turbomolecular pumps, for which no alternative exists. The Seiko group manufactures turbomolecular pumps with magnetic bearings, and occupies a strong dominant position on the market. By acquiring the "5 axe" magnetic bearing technology from S2M, the group would possess the best technology and could further reinforce its dominant position, as S2M was the only independent European manufacturer and supplier.

The Minister authorised the operation subject to the condition that Seiko Seiki continues to supply five axe magnetic bearings and grants manufacturing licences for such bearings to any manufacturer of turbomolecular pumps who makes the request during a three-year period.

v) Nellcor Inc / Puritan-Bennett

Puritan-Bennett Corporation was to be absorbed by a wholly-owned subsidiary of Nellcor Incorporated, whereas both of these companies deal in medical equipment for the diagnosis and treatment of breathing problems. Both companies have subsidiaries in France which are active in the sector; together, they would hold most of the market share. The Council considered that the operation would result in eliminating a competitor from the three markets of breathing aids for use in the home (oxygenotherapy, assisted ventilation, and the treatment of sleep apnoea syndrome), but that the level of existing and potential competition on this accessible market was high and the main French buyers had a choice between competitors.

The Minister consequently authorised the operation without imposing any specific conditions.

III. The role of the competition authorities in formulating and implementing other policies, such as measures to reform regulations, commercial policies or industrial policies

In 1995, in addition to carefully monitoring the conditions under which certain sectors will be opened to competition (cf. telecommunications), the competition authorities also focused on conditions under which state-owned monopolies diversify.

Experience shows that when such sectors are opened to competition the following measures should be taken:

- firstly, clarify and, if necessary, reinforce, the rules governing the provision of a universal service, while complying with the requirements of equality, continuity, an affordable price, and the constant efforts to satisfy changing needs, and

- secondly, introduce a framework within which the competition may make a positive contribution. In this connection, specific regulations should be reduced to a strict minimum, and the scope of application of ordinary competition and consumer protection rules should be kept as broad as possible. As regards the "regulation" of these sectors, three different roles can be identified:

    - comprehensive regulation (conditions of market entry, rules for the provision of a universal service, financing of the service), which must be the responsibility of parliament and government;
    - administrative and technical management (examination of applications for licences to provide services, allocation of rare resources, ensuring that operators comply with legal and regulatory obligations, in particular those specified in their terms of reference), which could be entrusted to independent administrative bodies;
    - monitoring of the market, in particular as regards competition, which is the duty of those authorities usually responsible therefor in all economic sectors.

The Directorate General has followed the above criteria, which have been adopted by the government. This is particularly true as regards mail services and the energy sector. The Directorate General now also intervenes systematically in the health care sector.

Mail services: Following a referral by the Ministry of Finance, under whose aegis the Directorate General acts, in a notice dated 17 October 1995, the Competition Council examined the position of the SERNAM, the service operated by the French railways (SNCF) which regroups all parcel delivery services, and the competition problems which could arise in this sector as a result of its special status. The consolidation of SERNAM's financial results in the accounts of the SNCF means that the losses it has suffered on a regular basis over the last few years are incorporated therein. Despite such losses, the SERNAM has been able to implement investment programmes.

This position should be compared with that of its competitors, whose losses are recorded in their own accounts, limiting their future financing capacity, and thus jeopardising continuation of business.

In view of the difficulty of assessing services offered by the SNCF for the use by the SERNAM of its facilities, equipment and services and, in particular, its stations, the Council proposed several essential conditions which should be respected by the SERNAM to ensure fair competition. These conditions consist of the comprehensive accounting and financial transparency of the SERNAM, in order to determine the company's income and expenditure, including when related to the use of SNCF property. The Council also proposed solutions to make this possible: it considered that the best solution would be to transform the SERNAM into a subsidiary so that, even given its repeated operating losses, it could continue to operate under the conditions required to guarantee fair competition.

As regards diversification in the energy sector: the Minister of the Economy referred a draft memorandum of understanding between EDF / GDF Services Lyon Métropole and several professional federations (CAPEB, FEDELEC, FNEE) to the Competition Council. The purpose of the memorandum was to introduce a quick electrical repair service for consumers "post-meter" in consideration for payment of a monthly subscription fee, in association with three professional organisations. A subscriber would simply have to phone the EDF/GDF Services line, open seven days a week and 24 hours a day, to obtain an appointment. This project would appear to be advantageous for the consumer, but it is not problem-free, as EDF would only have provided such assistance to members of said organisations, while using EDF's general resources, which result from its status as a monopoly.

The Council considered that the intervention of a company on the electricity repair market which has a monopoly for distribution of electricity, has full control over the “pre-meter” electricity network, is perceived as a public service and enjoys all the related benefits, could lead to distortion of competition.

The agreement also contained other potential risks: discrimination, abusive benefits, concerted prices, market sharing, indirect subsidies.

Anticipating the objections raised by the Council, EDF/GDF Services decided not to go ahead with the project.

In the health care sector, it was discovered that companies which manufacture or market medicines or medical equipment offer doctors various perks in consideration for prescribing their medicines or products. Some doctors actually request such perks. This practice is considered to constitute the purchase of prescriptions, and is contrary to the interests of public health. It also violates the principles of free competition, penalising those companies which refuse to implement such practices, and preventing other companies from entering the market.

Articles L 365, L 365-1 and L 549 of the Public Health Code have prohibited such practices. The Directorate General has closely monitored the application of these provisions since the Summer of 1993. It has referred more than one hundred cases implicating health care professionals to the Courts.

The application of this law has resulted in a drop in such practices, although regrettably some companies and doctors still persist. A recent example of this was a “symposium” organised in a Middle-Eastern country which was described by the organisers as having a dual function: firstly, it was educational, aiming to train local doctors, and secondly, it was in the interests of scientific research, with a series of discussions and work sessions. However, the Directorate General’s enquires revealed that this journey was almost exclusively for pleasure.

GERMANY*

(1 July 1995 - 30 June 1996)

Changes to competition laws and policies, proposed or adopted

Summary of new legal provisions of competition law and related legislation; and Government proposals for new legislation

Neither the German Act against Restraints of Competition (ARC), which is enforced by the Bundeskartellamt, 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 already announced in its 1993/1994 report, the Federal Government has decided to examine the ARC.

The Federal Government set up a "Working Group Competition Act Amendment" comprising officials from the Federal Ministry of Economics and the Bundeskartellamt. In May 1996 the Federal Ministry of Economics submitted cornerstones for a 6th amendment. With this revision, the Federal Government intends to strengthen the competition principle as a whole and harmonise national law with Community law wherever considered necessary. At the same time, the ARC, which has been in force since 1954 and has lost clarity as a result of being amended five times, is to be revised and streamlined.

This concept reflects the economic and political needs arising from the transformation of Europe into a single economic area. Both German law and Community law pursue an identical goal of protecting competition. Differences do, however, exist as regards substance and structure. In both legal systems in a single economic area, it is in the long run not desirable for national and European legislators to make different assessments under competition law when the situations involved are comparable.

National law and Community law are therefore to be harmonised as far as possible wherever necessary. What has proved successful at national level will be retained.

This two-pronged approach to the revision will on the one hand take account of the legitimate interests of the business community in having largely similar legal bases. On the other hand, German competition law will be retained in its present form:

- wherever its rules are more specific than Community law;
- wherever Community law is still developing; and

* The original language of this report is English.

– wherever, in the opinion of the Federal Government, national law offers solutions preferable to those available under European law.

The harmonisation of legislation will focus in particular on the general ban on horizontal agreements (cartels) and merger control. The areas exempted under the ARC will also be reviewed.

The cornerstones provide interested business circles with an opportunity to define their present position on the reform of the ARC more closely. Following a phase of comment, a draft for the revision of the ARC will be prepared, which is to be presented to Parliament.

The cornerstones contain the following proposals:

Ban on cartels and exemptions:

– adopt the wording of Article 85 (1) of the EC Treaty covering the ban on cartels in respect of horizontal agreements;

– retain the distinction between horizontal and vertical restraints of competition under German law; vertical agreements to continue to be effective in principle;

– introduce a general exemption based on EC law (Article 85 (3) of the EC Treaty); define more closely key groups of factual situations in line with the present list of exemptions of Sections 2 to 7 of the ARC;

– refrain from including an enabling provision for issuing block exemptions for national cases; and

– retain ministerial authorisation (Section 8 of the ARC).

Other agreements:

– retain ban on resale price maintenance (RPM);

– retain admissibility of RPM for publications; and

– retain abuse supervision of vertical restraints of competition.

Abuse, discrimination, other restrictive practices:

– introduce a ban on abuse of a market-dominating position in line with EC law (Article 86 of the EC Treaty);

– delete market domination presumptions; and

– retain abuse supervision in cases of relative market power.

Merger control:

- extend pre-merger control to bring it in line with EC law; raise turnover thresholds from DM 500 million to one billion; increase *de minimis* threshold to DM 10 million;

- streamline definition of merger; introduce acquisition of control as a definition of merger in line with EC law; retain acquisition of a 25 percent share/50 percent share as well as the criterion of a "competitively significant influence";

- treatment of co-operative and concentrative joint ventures in line with EC law;

- retain the substantive test of "creation or strengthening of a market-dominating position" in the form of single-firm market domination and oligopoly; essentially retain quantitative presumption rules;

- improve transparency of proceedings; introduce an obligation to issue formal decisions in main proceedings and publish them even if a merger is cleared; introduce a right to bring third-party actions in respect of decisions in main proceedings; the instrument of summary preliminary proceedings to be retained; and

- retain ministerial authorisation (Section 24 (3) of the ARC).

Exempted sectors:

- delete as many exemptions as possible, in particular for transport, banking and insurance sectors; and

- introduction of competition into energy sector will be dealt with in the context of the revision of the Energy Industry Act (see paragraph below).

In June 1996 , the Federal Ministry of Economics submitted a draft for the revision of the Energy Industry Act. As a central pillar for the introduction of competition into the electricity and gas sectors this draft provides for the elimination of the protection given to closed supply areas. The exemption under competition law enjoyed by supply companies would be abolished. Demarcations and exclusive rights of way will no longer be permitted.

The supply of electricity and gas via networks will thus be placed on the same footing as other sectors of the economy. It is planned to submit the amendment to the Federal Cabinet before the end of this year.

The new Telecommunications Act has been in effect since August this year. It marks the conclusion of a legislative process spanning just one and a half years. It is to form the legal basis for complete competition in the German telecoms market from 1 January 1998 and mark the abolition of the Deutsche Telekom AG’s monopoly, particularly in the area of telephone voice services and transmission networks.

The act is divided into 13 parts:

- general provisions (purpose of the act, regulatory aims, definition of terms);

- regulation of telecommunication services (licences, universal service);
- regulation of market-dominating providers;
- open network access and interconnections;
- customer protection;
- management of pool of telephone numbers;
- management of frequencies;
- use of transport routes;
- authorisation, transmission equipment;
- creation of a regulatory body;
- telecommunications secrecy, data protection, security;
- provisions concerning sanctions and administrative fines; and
- transitional and final regulations.

The upper house of the German Parliament presented a bill in the autumn of 1995 which is to make collusive tendering a criminal offence. This complements the previously existing offence of fraud. The aim is to render more effective the fight against illicit payments. Any cartel agreements made in the course of invitations to tender would also be subject to criminal prosecution. Such agreements would no longer be covered by the provisions of the Administrative Offences Act and would thereby no longer fall within the responsibility of the competition authorities. The Bundeskartellamt and the competition authorities of the Laender basically welcome the fact that such agreements are being classified as criminal offences. For the current discussion they are, however, of the opinion that the deterrent effect of such a criminal sanction depends to a large extent on it being applied effectively. The competition authorities' particular experience in this field could no longer be used in the criminal proceedings. Above all this legislative initiative involves the danger that the proceedings, as is also the case in other criminal proceedings, will concentrate on the individual, while the punishment of the businesses profiting from the agreements will become a secondary consideration. The competition authorities would prefer a more flexible method of regulating the distribution of responsibilities as is already provided under German law in the sectors of taxation and finance.

The Federal Ministry of Justice set up a working group "Review of Competition Law" in 1995 which dealt with the question of amending the Unfair Competition Act (UCA). In the final report of the working group, which was submitted at the beginning of October 1996, it was stated that reservations exist about making any major changes to the existing law.

Enforcement of competition laws and policies

Action against anti-competitive practices, including agreements and abuses of dominant positions

Summary of activities of competition authorities and courts

Agreements

The adjustment of German law to the European legal system must not be a one-way process, however, as has been explained above.

Rather, sensible harmonisation also presupposes the simultaneous further development of the different national and European competitive systems into a co-ordinated and improved system that is to serve as a protective mechanism against restraints of competition. A central concern in the context of this harmonisation process also ought to be the general and consistent embodiment of the subsidiary principle. One of the significant steps in this direction is to increase the decentralised application of EU competition law. Irrespective of decentralised enforcement and the conditions of enforcement, the Bundeskartellamt may challenge violations of Articles 85 and 86 of the EC Treaty provided the Commission has not initiated its own proceedings.

In the reporting period the Bundeskartellamt conducted the following proceedings, based either exclusively or additionally on the European competition rules. Regarding each of the proceedings, the Bundeskartellamt consulted with the EU Commission at an early stage. The Bundeskartellamt also instituted a number of proceedings for violations of the German ban on cartels.

In the reporting period, the Berlin Court of Appeals affirmed, among others things, the prohibitory decision against the Deutsche Fussball-Bund (German Football Association) in the context of the ban on cartels. The proceedings concerned the following cases:

A prohibitory decision based on Article 85 of the EC Treaty was issued against the energy supply company RWE Energie AG (RWE) and the city of Nordhorn. Both parties were prohibited from carrying out the electricity concession agreement they had concluded for a 20-year term, insofar as it hindered electricity imports from other EU Member States. In this case, the hindrance resulted from the fact that, under the exclusivity clause embodied in the agreement, the city of Nordhorn was obliged to grant RWE the exclusive right to use the town's public roads for the installation and operation of electric mains for the supply of electricity.

In this case, the Commission refrained from initiating its own proceedings and informed the Bundeskartellamt that in principle the Office's proceedings fitted in with the Commission concept. The prohibitory decision has not yet become unappealable.

In agreement with the Commission, the Bundeskartellamt reviewed under Article 85 of the EC Treaty the distribution system operated by seed growers which had been notified to Brussels. The restraint in question has since been abandoned by the parties involved.

The Bundeskartellamt found that the articles of association of carpartner Autovermietung GmbH constituted a violation of the ban on cartels under both Community law and German law and therefore prohibited the firm from implementing these articles. The prohibition covered, among other things,

co-operation agreements that carpartner had concluded with 42 insurance companies. Carpartner had been set up as a car rental company by six insurance companies and, according to the Bundeskartellamt, served to depress prices in the so-called rental car replacement business. The decision has since been affirmed by the Berlin Court of Appeals, which granted leave for an appeal on points of law to the Federal Supreme Court.

The Bundeskartellamt has so far imposed administrative fines totalling DM 25.4 million on 33 firms and 29 executives of these firms for bid-fixing agreements regarding tenders for road-marking work. Of these, administrative fine orders amounting to almost DM 20 million have already become unappealable.

Administrative fines totalling DM 570 000 were imposed on four manufacturers of ventilating and air-conditioning equipment as well as on their general managers and some members of their staff. From 1991 until early 1994 the firms had fixed prices of a large number of individual contracts, involving building projects in the Saarland and the neighbouring Federal Laender. Given the great social harmfulness of the competition law violations, the fine level is low. However, in deciding on the amount of the fines, the Bundeskartellamt made allowances for the extremely difficult economic situation of the firms concerned.

The Bundeskartellamt prohibited the 16 lottery companies run by the Federal Laender from excluding commercial players' associations from the lotteries. There have been about 30 such commercial pools in Germany for some 15 years now. They collect lottery tickets and football pool coupons from private individuals and pay them into a particular lottery outlet. Lottery and sports bets made by commercial players' associations have so far only accounted for two to three percent of the total lottery turnover of about DM 13 billion. The majority of the Land lottery companies wished to exclude these private firms from their gambling operations. In the Bundeskartellamt's view, this decision violates the ban on cartels, and it was therefore prohibited under penalty of a fine of up to DM one million. An appeal against this prohibitory decision was filed with the Berlin Court of Appeals.

The Berlin Court of Appeals affirmed the Bundeskartellamt's prohibitory decision against the Deutsche Fußball-Bund ('DFB', German Football Association): in September 1994, the Bundeskartellamt had prohibited the DFB from centrally marketing the television broadcasting rights of European Cup home games of German teams. The national champions, the national cup winner and the top-ranked clubs of the national league participate in this annual competition in three categories. The Bundeskartellamt found that the DFB's central marketing of television broadcasting rights constituted a restraint of competition and that it therefore violated the ban on cartels embodied in Section 1 of the ARC. The Berlin Court of Appeals confirmed the Bundeskartellamt's view that the individual clubs were the owners of the broadcasting rights of the games. The application for authorisation of a rationalisation cartel (under Section 5 of the ARC) was also rejected, because the conditions for exemption from the ban on cartels were not met.

Ban on concerted action

The German competition legislation provides for a ban on concerted action and restrictive practices. Enterprises are prohibited from threatening or causing harm, or from promising or granting advantages, to other enterprises for the purpose of inducing them to adopt conduct which under the ARC must not be made the subject-matter of a contractual commitment (cartel).

Based on this provision, the Bundeskartellamt imposed administrative fines totalling DM 397 000 on five mineral oil dealers on the grounds that they had violated the prohibition of exerting pressure on others. The firms concerned had threatened to take predatory measures against a mineral oil dealer who was located outside the region concerned in order to induce him to refrain from supplying diesel fuel to industrial customers in a particular region of Germany. For this purpose, the five firms involved sent offers to individual customers of the non-resident dealer, quoting unusually low prices for heating oil, thereby causing the dealer perceptible sales or revenue losses. One company has withdrawn its appeal against the decision. The other proceedings are currently pending before the Berlin Court of Appeals.

Exemptions from the general ban on cartels

There are some statutory exemptions from the general ban on cartelisation. For instance, co-operative agreements of small and medium-sized firms are permissible if three conditions are satisfied, viz:

- if the object of the agreement is the rationalisation of certain economic activities;
- if competition in the market concerned is not substantially impaired;
- if the agreement serves to promote the efficiency of small and medium-sized companies.

In the reporting period, the small business co-operative scheme Logex System für Entsorgungslösungen met the conditions for legalisation. The waste disposal companies operating in Bavaria and Baden-Württemberg will initially co-operate in the fields of electronic waste recycling, motorcar recycling/automotive components recycling, workshop waste disposal, plastics recycling as far as national waste disposal solutions are concerned. The companies concerned jointly solicit orders and handle national waste disposal orders. Each partner provides the services that are necessary in the context of the co-operative arrangement in his own name and for his own account.

Statistics of different types of legalised cartels

The number and types of cartels legalised by the Bundeskartellamt and the Federal Minister of Economics can be seen from the table below.

Table 1

Types of cartels	Cartels 1995/1996 additions	Cartels 1995/1996 deletions	Total number since 1958	Still effective as at June 1996
Condition cartels (Section 2)	-	-	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	8
Rationalisation cartels (Section 5 (2))	-	1	24	2
Rationalisation cartels (Section 5 (2) and (3))	2	1	40	11
Specialisation cartels (Section 5 a (1) Sentence 1)	1	-	66	17
Specialisation cartels (Section 5 a (1) Sentence 2)	-	-	57	16
Co-operation cartels (Section 5 b)	10	-	122	110
Purchasing co-operation (Section 5 c)	-	1	10	9
Export cartels (Section 6 (1))	-	3	115	37
Export cartels (Section 6 (2))	-	-	14	2
Import cartels (Section 7)	-	-	2	-
Emergency cartels (Section 8)	-	2	4	-
Total	**14**	**8**	**592**	**264**

There is no contradiction between the consistent enforcement of the German ban on cartels by he Bundeskartellamt and the provision of very wide-ranging possibilities of inter-company co-operation -in particular for small and medium-sized companies, but not only for them. In the period under review the number of cartels legalised by the Bundeskartellamt rose from 258 to 264 (against an increase from 239 to 258 in the 1994-1995 period). The increase in the number of legal cartels recorded in the period 1995/96 is mostly due to 10 cases of purchasing co-operation agreements operated exclusively by small and medium-sized firms. Such co-operation agreements account for some 40 percent of all legalised cartels. 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. The so-called small business co-operation agreements offer the co-operating companies better market chances when competing with powerful large enterprises.

Vertical restraints

In this area, too, the Bundeskartellamt - upon consultation with the EU Commission - conducted proceedings based on the application of Community law. The main points of the decision, by which the Bundeskartellamt in November 1994 prohibited the exclusivity agreement concluded by the Hanover-based Touristik Union International GmbH & Co. KG (TUI) with Spanish hotel owners on the Balearic and the Canary Islands, were affirmed by the Berlin Court of Appeals.

TUI (as a big but not dominant competitor) was prohibited from:

- excluding individual German competitors from buying room quotas in the same hotel as TUI for the season concerned,

- limiting the number of competitors admitted to the TUI contract hotel.

The Court has thus also confirmed that European competition law may be applied to such cases by the Bundeskartellamt. Leave was granted for an appeal on points of law to the Federal Supreme Court.

In a similar case, the Bundeskartellamt and the travel operator NUR Touristic GmbH had negotiated a settlement during a hearing on 1 November 1995 by which NUR agreed to refrain from applying the above prohibited clauses until an unappealable decision has been rendered.

To enforce non-binding price recommendations, manufacturers and importers unlawfully try to induce their dealers to adhere to recommended prices by threatening, among other things, to withhold supplies. In an effort to protect non-binding price recommendations, the Bundeskartellamt in several cases imposed fines on manufacturers and importers of branded goods. These firms had threatened, among other things, to withhold supplies from their retailers in order to enforce price recommendations or minimum price levels. Among the firms fined were manufacturers or distributors of paints, toothpaste and jeans.

Control of abusive practices by dominant firms

An important objective of abuse control is to keep markets open. Abuse control and the ban on discrimination are designed to prevent powerful firms from restricting other firms in their freedom to engage in economic activities and decision-making. In the year under review fewer abuse proceedings were brought by the Bundeskartellamt than in previous years. This illustrates that the number of proceedins is back to normal after a surge in the early 90s in the wake of German reunification. Many of for fear of negative publicity in connection with press reports.

IMAX Corporation, Toronto, Canada, was prohibited from treating Big Screen Cinema Projektionsgesellschaft mbH, Munich, Germany, differently from other large-screen theatres as regards the supply of 15/70 mm motion picture projection systems to be used in Berlin. IMAX had refused to supply Big Screen, which intends to operate a large-screen theatre on Potsdamer Platz in the centre of Berlin, on the grounds that the exclusive supply of IMAX projection systems had already been agreed with another Berlin-based firm. According to IMAX, two commercial theatres equipped with IMAX projectors were not viable in Berlin. IMAX has a market-dominating position as regards 15/70 mm projection systems. Moreover, IMAX already supplied several firms in geographic markets comparable to the Berlin market. In addition, there were no facts justifying IMAX's refusal to supply Big Screen. In the Bundeskartellamt's view, this constituted unlawful discriminatory conduct.

Moreover the Bundeskartellamt ordered an interim prohibitive injunction on the grounds that the long delivery time of the projector might otherwise prevent the timely inauguration of the large-screen theatre. The proceeding is pending before the Berlin Court of Appeals.

The Bundeskartellamt prohibited the regional gas supply company Spree Gas Gesellschaft für Gasversorgung und Energiedienstleistung mbH, Cottbus, from charging its small-scale customers and heating gas customers higher prices than those demanded in a comparable supply area. SpreeGas supplies

approx. 20 000 customers in south-east Brandenburg as well as in some parts of Saxony and Saxony-Anhalt with gas at prices that are on average 10 percent (in some cases up to 58 percent) higher than those of EWE, the company which works under comparable circumstances in the Brandenburg supply area.

The Bundeskartellamt exercised its discretionary powers to prohibit the abusive prices of an east German utility also on the grounds that the income level of consumers in the new Federal Laender is still substantially lower than in the old Laender.

In another case, abuse proceedings brought against the rail company Deutsche Bahn AG (DB) were discontinued after the latter abstained from the conduct objected to by the Bundeskartellamt. DB had refused to deal with the computer reservation system (CRS) SABRE. Originally set up as a marketing tool for airlines, CRSs are increasingly being used by rail operators as well. CRSs enable travel agents to issue airline and rail tickets, book seats, etc. via their personal computers. The START group, in which DB holds a stake, accounts for 90 percent of the German market for CRS services; the remaining 10 percent market share is held by SABRE, Galileo and Worldspan.

Mergers and acquisitions

Statistics on number, size and type of mergers notified and/or controlled under competition laws

Although the number of notified merger projects tends to be higher towards the end of any year than over the first six months, the year under review saw a decrease in the overall number of notified mergers compared with the previous reporting period.

Table 2 shows the number of mergers notified since the 1973 adoption of merger control in Germany.

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

Table 2. Mergers notified pursuant to Section 23 of the ARC (cont'd)

Year	Mergers
1990	1 548
1991	2 007
1992	1 743
1993	1 514
1994	1 564
1995	1 530
1 jan. 1996-30 june 1996	620
Total	**21 374**

Table 3. Breakdown of total figures

	1993	1994	1995	Jan. - June 1996
Mergers notified and reviewed prior to completion	1 050	1 086	1 087	430
Mergers notified after completion and found to be subject to control	310	331	282	121
Mergers not subject to control	154	147	161	69
Completed mergers total	**1 514**	**1 564**	**1 530**	**620**

The continuing decrease in merger activity in the 1995/96 period is explained by the declining impact of German reunification on merger statistics, which are almost back to their 1988 and 1989 levels.

The statistics also reflect the effect merger control tends to have on the way the business community conducts its activities. Firms often hold informal preliminary discussions with members of Bundeskartellamt divisions to determine whether particular merger projects are likely to raise competition concerns. This may result in proposed mergers being either abandoned or modified and completed in a way that takes account of the concerns voiced by the Bundeskartellamt. For the reporting period, the Bundeskartellamt statistics show 10 projects that were abandoned. Since the 1973 introduction of merger control in Germany a total of 273 projects have been abandoned.

Two trends can be observed:

- The waste disposal industry is marked by a process of growing concentration. A considerable number of mergers is due to semi-public joint ventures being formed by territorial authorities, who have to ensure waste disposal, and private sector companies;

- In view of the proposed reforms of exemptions in place for energy supply via networks there has been a significant increase in the trend towards joint ventures among suppliers and buyers of energy.

Summary of activities of competition authorities and courts

In the 1995/1996 reporting period, five mergers were prohibited in formal proceedings:

The proposed acquisition by the British company T&N plc., Manchester, of the German firm Kolbenschmidt AG, Neckarsulm, was prohibited by the Bundeskartellamt.

In the market for piston rings, the merger would have led to strengthening the already dominant position of the Burscheid-based German T&N subsidiary AE Goetze GmbH, whose market share of over 60 percent amounts to four times the market share figure of the second-largest competitor. Kolbenschmidt is a major buyer of piston rings, whose demand volume would have been lost to competition as a result of the merger, while securing T&N a lasting sales volume. In the market for steel/plastic friction bearings, the merger would have resulted in a paramount market position. The merging parties would have accounted for a combined market share of more than 60 percent in this market as well. This share would have been more than three times the market share of the next competitor. A look at the European competitive situation did not help to put these market positions into perspective, either. On a European scale, the piston ring market share level would have been similar, and, as far as friction bearings are concerned, market shares would have been even higher than in the domestic market.

Proceedings are pending before the Berlin Court of Appeals.

The Bundeskartellamt issued a prohibitory decision against Société d'Applications Routières S.A., Aubervilliers, France, which belongs to the Lafarge Coppée group. Société d'Applications Routières had intended to acquire a majority shareholding in the German firm Limburger Lackfabrik GmbH. The proposed merger had to be prohibited because the companies concerned would have obtained a market share of well over 40 percent in the market for road-marking paints and considerably exceeded a 33 percent share of the market for plastics materials and permanent marking films. The next ranking competitors would have fallen far behind, with market shares of only about 10 percent. Moreover, the firms involved in the merger project would have wielded much greater financial power than their competitors.

The decision has become unappealable.

The Bundeskartellamt issued a decision prohibiting ex post the already completed acquisition by the Geislingen-based WMF Württembergische Metallwarenfabrik AG of a majority stake in the Altensteig-based Auerhahn Besteckfabrik GmbH. In 1994, the WMF group recorded a worldwide turnover of more than DM 900 million from the production and distribution of cutlery, table utensils, cookware, kitchen and food-serving utensils, large coffee machines and glassware.

Prior to the merger, WMF accounted for a share of over 40 percent of the German market for higher- and medium-priced stainless steel cutlery. This share was more than three times the size of the market share of the second-largest supplier. In addition, WMF had comparatively large financial resources and excellent access to the sales markets owing to its own branch network, its own cutlery brand and the goodwill value of its name. Thus even before the merger WMF had a paramount market position in relation to its - mainly medium-sized - competitors. This position would have been further strengthened as a result of the acquisition of Auerhahn. Proceedings are pending before the Berlin Court of Appeals.

The acquisition - completed at the end of 1994 - of the entire share capital of Adolf Deil GmbH & Co. KG Druckerei und Verlag of the daily "Pirmasenser Zeitung" by Tukan Verlagsgesellschaft mbH & Co. KG, which is controlled by Rheinpfalz/Medien Union, was prohibited by the Bundeskartellamt on the grounds that the merger would have strengthened Rheinpfalz/Medien Union's dominant positions both in the regional market for subscription dailies and the advertising market in the area of circulation of the "Pirmasenser Zeitung" newspaper Proceedings are pending before the Berlin Court of Appeals.

The Bundeskartellamt also prohibited the completed acquisition by VEBA Energiebeteiligungs-GmbH of a 24.9 percent stake in Stadtwerke Bremen AG (SWB). In the Bundeskartellamt's view this transaction constituted a combination of firms which enabled VEBA to exercise a competitively significant influence on SWB. This was the first prohibition issued on the basis of Section 23 (2) No. 6 of the ARC, which was only introduced in 1990.

In the Bundeskartellamt's view the prohibited merger resulted in strengthening the market-dominating position of the VEBA group affiliates PreussenElektra and Hannover-Braunschweigerische Stromversorgungs-AG as well as three other firms in the sale of electricity in their respective areas of supply.

The prohibitory decision has not yet become unappealable.

In the period under review one prohibition decision of the Bundeskartellamt was upheld by the Federal Supreme Court and one was upheld by the Berlin Court of Appeals. One prohibition decision of the Bundeskartellamt was revoked by the Berlin Court of Appeals; an appeal was filed against this decision.

The Bundeskartellamt prohibited Fresenius' acquisition of Schiwa on the grounds that the merger would create or strengthen dominant positions in various markets for infusion and dialysis solutions. The existing market-dominating position held by Fresenius in the market for blood volume replacement solutions used to dilute and replace blood in patients suffering from burns or haemorrhagic shock would be strengthened. In the market for basic solutions to compensate for electrolyte loss, the existing market-dominating position of an oligopoly which includes Fresenius would be further strengthened. In two other markets for solutions to purify the blood of persons with renal insufficiencies Fresenius would obtain a paramount and/or monopolistic market position as a result of the merger.

The appeal on points of law to the Federal Supreme Court has in the meantime been withdrawn and the decision is therefore unappealable.

The Bundeskartellamt's prohibition in 1992 of the planned acquisition of Franz Daub & Söhne, Hamburg, by Werner & Pfleiderer GmbH, Stuttgart, a member of the Krupp group, was upheld by the Federal Supreme Court. The Bundeskartellamt had prohibited the proposed merger because it would have led to the parties involved acquiring a market-dominating position in the sector of industrial baking ovens. This was particularly evident from their high market shares, large leads over their mainly medium-sized competitors and the financial power enjoyed by Werner & Pfleiderer as a member of the Krupp group.

The prohibition of the acquisition of a 49.99 percent stake of RWE-Energie AG (RWE) in the Gemeinschaftsunternehmen Stromversorgung Aggertal GmbH was revoked by the Berlin Court of Appeals. The Bundeskartellamt stated in its reasons for the prohibition that this proposed merger would permanently secure the market-dominating position already existing in the electricity supply of communities.

The Berlin Court of Appeals did not agree with this view and stated among other things thatThe EU Commission had in the meantime introduced measures to liberalise the energy markets. It also attached particular importance to the establishment of a Single Market in the energy sector.

Regulations were also being prepared at national level which aimed at the far-reaching liberalisation of the energy markets, and this in turn would bring about a reorganisation of the geographic markets. The court therefore considered it highly unlikely that such market dominance would continue to exist.

The Bundeskartellamt filed an appeal on points of law against this decision with the Federal Supreme Court.

SUMMARIES OF OR REFERENCES TO NEW REPORTS AND STUDIES ON COMPETITION POLICY ISSUES

Wettbewerbspolitik in Zeiten des UmbruchsXI. Hauptgutachten der Monopolkommission, Köln1996 (Eleventh Biennial Report by the Monopolies Commission)

KOOPMANN, Georg/SCHARRER, Hans-Eckart*: The Economics of High-Technology Competition and Co-operation in Global Markets*, Baden-Baden 1996

NOWAK, Andreas M.: *Einkaufskooperationen zwischen Kartellverbot und Legalisierung nach dem Gesetz gegen Wettbewerbsbeschränkungen,* Bochum: Brockmeyer 1993. 146 p. (Purchasing co-operation - cartel ban and legalisation under the ARC)

RÖSLER, Patrick: *Implementierung einer Fusionskontrolle im europäischen Binnenmarkt. Auswirkungen auf das deutsche Recht der Unternehmenszusammenschlüsse*. Frankfurt/Main: Lang 1994 (European merger control in a Single Market - effects on German merger control law)

SCHÄFER, Helga: *Internationaler Anwendungsbereich der präventiven Zusammenschlußkontrolle im deutschen und europäischen Recht*. Frankfurt/Main: Lang 1993. (International scope of German and European pre-merger control law)

VOLKERS, Frank: *Telekommunikationsinfrastruktur und Wettbewerb*: *Pflichtleistungsverordnungen für die Deutsche Bundespost TELEKOM*. Baden-Baden: Nomos 1994.(Telecoms infrastructure and competition)

ALBACH, Horst/ ROSENKRANZ, Stephanie: *Intellectual Property Rights and Global Competition*. Berlin: Edition Sigma 1995.

Härtel, Hans Hagen u.a.: *Die Entwicklung des Wettbewerbs in den neuen Bundesländern*: Baden-Baden: Nomos 1995. 346 p.(Development of competition in the new Federal Laender)

FIKENTSCHER, Wolfgang/ IMMENGA,Ulrich (Hrsg.): *Draft International Antitrust Code. Kommentierter Entwurf eines internationalen Wettbewerbsrechts mit ergänzenden Beiträgen.* Baden-Baden: Nomos 1995. 110 p. (Draft International Antitrust Code with comments)

KANTZENBACH, Erhard/OTTO G. Mayer (Hrsg.*): Deutschland im internationalen Standortwettbewerb.* Baden-Baden: Nomos 1995.(Germany and international competition for business locations)

LÜDER, Gerken: (Hrsg.) *Europa zwischen Ordnungswettbewerb und Harmonisierung. Europ. Ordnungspolitik im Zeichen der Subsidiarität*. Springer Verl. 1995.

BÜDENBENDER, Ulrich: *Die Kartellaufsicht über die Energiewirtschaft*. Baden-Baden: Nomos 1995. 409 p. (Veröffentlichungen des Instituts für Energiewirtschaft in Köln. Bd. 76.)(Supervision of energy industry under competition law)

GREECE*

(1995)

I Executive Summary

This Annual Report summarises the main legislative developments and changes that were effected in the Greek Competition Act during 1995 and its enforcement under the new legal as well as organisational framework since April 1995.

The last report submitted during the meeting of the Committee on Competition Law and Policy that was held last May, covered the year 1994 and the first quarter of 1995.

II. Legislative Developments

During 1995 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 and entered into effect on 24 February 1995.

The main amendments involve the establishment of a general merger control procedure for all the sectors of the economy. Under this regime, concentrations of undertakings are not *per se* prohibited as anti-competitive since the Competition Committee decides on a list of criteria - indicatively stated in the Law - whether a certain concentration can lead to an impediment, restriction or distortion of competition. A concentration that has been prohibited may be approved by a justified decision of the Ministers of National Economy and Commerce on the grounds of public and general economic interest. The jurisdictional criteria and the respective thresholds provided for the merger control procedure are as follow:

i) Post notification

All concentrations of undertakings should be notified to the Competition Committee within one month from their entering into effect where:

- the combined market share in the national market or in a significant part thereof represents at least ten per cent of the aggregate turnover in the relevant product market, or

- the combined aggregate turnover of the participating undertakings amounts at least to the equivalent of ten million ECU in Greek drachmae.

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* The original language of this report is English

ii) Prior notification

All concentrations of undertakings should be notified to the Competition Committee within ten working days where:

- the combined market share in the national market or in a significant part thereof represents at least 25 per cent of the aggregate turnover in the relevant product market, or

- the combined aggregate turnover of the participating undertakings amounts at least to the equivalent of 50 million ECU in Greek drachmae and the aggregate turnover in the national market of each of at least two of the participating undertakings is more than the equivalent of five million ECU in Greek drachmae.

Both post notification and prior notification of concentrations are obligatory where the thresholds mentioned above under points *i)* and *ii)* are met.

The procedure following the notification is as follows:

- where the concentration is found not to fall under *ii)* above, the President of the Competition Committee issues a relevant decision within one month from the notification date.

- where the concentration is found to fall under *ii)* above, the case is introduced before the Competition Committee within one month from the notification date.

- where the Competition Committee finds that the concentration may not significantly restrict competition, it issues a relevant decision within two months

- where the Competition Committee finds that the concentration may significantly restrict competition, it issues a decision prohibiting the concentration within two months from its introduction date to it. Following an application by the interested parties submitted within one month from the date a prohibiting decision has been notified, the Ministers of National Economy and Commerce may approve the concentration within two months from the date of application on the grounds of public and general economic interest. Failure on their part to reply within the said period signifies rejection of the request.

In addition to general merger control procedures, other amendments concern :

- the provision for granting negative clearance to notified agreements or decisions was re-established in the light of legal certainty;

- a new composition was introduced for the Competition Committee ,while it was re-organised as an independent authority with autonomous administrative and organisational structure. Also a Secretariat was established in the place of the Directorate for Market Research and Competition of the Ministry of Commerce;

- the broadening of the Competition Committee's powers through its exclusive competence in taking provisional measures; as well as, in issuing legal opinions in various legal matters.

III. Enforcement

Since last May when the Competition Committee has started functioning as an independent authority, 114 cases have been notified to its Secretariat. Out of the 114 cases, 90 of them have been handled as analysed in Table 1. Further to that, the Competition Committee issued within the framework of its duties:

- a regulation for its internal rules of procedure governing its operation and all matters related to the procedure of cases referred to it.

- two Forms for the notification of concentrations

The cases entered/handled within the aforementioned period can be classified into five categories as presented in the following table:

Table 1

	Cases entered	**Cases handled**	**Decisions taken**	**Pending* before the CC**
1. Agreements	14	5	-	5
2. Complaints	29	10	1	9
3. Mergers	68	68	13	4**
4. Provisional measures	5	5	3	2
5. Miscellaneous	2	2 ***	-	2
Total	118	90	17	22

* *in the stage of draft decisions*

** *the difference is analysed in Table 3*

*** *two cases involving mergers where the parties to it ,breached their obligation to notify*

The 68 merger cases notified during the period under report can be further analysed in Table 2 and Table 3 that follow:

Table 2

	Merger Cases Notified
1. Post notifications	51
2. Prior notifications	17
Total	68

Table 3

Mergers Cases Notified	Actions taken by the Competition Committee
1. Files closed (post notifications)	51
2. Decisions (prior notifications/ found not to fall under the provisions of art.4b par.1)	6
3. Decisions (prior notifications/ found to fall under thresholds)	7
4. Pending Decisions (same as 3 above)	4
Total	68

IV. Description of main cases

Provisional Measures

All cases brought before the Competition Committee involving requests for granting provisional measures were rejected. The main facts for two cases are as follow:

- the first case involved a request lodged by a business firm (gift shop) for granting provisional measures against one of its suppliers because of the termination of an exclusive agreement. The request was made on the grounds of an alleged abuse by the supplier either of its dominant position or of its relation of economic dependence (articles 2 and 2a of the Greek Law).

- the second case involved a request lodged by a business firm involved in the chemical sector against an Italian firm and its new exclusive distributor in Greece. After five years of co-operation, the Italian firm refused to continue supplying the complainant on the grounds of its long due financial obligations. The request for granting provisional measures against the two firms was made on the grounds of an alleged violation of article 1 or article 2a of the Greek Law.

According to the legal assessment of the decisions issued by the Competition Committee with reference to the above two cases, provisional measures can be taken pursuant to the Greek Competition Act where an infringement of Articles 1, 2 and 2a is most probable to occur and where there is an urgent need for an imminent and incurable damage to the complainant or to the public interest to be prevented. Further to that the following points were taken into account for the issuance of the relevant decisions:

- in the first case given the fact that the abuse of dominant position presupposes its existence in the relevant product market, the market share of one per cent held by the supplier could by no means justify such an infringement. In the same time the abuse of economic dependence also presupposes its existence. Such an abuse is well founded and consequently prohibited when the complainant in the certain case (i.e. the gift shop) is left with no equivalent alternative solutions. The products supplied in this case (crystal items of household nature) could be easily substituted by similar ones of the same quality and value.

It should be noted that no evidence was provided by the complainant when asked for any barriers met in respect to his effort to be alternatively supplied, while the products under question had a two per cent share in its aggregate turnover. On that grounds the Competition Committee decided to reject the request.

- in the second case given the fact that the violation of article 2a presupposes the existence of economic dependence, the Competition Committee was of the opinion that this implies the existence of an enterprise acting as a buyer or supplier from the one side and the existence of a dependent enterprise with no alternative solutions from the other side. Such an abuse may be well founded and consequently prohibited when the complainant (i.e. the business firm) because of long term established relationships and relative investments undertaken, had adjusted its business to the promotion and sale of the products involved in the case, so he could not turn to equivalent alternative sources of supply without serious economic disadvantages. In the mentioned case the investments undertaken besides their low level they were of a general nature(software/hardware and transport means) that could be alternatively utilised. In addition to that, five years of co-operation were not considered by the Competition Committee as justifying long term established commercial relationships. Finally the alleged violation of article 1 according to which all agreement between undertakings, all decisions by associations of undertakings and concerted practices of whatsoever kind, which have as their object or effect the prevention, restriction or distortion of competition could not be justified, on the basis of the market share (2.5 per cent) held by the undertakings concerned (application of the *de minims* rule). On that grounds the Competition Committee decided to reject the request.

Complaints

During the period under review the Competition Committee issued a decision regarding a complaint lodged against:

- Bank of Piraeus S.A;
- ABN-AMRO Bank;
- Barclays Bank;
- Commercial Bank of Greece S.A;
- Bank Societe Generale;
- Ergasias Bank S.A;
- Commercial & Stock Exchange S.A.

for violating articles 1 and 2 of the Greek Competition Act by charging investors when registering to a public registration offer for shares with a letter of credit instead of a cash payment, with a commission levied up to 0.4 per cent of its amount. Following an investigation by the Secretariat of the Competition Committee and the hearing held, it was clearly seen that the Banks as well as the Commercial & Stock Exchange S.A had followed that practice since 1993, until the Committee for the Stock Exchange Market through its 1994 decision required that registration could only be effected by tying investors' deposit accounts or cash.

According to the legal assessment of the decision, by charging a commission on every letter of credit issued for the relevant purpose, a uniform condition was imposed against investors leading to a violation of article 1, provided that this was based on an agreement or concerted practice between the involved undertakings. Given the fact that no agreement was found to exist between them, violation of

article 1 could only be established if this behaviour was not the result of an independent business practice exercised by each of the undertakings concerned , but a result of concerted practice between them. A concerted practice is less likely to occur when it is found to be reasonable as well as expectable in the light of the conditions prevailing in the market. The certain practice in question according to the decision issued was found to be reasonable since the registration by letter of credit was an extra service offered to the investor but not provided in the agreement between the firm issuing the shares and the contracting bank. In addition to that, as the percentage of the commission charged varied (difference up to 100 per cent) among the banks and even among customers/investors of the same bank the existence of competition between the banks was not precluded. Examining the certain complaint in the light of whether it constituted a violation of article 2, the Competition Committee stated that even in case the commission charged was found not to be a reasonable trading condition, the existence of a dominant position by the undertaking concerned was a prerequisite for article 2 to be applied. As it is generally accepted a dominant position is being established when an undertaking can behave independently in relation to its competitors, customers or suppliers. According to article 2 a dominant position can be a collective one i.e. held by more than one undertakings. For a collective dominance to be accepted the existence of an oligopolistic structure of the relevant market is not the only sufficient condition that must be satisfied. There must also be two conditions cumulatively fulfilled: *i)* the absence of competition among members of the oligopoly and *ii)* the absence of competitive pressure outside the oligopoly. On that grounds the Competition Committee rejected the complaint.

Mergers

During the period under review which coincides with the first application of the recently pre-notification procedure for mergers, seven decisions were issued by the Competition Committee (Table 3). Six out of the seven decisions were positive i.e. concentrations have been appraised as not constituting a significant impediment of competition in the national market or in a substantial, with respect to the characteristics of products or services, part of it and particularly by creating or strengthening a dominant position. For one concentration notified the decision was negative since it has been appraised as constituting a significant impediment of competition in the national market. An application by the interested parties has already been submitted to the Ministers of National Economy and Commerce in order the concentration to be approved. No decision has been taken yet.

Three of the above mentioned notifications were under a multiple notification procedure:

- IBM/LOTUS Case
- ETHYL/TEXACO Case
- JOHNSON & JOHNSON/CORDIS Corp. Case

In the *IBM/LOTUS* case the concentration was appraised as not constituting a significant impediment of competition in the national market with respect to the market of software products where both firms were engaged and particularly by creating or strengthening a dominant position. The market shares for IBM and LOTUS in the Greek market were 13 per cent and 28 per cent respectively. According to the decision issued by the Competition Commission the acquisition of LOTUS will offer IBM - that is mainly concentrated in the hardware sector - all the possibilities to expand its activities in the software market, and thus counterbalancing the already existing market share of MICROSOFT in the Greek market (50 per cent).

In the *Johnson & Johnson/Cordis* case the concentration was also appraised as not constituting a significant impediment of competition in the national market with respect to the market of medical

technology and especially in the markets of hydrocephalus shunts and external ventricular drainage systems where both are engaged and particularly by creating or strengthening a dominant position. The market shares for Johnson & Johnson and Cordis in the two markets were 40 per cent and two per cent for the first market and 29 per cent and 24 per cent for the second. Given the presence of PS-Medical in the market with shares of 55 per cent and 35 per cent respectively in conjunction with the social importance of research and development for new applications in the field of medical technology in the future, the Competition Committee issued a positive decision.

SARA LEE/DE N.V- DOUWE EGBERTS N.V/BRAVO A.E

In this merger case, which was actually the first case examined under the pre-notification control procedure, 51 per cent of the shares of the Greek firm BRAVO A.E were acquired by SARA LEE/DE N.V and DOUWE EGBERTS N.V. The merger was notified on the basis of the aggregate threshold turnover and involved coffee (packed and unpacked) as the relevant product market with Greece being assessed as the relevant geographic market affected. Given the fact that the merger would lead to a combined market share of less than 25 per cent in the relevant product market and the position of the main competitors in the Greek market (LOUMIDIS s.a belonging to the NESTLE group and KRAFT-JACOBS SUCHARD belonging to the PHILIP MORRIS group) together with the price competition from small and medium size companies and following the provisions of art. 4c (2) of the Greek Act according to which in appraising the possibility of whether or not a concentration constitutes a significant impediment of competition, the following factors have to be taken into account:

- the structure of the relevant market concerned;
- the actual or potential competition located either within or outside Greece;
- the existence of any legal or others barriers to entry;
- the market position of the undertakings and their financial and economic power;
- the alternatives available to suppliers and users by the undertakings concerned as well as by actually or potentially competitive undertakings.

The Competition Committee issued a positive decision.

Annex 1

ACT No 703 OF SEPTEMBER 26th, 1977

ON THE CONTROL OF MONOPOLIES AND OLIGOPOLIES AND THE PROTECTION OF FREE COMPETITION

AS AMENDED BY
ACTS No 1934 OF MARCH 8th, 1991, No 2000 OF DECEMBER 24th, 1991 and No 2296 OF FEBRUARY 2nd, 1995

CHAPTER I

SUBJECT MATTER OF THE ACT

Article 1
Prohibited Cartels

1. The following shall be prohibited: all agreements between undertakings, all decisions by associations of undertakings and concerted practices of whatsoever kind, which have as their object or effect the prevention, restriction or distortion of competition, and in particular those which:

a) directly or indirectly fix purchase or selling prices or any other trading conditions;
b) limit or control production, markets, technical development or investment;
c) share markets or sources of supply;
d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby impeding competition in particular by refusing without valid justification to sell, purchase or conclude any other transaction;
e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited, pursuant to the preceding paragraph, shall be absolutely null and void, except where otherwise provided by the present Act.

3. Agreements, decisions and concerted practices or categories thereof, falling within the provisions of paragraph 1 of the present Article may be declared valid, wholly or in part, by a decision of the Competition Committee, if they cumulatively fulfil the following conditions:

a) they contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit;
b) they do not impose on the undertakings concerned, restrictions which are not indispensable to the attainment of the aforementioned objectives;
c) they do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the relevant market in question.

Article 2

Prohibited Abuse of a Dominant Position

1. Any abuse by one or more undertakings of a dominant position within the national market as a whole or in a substantial part of it, shall be prohibited. Such abuse may, in particular, consist in:

a) directly or indirectly imposing fixed purchase or selling prices or other unfair trading conditions;
b) limiting production, consumption or technical development to the prejudice of consumers;
c) applying dissimilar conditions to equivalent transactions with other trading parties, in particular by refusing without valid justification to sell, purchase or conclude any other transactions, thereby placing certain undertakings at a competitive disadvantage;
d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations or supplementary contracts which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Article 2a

Prohibited Abuse of Economic Dependence

Any abuse by one or more undertakings of the relation of economic dependence between them and an enterprise acting as their buyer or supplier even of one certain type of goods or services and is being left with no equivalent alternative solution, shall be prohibited.

Such abuse may, in particular, consist in the imposition of arbitrary trading conditions, in the exercise of discretionary behaviour or in a sudden and unjustified termination of long term established commercial relationships.

Article 3
General Provision

Without prejudice to Article 1(3), the agreements, decisions and concerted practices referred to in Article 1(1), the abuse of dominant position referred to in Article 2 and the abuse of economic dependence referred to in Article 2a, shall be prohibited without any prior decision to that effect by any authority being required.

Article 4
Concentration between Undertakings

1. A concentration between undertakings, as such, shall not fall into the scope of the prohibitions of Article 1(1) and Article 2 of the present Act.

2. A concentration shall be deemed to arise where:

a) two or more previously independent undertakings merge,

b) one or more persons already controlling at least one undertaking or one or more undertakings, acquire direct or indirect control of the whole or parts of one or more undertakings.

3. For the purpose of the present Act, control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on a undertaking, in particular by:

(a) ownership or the right to use all or part of the assets of an undertaking;

(b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

4. Control is acquired by person(s) or undertakings which:

(a) are holders of the rights or entitled to the rights under the contracts concerned; or

(b) while not being holders of such rights or entitled to rights under such contracts concerned, have the power to exercise the rights deriving therefrom.

5. Operations, including the creation of a joint venture, which have as their object or effect the co-ordination of the competitive behaviour of undertakings which remain independent shall not constitute a concentration within the meaning of paragraph 2(b). The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity, which does not give rise to co-ordination of the competitive behaviour of the parties among themselves or between them and the joint venture, shall constitute a concentration within the meaning of paragraph 2(b).

3. A concentration shall not be deemed to arise when:

a) credit institutions or other financial institutions or insurance companies, the normal activities of which include transactions and dealing in securities for their own account or for the account of others, hold on temporary basis securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking or provided that they exercise such voting rights only with a view to preparing the disposal of all or part of that undertaking or of its assets or the disposal of those securities and that any such disposal takes place within one year from the date of acquisition. That period may be extended for a reasonable period of time by the Competition Committee,where such institutions or companies can show that the disposal was not reasonably possible within the period set;

b) the operations referred to in paragraph 2(b) are carried out by the financial holding companies, provided however that these rights are exercised, in particular in relation to the appointment of members of the management and supervisory bodies of the undertakings in which they have holdings, only to maintain the full value of those investments and not to determine directly or indirectly the competitive conduct of those undertakings.

Article 4a

Notification of Concentrations between Undertakings

1. Every concentration between undertakings shall be notified to the Competition Committee within one (1) month as from its realisation where :

a) the market share of the products or services to which the concentration is concerned, as being defined in Article 4f, represents within the national market or in a substantial, with respect to the particular characteristics of the products or services, part of it at least a 10% of the combined aggregate turnover of the products or services which are regarded as identical because of their properties, their prices and their intended use, or

b) the combined aggregate turnover of all the undertakings concerned, as being defined in Article 4f, is at least equal to the equivalent to drachmae amount of 10 million ECU.

2. Obliged to notify are:

a) each of the undertakings in the case where the concentration is the subject of an agreement between undertakings being parties to the merger;

b) the persons, the undertakings or the groups of persons or undertakings acquiring control of the whole or parts of one or more undertakings, in all other cases.

3. The specific content of the notification form; as well as, any other relevant matter shall be determined by decision of the Competition Committee.

4. The Competition Committee can impose a fine not exceeding 5% of the aggregate turnover, as defined in Article 4f, in case of a culpable omission of the obligation to notify.

Article 4b
Prior Notification of Concentrations

1. Every concentration between undertakings shall be notified to the Competition Committee within ten (10) working days as from the conclusion of the agreement, or the announcement of the public bid to buy or exchange, or the acquisition of a controlling interest where:

a) the market share of the products or services to which the concentration is concerned, as being defined in Article 4f, represents within the national market or in a substantial, with respect to the particular characteristics of the products or services, part of it at least a 25% of the combined aggregate turnover of the products or services which are regarded as identical because of their properties, their prices and their intended use, or
b) the combined aggregate turnover of all the undertakings concerned, as being defined in Article 4f, is at least equal to the equivalent to drachmae amount of 50 million ECU, and the aggregate national turnover of each of at least two of the undertakings concerned is more than the equivalent to drachmae amount of 5 million ECU.

2. The 10 days time limit shall begin when the first of those events, referred to in the previous paragraph, occurs.

3. As far as those obliged to notify are concerned, the provisions of paragraph 2 of Article 4a shall apply.

4. The Competition Committee can impose a fine not exceeding 7% of the aggregate turnover, as being defined in Article 4f, in case of a culpable omission of the obligation to notify.

Article 4c
Preventive Control of Concentrations

1. Every concentration between undertakings that is subject to prior notification and may significantly impede competition in the national market or in a substantial, with respect to the characteristics of the products or services, part of it and particularly by creating or strengthening a dominant position, shall be prohibited by decision of the Competition Committee.

2. Within the scope of appraising the possibility of a concentration to constitute a significant impediment of competition within the meaning of paragraph 1 of the present Article, the following shall be taken into account, especially the structure of all the relevant markets concerned, the actual or potential competition from undertakings located either within or outside Greece, the existence of any legal or other

barriers to entry, the market position of the undertakings concerned and their financial and economic power, the alternatives available to suppliers and users by the undertakings concerned as well as by actually or potentially competitive undertakings, their access to suppliers or markets, the supply and demand trends for the relevant goods or services, the interests of the intermediate and ultimate consumers and their contribution in the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

3. A concentration that has been prohibited by the Competition Committee, pursuant to paragraph 1, may be approved by a specifically justified decision of the Ministers of National Economy and Commerce as particularly provided in Article 4d (7), where the concentration in question presents advantages of general economic nature that counterbalance the resulting restriction of competition, or it is regarded as being indispensable for the public interest, especially where it contributes to the modernisation and rationalisation of production and economy, the attraction of investments, the strengthening of competitiveness in the European and International market and the creation of new employment positions.

Article 4d

Procedure for the Preventive Control of Concentrations

1. The Competition Committee shall examine the concentration as soon as the relevant notification is submitted.

2. Where it is found that the concentration notified does not fall within the scope of Article 4b (1), the President of the Competition Committee shall record that finding by means of a relevant decision issued within one (1) month as from its notification and which will be served to the persons or undertakings that submitted the notification.

3. Where it is found that the concentration notified falls within the scope of Article 4b (1), the case in question shall be introduced to the Competition Committee within one (1) month as from its notification and the persons or undertakings that submitted the notification will be accordingly informed.

4. Where the Competition Committee finds that the notified concentration, following modifications made by the undertakings concerned if necessary, can not lead to a significant restriction of competition, it shall issue a relevant decision within two (2) months as from the introduction of the case to it.

5. The Competition Committee may attach to its decision issued according to paragraph 4, conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Competition Committee, with a view to modifying the original concentration plan. This decision shall also cover restrictions directly related and necessary to the implementation of the concentration.

6. Where the Competition Committee finds that the concentration, can lead to a significant restriction of competition, it shall issue within two (2) months as from the introduction of the case a

decision prohibiting its realisation. The decision shall be served to the undertakings concerned within ten (10) days as from its issuance.

7. On request made by the interested persons or the undertakings concerned within one (1) month as from the notification of a prohibition decision issued by the Competition Committee, the Ministers of National Economy and Commerce may approve the concentration as provided for in Article 4c (3).

This decision shall be issued within a time limit of two (2) months as from its relevant request is made, and may be subject to conditions and obligations intended to ensure conditions of effective competition or to secure the attainment of economic or other advantages that shall counterbalance the unfavourable consequences to competition. The lapse of the two (2) months period is considered as equivalent to the request being rejected.

8. The time limits provided for in paragraphs 2, 3, 4, 6 and 7 of the present Article can be extended under the following circumstances:

a) where the participating undertakings to the concentration, reach an agreement;
b) where the information contained in the notification is incomplete;
c) where the notification is incorrect or misleading.

Under (b) and (c) cases the time periods shall start on the date of the duly made notification or the date on which the complete and correct information is being received by the competent Competition Service.

9. In the case where a decision issued according to the provision of the present Article is being declared null and void wholly or in part by a court decision, the time periods provided for in paragraphs 2, 3, 4, 6 and 7(b) of the present Article shall start again from the date the decision is being notified to the Competent Service.

10. The decisions issued according to paragraphs 2, 4 and 7 of the present Article can be revoked by the issuing authority under the following circumstances:

a) where its issuance has been based on incomplete, incorrect or misleading data;
b) where the undertakings concerned commit a breach of the conditions and obligations attached to the decision.

In the cases where a decision is being revoked under the previous indent, the issuance of a new one shall not be subject to the time limits provided for in the present Article.

Article 4e
Suspension of Concentrations

1. Without prejudice to the provisions of paragraphs 2 and 3 of the present Article a concentration is prohibited to be put into effect until one of the decisions provided for in Article 4d (2), (3), (4), (5), (6) and (7) is issued.

The aforementioned prohibition also applies to concentrations that have not been notified, in accordance with Article 4b (1), although there was an obligation to.

In case of breaching this prohibition a fine not exceeding 15% of the aggregate turnover of the undertakings concerned, as being defined in Article 4f, shall be imposed by the Competition Committee.

2. The provisions of the preceding paragraph shall not prevent the implementation of a public bid to buy or exchange, or the acquisition of an undertaking's controlling interest through the stock exchange market provided that these actions have been notified to the competent competition service within the time limit set by Article 4b (1) and that the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of his investment and on the basis of a derogation granted by the Competition Committee pursuant to paragraph 3 of the present Article.

3. The Competition Committee may, on request, grant a derogation from the obligations imposed in paragraphs 1 and 2 of the present Article in order to prevent serious damage to one or more undertakings concerned by the concentration or to a third party. The decision granting the derogation may be made subject to conditions and obligations in order to ensure conditions of effective competition and to prevent situations that could hinder the execution of a possible prohibiting final decision. A derogation may be applied for and granted at any time, even before notification or after the transaction. The decision granting the derogation can be revoked by the Competition Committee if any of the reasons provided for in Article 4d(10) is found to exist.

4. Where a concentration has already been realised, in breach of the provisions or decisions prohibiting its realisation, the Competition Committee may order by a decision pursuant to Article 4d(6) or by a separate decision, without a deadline, require the undertakings or assets brought together to be separated or the cessation of joint control or any other actions that may be appropriate in order the restriction of competition resulting from the concentration to be removed.

In case of non-compliance with this decision, a fine not exceeding 15% of the aggregate turnover of the undertakings concerned, as defined in Article 4f, and a penalty payment of up to Drs 3 million for each day of delay to comply with, shall be imposed by the Competition Committee

5. The issuance of a decision pursuant to the preceding paragraph does not preclude the possibility of the concentration to be approved by the Ministers of National Economy and Commerce, according to the procedure provided for in Article 4d(7), and provided that the presuppositions within the meaning of Article 4c(3) are being met.

6. The validity of any transaction carried out in contravention of paragraph 1 of the present Article shall be dependent on the decision pursuant to Article 4d(2) or pursuant to paragraphs 4 and 5 of the present Article. The decision of the Ministers of National Economy and Commerce approving the concentration, shall prevail in any of these cases.

7. The present Article has no effect on the validity of transactions in securities including those convertible into other securities, unless the buyers and the sellers knew or ought to have known that the relevant transaction was carried out in contravention of paragraph 1 of the present Article.

Article 4f

Calculation of Market Share and Turnover

1. The market share within the meaning of Articles 4a(1)(a) and 4b(1)(a) corresponds to the aggregate of all the market shares that the undertakings concerned hold in the national market or in a substantial part of it to which the concentration is concerned.

2. The aggregate turnover within the meaning of Articles 4a(1)(b) and (4), 4b(1)(b) and (4), 4e(1) indent 3 and (4) indent 2, shall comprise the amounts derived by the undertakings concerned in the preceding financial year from the sale of products and the provision of services falling within the undertakings' ordinary activities after the deduction of sales rebates and of the value added tax and other taxes directly related to turnover. The aggregate turnover of an undertaking concerned shall not include the sale of products or the provision of services between any of the undertakings referred to in paragraph 5 of the present Article.

The turnover achieved in the national market shall comprise products sold and services provided to undertakings or consumers in the national market.

3. By way of derogation from paragraph 2, where the concentration consists in the acquisition of parts of one more undertakings, regardless of whether or not these parts constitute legal entities, only the turnover and the market share relating to the part which is the subject of the transaction shall be taken into account with regard to the seller.

Two or more transactions within the meaning of the previous indent which take place within a two-year period between the same persons or undertakings shall be treated as one and the same concentration arising on the date of the last transaction.

4. In place of turnover the following shall be used :

a) for credit institutions and other financial institutions as well as for undertakings of portfolio investments, one-tenth (1/10) of their total assets, as this is derived from the Balance sheet of the preceding financial year.

As regards Article 4b(1)(b), the total national turnover shall be replaced by one-tenth (1/10) of the total assets multiplied by the ratio between loans and advances to credit institutions and customers being located or having their residence in Greece; to the total sum of loans and advances to credit institutions and customers.

b) for insurance undertakings, the total value of gross premiums written which shall comprise all amounts received and receivable in respect of insurance contracts issued by or on behalf of the insurance undertakings, including also outgoing reinsurance premiums, and after deduction of taxes and levies charged by reference to the amounts of individual premiums or to the total volume of premiums.

As regards Article 4b(1)(b), the gross premiums received from those located or having their residences in Greece shall be respectively taken into account.

5. Without prejudice to the provisions of paragraph 3, the aggregate turnover and the market share of an undertaking concerned within the meaning of Articles 4a(1)(b) and (4), 4b(1)(b) and (4), 4e(1) indent 3 and (4) indent 2 shall be calculated by adding together the respective turnovers and markets shares of the following:

a) the undertaking concerned;
b) those undertakings in which the undertakings concerned, directly or indirectly :
   aa) own more than half the capital or business assets, or
   bb) have the power to exercise more than half of the voting rights, or
   cc) have the power to appoint or discharge more than half of the members of the administrative bodies of the undertakings concerned, or
   dd) have the right to manage the undertakings' affairs.
c) those undertakings which have in the undertaking concerned the rights or powers listed in case (b);
d) those undertakings in which an undertaking as referred to in case (c) has the rights or powers listed in case (b);
e) those undertakings in which one or more undertakings as referred to in cases (a) to (d) jointly have the rights or powers listed in case (b).

6. Where undertakings concerned by the concentration jointly have the rights or powers listed in paragraph 5(b), in calculating the aggregate turnover of the undertakings concerned within the meaning of Articles 4a (1)(b) and (4), 4b(1)(b) and (4), 4e (1) indent 3 and (4) indent 2:

a) no account shall be taken of the turnover resulting from the sale of products or the provision of services between the joint undertaking and each of the undertakings concerned or any other undertaking connected with any one of them, within the meaning of paragraph 5(b) to (e);

b) account shall be taken of the turnover resulting from the sale of products and the provisions of services, or the provision of services between the joint undertaking and any third undertaking. This turnover shall be apportioned equally among the undertakings concerned.

CHAPTER II

SPECIAL REGULATIONS AND EXEMPTIONS

Article 5
Special Regulations

1. The provisions of the present Act shall also apply to public undertakings or to undertakings of public utility; however, the Ministers of National Economy and Commerce may, by joint decisions issued after the Competition Committee has been consulted, exempt certain of the aforementioned enterprises or categories of them from the application of the present Act, provided that they are of general importance to the national economy.

2. The provisions of the present Act shall also apply to undertakings and associations of undertakings engaged in the production, processing, transformation or trading of agricultural or livestock products, forestry or fisheries, unless the Ministers of National Economy, Commerce and Agriculture by joint decisions, issued after the Competition Committee has been consulted, exempt categories of these undertakings or sectors of their activities from the application of the present Act.

3. The provisions of the present Act shall also apply to transport undertakings and its associations, unless the Ministers of National Economy, Commerce and Transport & Communications in the case of land and air transport, or the Ministers of National Economy, Commerce and Merchant Marine in the case of maritime transport, by joint decisions, issued after the Competition Committee has been consulted, introduce special regulations or exemptions necessitated by transport policy.

4. The provisions of the present Act shall not apply to the extent that the Treaty establishing the European Coal and Steel Community provides for special regulations.

Article 6
Exemption of Export Cartels

Without prejudice to the country's international obligations, the provisions of the present Act shall not apply to agreements, decisions and concerted practices, the exclusive aim of which is to insure, promote or strengthen exports, unless the Ministers of National Economy and Commerce, by joint decisions issued after the Competition Committee has been consulted, decide otherwise with respect to categories of undertakings or products.

Article 7
Exemptions of Agreements or Categories of Agreements

1. The jurisdictions of the Minister of Commerce, as provided by Article 66(11)(b) of P. D. 397/1988 (Government Gazette No 185/25. 8. 1988, issue A') are exercised, without prejudice to the provisions of the present Act, by the Competition Committee as this is provided by Article 8 of the present Act.

2. The Minister of Commerce may, after obtaining the concurrent opinion of the Competition Committee, issue ministerial decisions exempting certain categories of agreements in accordance with Article 1(3) of the present Act.

3. The Minister of Commerce may, after obtaining the concurrent opinion of the Competition Committee, issue ministerial decisions which define agreements or categories of agreements which do not fall within the provisions of Article 1(1) of the present Act.

CHAPTER III

COMPETITION COMMITTEE

Article 8
Competition Committee

1. A Competition Committee is being established, functioning as an Independent Authority. Its members shall enjoy personal and functional independence and shall be bound solely by the present Act and their conscience during the exercise of their duties. The Competition Committee shall be administratively independent and shall be supervised by the Minister of Commerce.

2. The budget of the Competition Committee is registered under a special heading in the budget of the Ministry of Commerce.

3. The Competition Committee shall be composed of:

a) a member or an ex-member of the Legal Council of State being designated together with his deputy by the plenary session of the aforementioned Council;

b) a judge of the highest rank or an ex-judge of the Courts of Civil Justice being designated together with his deputy by the plenary session of the Supreme Court;

c) a representative of the Association of Greek Industries being designated together with his deputy by the aforementioned Association;

d) a representative of the National Confederation of Greek Trade being designated together with his deputy by the aforementioned Confederation;

e) a representative of the General Confederation of Small & Medium Sized Businesses, Craftsmen & Traders of Greece, being designated together with his deputy, by the aforementioned Confederation;

f) a representative of the consumers being nominated together with his deputy by the National Consumers' Council;

g) a member from the faculty of a Greek University Department. He must be specialised in Competition Law;

h) a member from the faculty of a Greek University Department. He must be specialised and experienced in competition matters, and

i) a person of recognised status with experience in the competition field.

The members of the Competition Committee and their deputies under cases (g), (h) and (i), shall be appointed by the Minister of Commerce.

4. The Director of the Secretariat shall act as General Rapporteur assisted by the Rapporteur(s) of the case under discussion. An official of the Secretariat shall act as Secretary of the Competition Committee.

5. Without prejudice to other provisions of the present Act, the President, the members of the Competition Committee and their deputies shall be appointed by decision of the Minister of Commerce, for a three-year period which can be renewed. In case of a premature termination of the period of service of any member, including the President, for any reason, a new member shall be appointed for the remaining period of service of the retired member. Those who have been forfeited the Committee, for reasons that are defined in the present Act, cannot be appointed as members or deputy members of the Competition Committee.

6. The President of the Competition Committee and his deputy shall be appointed by the Minister of Commerce among the members of the Committee. He shall be a state functionary being exclusively employed. The President's monthly compensation and the allowance per sitting given to the members of the Competition Committee and to their deputies, shall be determined by joint decision issued by the Ministers of Finance and Commerce.

7. During their period of service, the President of the Competition Committee and its members shall not perform any other salaried or not public service or practice any other private professional activity of business or non-business nature, which may be incompatible with the characteristics and the duties of a member of the Competition Committee. Members shall be obliged to inform the President in case of undertaking any of the aforementioned activities. Its incompatibility or not shall be decided by the Competition Committee's plenary session while the member(s) concerned, shall abstain from the sessions during which the decision shall be taken. The relevant decision must be justified. It shall be notified to the Minister of Commerce and published according to the provisions of the present Act.

8. The President, the members of the Competition Committee and their deputies shall submit each year to the Prosecutor's office of the Supreme Court, the statement of property provided by Act No 1738/1987.

9. Judicial functionaries in office, appointed as members of the Committee, may, by decision of the Supreme Judicial Council, be relieved of their official duties during their period of service. All other civil functionaries, civil servants and officials of corporate bodies of public law when appointed as members of the same Competition Committee, may, by joint decision of the Minister of Commerce and the Minister heading their service, be relieved of other official duties during their period of service. For all the above mentioned members, this period shall be deemed as period of actual service for all purposes and in no case shall such membership adversely affect their position or status in the service.

10. The Rules of Procedure governing the operation of the Competition Committee and all matters related to the preliminary procedure of cases referred to it, the procedure before it, the circumstances under which its President, members or Secretary, should be excused or disqualified, the drafting, publication and notification of its decisions, the granting of copies of or extracts from its decision or opinions and any other detail shall be laid down by decision of the Minister of Commerce after the Competition Committee has expressed its concurrent opinion. The decision shall be issued within six (6) months as from the date the present Act comes into force and shall be published in the Government Gazette.

11. The Competition Committee may, by decision, operate in divisions composed of four (4) members. By the same decision its duties, composition and the person chairing the relevant divisions shall be determined.

12. The Competition Committee sits duly in session if the President or its deputy, at least four (4) of its members and its secretary are present at the meeting. Decisions shall be taken by majority vote. In case of a tie, the President's vote shall be dominant.

13. After a member's inexcused absence in five (5) consecutive regular meetings, the Competition Committee may be called upon by three (3) of its members or by its President and decide by majority vote of four (4) of its members to expel the inexcusably absent member.

14. During the discussion before the Competition Committee of applications or complaints submitted according to the present Act, the persons who have made them may appear in person or accompanied or represented by attorneys-at-law; to this purpose they shall be given notice thirty (30) days in advance. The same rule shall apply to undertakings or associations of undertakings against which the procedure before the Committee has been initiated and which are also given notice thirty (30) days in advance. If no notice is given or in case of an undue or delayed notice the party that failed to appear at the hearing may submit a request for a new hearing before the Competition Committee within a time limit of fifteen (15) days as from the date the decision was served on it.

15. The decisions and the opinions of the Competition Committee shall be served by its Secretariat on those persons entitled to appeal pursuant to the provisions of the present Act.

Article 8a

Authorities of the Competition Committee

1. The Competition Committee is the competent authority for the observance of the provisions of the present Act.

2. In particular, the Competition Committee has the following authorities:

a. decides whether the prohibited agreements, decisions and concerted practices of the kind described in Article 1(1) of the present Act are valid according to the provisions of Article 1(3);

b. certifies that there is no infringement of the provisions of Articles 1(1), 2 and 2a, according to the specific provisions of Article 11 of the present Act;

c. prohibits, according to the specific provisions of Articles 4c and 4d of the present Act, the realisation of a concentration notified according to Article 4b of the present Act, if the concentration can significantly restrict competition. In case where the concentration has been put into effect in breach of the provisions or decisions, the Committee may take measures pursuant to the provisions of Article 4d(4) of the present Act;

d. it may grant a derogation from the obligation regarding the suspension of a concentration, according to the specific provisions of Article 4e(1) to (3) of the present Act;

e. threatens and imposes the fines, penalty payments and the sanctions, as provided for in Articles 4a (4), 4b(4), 4e(1) and (4), 9(1) and (2), 21(2), 25(2) and 26(6) of the present Act;

f. takes provisional measures under the circumstances referred to in Article 9(4) of the present Act;

g. keeps the Provisional and Definite Registers of Cartels and registers the notifications and decisions, according to the specific provisions of Article 19 of the present Act;

h. expresses its concurrent opinion for the issuance of Ministerial decisions exempting categories of agreements according to Article 1(3) of the present Act;

i. expresses its concurrent opinion for the issuance of Ministerial decisions determining agreements, decisions and concerted practices or categories thereof that do not fall within the provisions of Article 1(1) of the present Act;

j. expresses its concurrent opinion for the issuance of the Competition Committee's Rules of Procedure;

k. expresses its concurrent opinion for the appointment of the Director of its Secretariat;

l. delivers its opinion for the issuance of Ministerial decisions pursuant to Articles 5 and 6 of the present Act;

m. delivers its opinion with respect to competition matters and proposals amending the present Act according to what is provided in Article 8d of the present Act;

n. collects, studies and evaluates, under its obligation for professional secrecy, all the necessary for the attainment of its tasks, information and documents obtained pursuant to what is particularly provided in Articles 25 and 26 of the present Act.

Article 8b

Authorities of the President of the Competition Committee

Pursuant to the present Act, the regulatory Acts and the decisions adopted in its plenary sessions, the President of the Competition Committee is responsible for its functioning, exercising the relevant jurisdictions and in particular:

a. he follows the execution of the decisions of the Competition Committee, informing accordingly its plenary session and the Minister of Commerce;
b. he co-ordinates and directs the activities of the Competition Committee's Secretariat;
c. he represents the Competition Committee in the Committees, Working Parties, Conferences and Meetings held within the framework of the European Union, the Organisation of Economic Co-operation and Development and other international organisations, being empowered to authorise for this purpose the Director or an official of the Secretariat;
d. he is the administrative supervisor of the personnel of the Competition Committee's Secretariat exercising the relevant disciplinary power.

Article 8c

Organisation and Personnel of the Competition Committee

1. A Secretariat shall be set up and operate within the Competition Committee headed by a Director appointed for five-year period of service that can be renewed. His appointment is effected by decision of the Minister of Commerce, after the opinion of the Competition Committee has been obtained. The Director's position can also be filled by detachment or transfer from another state position. The Director supervises the functions of the Secretariat and provides for its efficient and effective operation.

2. The organisation of the Secretariat, its structure and duties, the number of the staff employed, its classification and qualifications; as well as, any other necessary detail shall be laid down by Presidential Decree, issued on the proposal of the Ministers of Presidency of Government, Finance and Commerce. The total number of the staff positions of any nature cannot be greater than forty (40). The number of the staff positions can be increased by Presidential Decree issued on the proposal of the Ministers of Presidency of Government, Finance and Commerce, after the proposal of the Competition Committee.

3. The staff positions shall be filled either by appointment or recruitment according to the existing provisions; as well as, by detachment or transfer of state employees, following a public announcement for the submission of applications. Filling of staff positions by private contracts shall be done for specialised scientific personnel for those positions not filled through detachments or transfers. The concurrent opinion of the President of the Competition Committee is required for a transfer to be recalled. The procedure and any other detail regarding the public announcement and the submission of applications are determined by decision of the Minister of Commerce.

4. The Competition Committee may be consulted by specialists and experts for particular issues and problems involved, when it is deemed necessary and appropriate. The procedure, as well as matters

related to the remuneration of specialists and experts shall be determined by joint decision of the Ministers of Finance and Commerce in derogation of the existing provisions.

5. The employees' council of the Secretariat's staff shall be established by decision of the President of the Competition Committee. It shall consist of two (2) members from the Competition Committee, elected by its plenary session, the Secretariat's Director and two (2) elected employees' representatives. All other matters shall be regulated by the existing legislative provisions governing employees' council.

Article 8d

Opinion Authorities of the Competition Committee

1. The Competition Committee has the competence to deliver opinions with respect to competition matters, following requests made by the Parliament, the Parliamentary Committees, the Minister of National Economy, the Minister of Commerce, associations of trade and industry and industrial or commercial unions.

2. At the request of the Minister of Commerce, the Competition Committee delivers an opinion with respect to proposals amending the present Act.

Article 9

Powers of the Competition Committee with Regard to Infringements of Articles 1(1), 2 and 2a

1. Where the Competition Committee, upon its own initiative or upon a complaint lodged or a request made by the Minister of Commerce finds that there has been an infringement of Articles 1(1), 2 and 2a, it may by decision:

a) address to the interested undertakings or associations of undertakings recommendations to put an end to such infringement;
b) require the undertakings concerned to put an end to such infringement and to refrain from committing it in the future;
c) threaten to impose a fine or penalty payment or both in the case of continuing or repeating the offence;
d) consider that the fine or penalty payment or both are due, where it confirms by decision that the infringement has been continued or repeated;
e) impose a fine on the undertakings or associations of undertakings that have committed the offence.

2. The fine imposed or threatened under the preceding paragraph may amount up to 15% of the gross receipts of the offending undertaking(s) or association of undertakings in the financial year in which the offence was committed or in the preceding year. In fixing the amount of fine the gravity and the

duration of the infringement should be taken into account. The penalty payment provided under the preceding paragraph amounts up to Drs 2 million per each day of delay to comply with the decision, calculated from the date appointed by it.

3. The undertakings or association of undertakings concerned are obliged within 15 days from the date of the notification of the decision to inform the President of the Competition Committee for the actions they have taken or are going to take in order to put an end to the infringement. The obligation also applies to undertakings and associations of undertakings where they have to comply with a court decision issued after an appeal against a Competition Committee's decision.

4. The Competition Committee has the exclusive competence to take provisional measures, upon its own initiative or upon request of the person who brought the complaint pursuant to Article 24 of the present Act or of the Minister of Commerce, where an infringement of Articles 1, 2 and 2a of the present Act is most probable to occur and where there is an urgent need for an imminent and incurable damage to the complainant or to the public interest to be prevented.

The Competition Committee may threaten to impose a penalty payment amounting up to Drs 1 million per each day of non-compliance with its decision and consider it as being due when non-compliance is being confirmed by its decision.

The Competition Committee is obliged to take a decision within fifteen (15) days as from the date of the relevant request at most, provided that the interested parties are being heard.

This decision can be appealed only before the Athens Administrative Court of Appeal. The provisions of Article 14 (2) to (4) are applied by analogy.

5. Decisions taken pursuant to paragraph 1 shall be independent of the notification submitted under Articles 20 and 21, or the expiration of the time limit set for notification.

Article 10

Decisions Pursuant to Article 1(3)

1. The Competition Committee shall have the sole power to apply the provisions of Article 1(3).

2. Whenever the Competition Committee issues a decision pursuant to the provisions of Article 1(3):

a) it shall specify therein the date from which the decision shall take effect. Such date in no case shall be earlier than the date of the notification;
b) it shall specify the period of validity thereof; and
c) it may make the decision conditional upon certain conditions and obligations.

3. The Competition Committee may, on request of the undertaking or association of undertakings concerned, renew its aforementioned decision, if the conditions of Article 1(3) continue to be fulfilled.

4. The Competition Committee may, after informing the undertakings or associations of undertakings concerned, revoke or amend a decision pursuant to Article 1(3), where:

a) there has been a change in any of the facts which were basic to the issuance of the decision declaring valid by exemption, agreements, decisions and concerted practices, prohibited by Article 1(1) of the present Act or where the parties abuse the exemption granted to them;
b) the contracting parties do not comply with the conditions or obligations imposed;
c) the conditions for the revocation of administrative acts are being fulfilled. In the cases (b) and (c) of the present paragraph, the revoking or amending decision may have retroactive effect.

Article 11

Negative Clearance

1. Upon application by the undertaking or association of undertakings concerned, which is submitted to the Secretariat, the Competition Committee may certify within two months after such submission, that, on the basis of the facts in its possession, there is no infringement of the provisions of Articles 1(1), 2 and 2a of the present Act. Such clearance may be sought even for a cartel, exploitation of a dominant position or of a relation of economic dependence, which are merely anticipated to arise in the future.

2. The granting of negative clearance, as provided in the previous paragraph does not exclude the possibility of a later contrary decision to be taken by the Competition Committee concerning the same case.

3. Until the issuance of a decision contrary to the negative clearance previously granted, the undertakings or associations of undertakings involved, shall not be liable to the consequences and sanctions provided for in the present Act, unless they have misled the Competition Committee by providing it with inaccurate information or by concealing real facts.

Article 12

Imposition of Fines

The fines and the penalty payments provided for in the present Act shall be imposed by decision of the Competition Committee.

Article 13
Revocation of Decisions of the Competition Committee

The Competition Committee has the right to revoke its decision as to the non-violation of the prohibitions laid down in Articles 1(1), 2 and 2a of the present Act, should its attention be drawn by an investigation upon its own initiative, complaint or any other source, to facts of which it had been informed or which have come to light after the decision has been taken and which provide evidence of a violation of the aforementioned Articles.

Article 13a
Publication of Decisions of the Competition Committee

1. The decisions of the Competition Committee, pursuant to the provisions of the present Act, must be specifically justified and shall be published in the Government Gazette.

2. The Competition Committee may order an undertaking or association of undertakings that violated the present Act to publish its decision in the national or local press depending on the magnitude of the market in which the violation occurred; as well as, on its gravity and effects. If the decision of the Competition Committee is being revoked by an irrevocable court decision, the Competition Committee is obliged to publish that decision in the same newspaper and on its own expenses.

Article 13b
National Competition Authority

1. The Competition Committee, as the National Competition Authority, is competent for the co-operation:

a) with the competition authorities of the Commission of the European Union providing the necessary assistance to its authorised officials in carrying out investigations provided by the community law;
b) with the competition authorities of other countries;
c) with international organisations.

2. Where an undertaking, which has its headquarters or exercises its activity in Greece, opposes an investigation ordered pursuant to community provisions, the Competition Committee and its authorised officials, upon its own initiative or upon the request of the authorised officials of the Commission, shall take all the necessary measures for the normal conduct of the investigation especially by providing the necessary assistance according to the provisions of Article 26 of the present Act.

3. The Competition Committee and its Secretariat shall perform the tasks which have been assigned to the national authorities of the member states by Articles 88 and 89 of the Treaty establishing

of the European Economic Community; as well as, by Regulations pursuant to Article 87 of the same Treaty in conjunction with other enabling provisions of the Treaty. To perform these tasks the Competition Committee and its Secretariat shall have the powers granted to them for the application of the present Act.

Article 13c
Annual Report of the Competition Committee

1. The Annual Report of the Competition Committee shall be submitted to the Ministers of National Economy and Commerce and to the Speaker of the Parliament during the month of April. It shall include a full report of its activities and decisions; as well as, its evaluations on the conditions and developments in the area of its competence.

2. The first annual report will be submitted by the Competition Committee in the month of April of the year following the commencement of its functioning.

CHAPTER IV

LEGAL PROTECTION

Article 14
Appeal Before the Athens Administrative Court of Appeal

1. The decisions of the Competition Committee; as well as, the decisions of the Ministers of National Economy and Commerce which are issued pursuant to Articles 4c(3) of the present Act, may be challenged on appeal to the Athens Administrative Court of Appeal within 20 days as from their notification.

2. The bringing of the appeal does not suspend the execution of the Competition Committee’s decision. However the President of the Athens Administrative Court of Appeal may suspend - after the request of the person concerned - wholly or in part, or subject to certain conditions, the execution of the contested decision if there are sufficient grounds for such suspension, applying by analogy the provisions of Article 2(2) of the Legislative Decree No 4600/1966 "on the regulation of certain questions concerning the Fiscal Courts".

3. The right to appeal may be exercised :

a) by the undertakings or associations of undertakings against which the decision was issued;
b) by the person who submitted a complaint regarding an infringement of the provisions of the present Act;

c) by the State through the Minister Commerce;

d) by any third party having a legitimate interest.

4. The appeal must be heard within three months from the day on which it was brought before the Athens Administrative Court of Appeal. An adjournment of the hearing may be granted only once, on sufficient grounds and to a hearing date not more than one (1) month later than the original hearing date, unless several appeals are to be jointly heard.

Article 15

Legal Remedies

1. Against the decisions of the Athens Administrative Court of Appeal, delivered in accordance with this Act, the parties to the case before that Court shall be allowed to appeal by a writ of error to the Council of State. This appeal shall be brought and heard in accordance with the provisions governing appeals to the Council of State.

2. The State General Commissioner for the ordinary administrative courts shall be entitled to appeal by a writ of error even though he was not a party to the proceedings in which the decision appealed against was issued. In this case, the time allowed for exercising the legal remedy shall be of three months as from the date on which the decision was published.

3. An appeal by a writ of error must be heard within three months from the date on which it was brought before the competent court. An adjournment of the hearing may be granted only once, on sufficient grounds and to a hearing date not more than one (1) month later than the original hearing date, unless several appeals are to be jointly heard.

4. The provisions of Article 52 of Presidential Decree No 18/1989 concerning the stay of execution of administrative acts challenged on appeal to be set aside, shall apply by analogy to the stay of execution of ordinary administrative courts' decisions in case where an appeal by writ of error is exercised against them, according to the present Act.

5. Where in Act reference is made to ordinary administrative courts it is implied that only the Athens Administrative Court of Appeal is concerned by this regulatory provision.

Article 16

Procedural Provisions

1. Unless otherwise provided or regulated by this Act, the provisions applicable to the procedure before the administrative courts according to it, shall be the provisions of the Code of Fiscal Procedure and the provisions governing appeals to the Council of State as they are in force. This concerns, in particular, those provisions which refer to jurisdiction and competence of the Courts; the exclusion, the challenge and the abstention of judges; the parties to a case; joint actions; connection and intervention;

joint hearing and separation of cases; appearance at the hearing; the fundamental rules of conducting the case; the reports and legal documents of the case; the service of documents; the time limits; the procedural nullities, the opposition and the additional reasons; the preparation of the hearing; the public hearing; the discontinuance, resumption and cancellation of the hearing; the decisions; the rectification and the interpretation of decisions; the "res judicata"; the evidence; the general provisions concerning legal remedies; the opposition in case of default to appear at the hearing; the appeal, the revision and the appeal by a writ of error.

2. The provisions of Articles 70, 71, 72 and 74(2) of the Code of Fiscal Procedure shall not apply to disputes proceedings arising under paragraph 1 of the present Article.

3. Undertakings or associations of undertakings which have participated in a practice within the meaning of Articles 1, 2 and 2a of the present Act, with an undertaking or association of undertakings which is party to a case; as well as, any third party having a legitimate interest shall be authorised to intervene in the proceedings referred to in paragraph 1 of this Article.

4. By Presidential Decree issued on a proposal of the Ministers of Justice and Commerce, special divisions of the Athens Administrative Court of Appeal may be established to hear appeals, interventions, oppositions in case of default to appear and applications for review made in accordance with the present Act. The same Decree shall also regulate any question concerning the procedure to be followed before these divisions when judging according to the provisions of the present Act.

Article 17

Exercise of Legal Remedies by the State General Commissioner

1. The provision in Article 16 of the Code of Fiscal Procedure shall apply equally to the procedure of legal remedies exercised according to the present Act by the State General Commissioner for the ordinary administrative courts.

2. The State General Commissioner shall not be required to appear before the courts, including the Council of State, during the hearing of legal remedies exercised by him in accordance with the present Act; such remedies shall be tried in his absence as if he were present.

3. The State General Commissioner may entrust the exercise of any of his powers provided by this Act, to the Deputy Commissioner or to any other lawful deputy.

4. The right of the State General Commissioner to appeal by a writ of error, to the benefit of the Law, against any decision of the administrative courts in accordance with Article 16 of the Code of Fiscal Procedure, shall be independent of his right to appeal to the Council of State in accordance with Article 15(2) of the present Act.

Article 18
Jurisdiction of Other Courts

1. Decisions of the Athens Administrative Court of Appeal and Council of State which are delivered, following an appeal in accordance with the present Act, shall have the force of "res judicata". Decisions of the Competition Committee; as well as, of the Minister of Commerce which are not appealed within the time limit specified, are only incidentally judged by the Courts as far as their validity is concerned.

2. Except in cases within the meaning of Article 1(3) and without prejudice to the provisions of the preceding paragraph, the courts of whatever nature shall be entitled to judge incidentally the validity of agreements and decisions of the kind described in Article 1(1) or the existence of a prohibited concerted practice or abuse of a dominant position or abuse of a relation of economic dependence. The Competition Committee, the Athens Administrative Court of Appeal and the Council of State shall not be bound by such judgement when delivering a decision in accordance with the present Act.

CHAPTER V

REGISTERS AND NOTIFICATIONS

Article 19
Registers

The Competition Committee shall keep:

1) the Provisional Register of Cartels, where the notifications, pursuant to Articles 20 and 21, shall be registered. The Provisional Register of Cartels shall be confidential;

2) the Definite Register of Cartels where, within thirty (30) days as from their publication, shall be registered:

a) the Competition Committee's decisions on matters or disputes covered by the provisions of Article 1(1) and (3), provided that they are no longer subject to legal remedies;

b) the Administrative Court of Appeal's decisions on the same matters or disputes, provided that they are no longer subject to legal remedies;

c) the Council of State's decisions on the same matters or disputes;

The Definite Register of Cartels shall be accessible to the public.

3) The Register of realised Concentrations where the notifications of concentrations, pursuant to Article 4a, shall be registered. The Register of realised Concentrations shall be accessible to the public;

4) The Provisional Register of Concentrations subject to preventive control where the notifications, pursuant to Article 4b, shall be registered. The Provisional Register of Concentrations shall be confidential;

5) The Definite Register of Concentrations subject to preventive control where shall be registered:

a) the Competition Committee's decisions pursuant to Articles 4d and 4e, provided that they are no longer subject to legal remedies;

b) the Ministers' of National Economy and Commerce decisions pursuant to article 4d;

c) the Administrative Court of Appeal's decisions provided that they are no longer subject to legal remedies;

d) the Council of State's decisions on the same matters or disputes.

The Definite Register of Concentrations shall be accessible to the public.

Article 20

Notification of Existing Cartels

1. Agreements, decisions and concerted practices of the kind described in Article 1(1) of the present Act which were in existence at the date of entry into force of Act No 703/77 (Government Gazette No 278/26.9.77, issue A'), should have been notified by the undertakings or associations of undertakings concerned to the Service for the Protection of Competition, within four (4) months as from the date of entry into force of Act No 703/77.

2. In case the above notification has not been effected, each of the undertakings or associations of undertakings which omitted the notifications will suffer the following consequences:

a) total withdrawal of the benefit of the provisions of Article 1(3), being applied, and

b) a fine of not less than Drs 100.000 nor more than Drs 200.000 shall be imposed.

Article 21

Notification of New Cartels

1. Agreements, decisions and concerted practices of the kind described in Article 1(1) must be notified by the undertakings or associations of undertakings concerned to the Competition Committee, within 30 days as from the date on which they were concluded, taken or exercised.

2. In case the aforementioned notification is not effected, each of the undertakings or associations of undertakings which omitted the notifications will suffer the following consequences:

a) total withdrawal of the benefit of the provisions of Article 1(3), being applied, and
b) a fine of not less than Drs 3 million nor more than 10% of the gross receipts that the undertaking achieved during the present or the previous financial year in which the offence was committed, shall be imposed.

Article 22

Content of Notification

1. The notification must contain all the necessary information for the examination by the Competition Committee of the particular case submitted to it or for the conduct of inquiries into the sectors involved or for the control of cartels of undertakings. The following must be included in every case; otherwise, the notification will be inadmissible:

a) the business name and registered office of all participating undertakings and the appointed authorised attorney registered in Athens;
b) the documents incorporating the agreement concluded or evidencing the decision taken;
c) any other information evidencing the cartel notified.

2. Further documents and evidence may be demanded by decision of the Competition Committee in order to ensure the admissibility of the notification.

3. The content, form and procedure in respect of submission and entry of the following, shall be determined by decision of the Competition Committee:

a) notifications pursuant to Articles 20 and 21;
b) applications for negative clearance pursuant to Article 11;
c) applications for the implementation of Article 1(3) pursuant to Article 10;
d) complaints concerning violations of Articles 1(1), 2 and 2a pursuant to Article 24(1);
e) any other matter relevant to the aforementioned notifications, applications or complaints.

4. The application for negative clearance pursuant to Article 11(1) or the application for the implementation of Article 1(3) pursuant to Article 10, shall be simultaneously submitted at the time of notification.

Article 23

Consequences of Notification

1. Until a decision is taken by the Competition Committee pursuant to Article 1(3), the agreements and decisions duly notified pursuant to Articles 20 and 21 by the undertakings concerned, shall be deemed provisionally valid.

2. Agreements and decisions which were not notified and which existed at the date of entry into force of Act No 703/77, shall be deemed null and void as from that date.

3. Notified agreements and decisions which existed at the date of entry into force of Act No 703/77, shall be deemed null and void as from the date on which the time limit for their notification expired.

4. Agreements and decisions which are not notified and which were concluded or taken after the date of entry into force of Act No 703/77, shall be deemed null and void as from the date on which such agreements were concluded or such decisions were taken.

5. Notified agreements and decisions which were concluded or taken after the date of entry into force of Act No 703/77, shall be deemed null and void as from the date on which the time limit for their notification expired.

CHAPTER VI

COMPLAINTS AND INVESTIGATIONS

Article 24
Complaints

1. Any natural or legal person shall be entitled to submit a complaint regarding the infringement of the provisions of Articles 1(1), 2 and 2a.

2. Civil servants, officials of corporate bodies of public law, employees of public undertakings or undertakings of public utility and persons temporarily entitled to an administrative service shall report, without fail, to the Competition Committee any information which comes to their knowledge regarding an infringement of the provisions of Articles 1(1), 2, 2a and 4 to 4f. In case of failing to do so, a penalty of imprisonment for up to six (6) months or a fine of not less than Drs 100.000 nor more than Drs 500.000 can be imposed.

3. The secretaries of the Courts shall be obliged to send, free of charge, copies of decisions issued in accordance with the present Act to the Competition Committee. In case of failing to do so, they shall be subject to disciplinary sanctions.

4. The Competition Committee shall be obliged to issue a decision within six (6) months from the date a complaint was lodged. Under special circumstances and when the case calls for further investigation, the Competition Committee can extend the aforementioned period by two (2) months.

Article 25
Collection of Information

1. In carrying out the duties assigned to the Competition Committee by the provisions of the present Act, its President or the authorised by him Director or official of its Secretariat shall be entitled to obtain all necessary information from undertakings, associations of undertakings, other natural or legal persons, public or other authorities by sending a written request. The document shall state the legal provisions on which the request is based, the time limit for supplying the information requested, which can not be less than twenty (20) days; as well as, the penalties provided for in the present Act for non-compliance with the obligation to supply information.

The persons the document is addressed to, shall be obliged to supply the information requested immediately, accurately and completely. In the case of information requested from undertakings or associations of undertakings, the information shall be supplied by the designated under Article 30 of the present Act persons and their competent officials. Persons who under Article 212 of the Code of Criminal Procedure cannot be examined in criminal proceedings, shall not be required to supply the aforementioned information provided that they comply with the obligation imposed on them by paragraph 3 of that same Article. The provisions of this paragraph shall be without prejudice to the provisions concerning banking secrecy.

2. Where the supply of information requested in accordance with the previous paragraph, is being refused, obstructed or delayed, or where information is inaccurate or incomplete, the Competition Committee, without prejudice to the penal sanctions provided under Article 29, shall:

a) in the case of undertakings or associations of undertakings, their directors and employees; as well as, in the case of individuals or private legal entities impose a fine not exceeding Drs 3 million, on each of them and in respect of each infringement;
b) in the case of civil servants or officials of public corporate bodies, refer the matter to the competent supervisory authorities for disciplinary proceedings, since such non-compliance constitutes a disciplinary offence.

Article 26
Conduct of Investigations

1. Without prejudice to specific laws introducing an obligation to keep secrecy, all Public Authorities and Public Corporate Bodies shall be obliged to inform; as well as, to assist the Competition Committee and its authorised officials in the execution of their duties.

2. In order to establish the existence of an infringement of Article 1(1) and Articles 2, 2a and 4 to 4f the authorised officials of the Competition Committee's Secretariat having the powers of a tax inspector, may inter alia:

a) examine all books, records and documents held by undertakings or associations of undertakings and take copies of or extracts from them;

b) carry out investigations in the offices and other premises occupied by the undertakings or the associations of undertakings;

c) make house searches in conformity with the provisions of Article 9 of the Constitution;

d) take sworn or unsworn evidence, where they find it appropriate, subject to the provisions of Rule 212 of the Code of Criminal Procedure.

3. The relevant authorisation to conduct an investigation shall be given in writing by the President of the Competition Committee or the entitled Director of the Competition Committee's Secretariat. The authorisation shall specify the subject matter of the investigation and the consequences of any attempt to impede or obstruct the conduct of such investigation or to refuse to show books, records and other documents or to provide copies of or extracts from them.

4. The President of the Competition Committee or the authorised by him Director of the Competition Committee's Secretariat may request in writing the assistance of the competent services of the Local and Prefectural self-government agencies in carrying out the investigations referred to in paragraph 2(a) to (d) of the present Article.

5. The official responsible for the inspections and investigations carried out, shall make a report, a copy of which will be sent to the undertakings or association of undertakings concerned.

6. By decision of the Competition Committee and without prejudice to the penal sanctions provided for in Article 29 of the present Act, a fine not exceeding Drs 3 million shall be imposed on those persons impeding or obstructing the conduct of the investigations referred to in paragraphs 1 and 3 of this Article; as well as, on those persons refusing to produce books, records and other documents or to provide copies of or extracts from them.

7. In case of the authorised employees of the Secretariat being refused or being impeded during the execution of their duties, the assistance of the Local Police authorities may be requested through the competent Public Prosecutor.

Article 27

Obligation of Secrecy

1. Information acquired as a result of the application of the present Act shall be used only for the purpose of the relevant request for information, investigation or hearing.

2. Without prejudice to the provisions of Article 37 (2) of the Code of Criminal Procedure, the authorised according to Article 26 (2) to (4) of the present Act officials of the Competition Committee's Secretariat and the employees of the competent services of the Local and Prefectural self-government agencies who, in the exercise of their duties, have access to confidential information unrelated to the implementation of the present Act, shall be required to keep such information secret.

3. Without prejudice to the provisions of Article 37 (2) of the Code of Criminal Procedure, the aforementioned officials shall be bound by the same obligation of secrecy concerning confidential

information related to the implementation of the present Act. This information shall be communicated to the President of the Competition Committee annexing in their report the relevant documents. This report and the documents annexed thereto may be included in the file submitted to the Competition Committee, the Athens Administrative Court of Appeal and the Council of State, thus ceasing to be confidential.

4. Any official committing a breach of the obligations imposed by the preceding paragraphs, shall be liable:

a) to the penalties provided for in Article 252 of the Criminal Code and to a fine of not less than Drs 20.000 nor more than Drs 200.000;
b) to disciplinary proceedings since non-respect of the obligation of secrecy constitutes a disciplinary offence.

5. The President and the members of the Competition Committee that commit a breach of the obligations imposed by the preceding paragraphs, shall be liable to the penalties provided for in Article 252 of the Criminal Code and to a fine of not less than Drs 500.000 nor more than Drs 3 million. By the same decision they are being forfeited from the Competition Committee.

CHAPTER VII

SANCTIONS - PAYMENT OF DUTIES

Article 28
Obligation to Report Offences

When the Competition Committee ascertains that an offence has been committed contrary to the provisions of Articles 1(1), 2, 2a and 4 to 4f, shall report such offence to the competent prosecuting authority not later than 10 days after the issuance of its relevant decision.

Article 29
Penal Sanctions

1. Any person who, either personally or as representative of a legal entity, concludes agreements, takes decisions or applies a concerted practice prohibited pursuant to Article 1(1) and any person acting in breach of Articles 4 to 4f; as well as, anyone who, in the same capacities and contrary to Article 2 abuses a dominant position in market of his own undertaking or the undertaking he represents or in breach of Article 2a, abuses the relation of economic dependence with respect to him or to the undertaking he represents, shall be punished by a fine of not less than Drs 1 million nor more than Drs 5 million. In case of relapse, the aforementioned limits shall be doubled.

2. A sentence of at least three (3) months' imprisonment and a fine of not less than Drs 1 million nor more than Drs 3 million, shall be imposed on any person who:

a) impedes, in any way, the investigations carried out by the authorised officials pursuant to Article 26, especially by creating obstacles or concealing documents;

b) delays or refuses to supply the Competition Committee or its authorised officials with information requested pursuant to Article 25;

c) knowingly provides the Competition Committee or its authorised officials with false information or conceals true information in breach of the provisions of Articles 25 and 26;

d) refuses to give sworn or unsworn evidence to an authorised, pursuant to Article 26(1) to (3), official of the Competition Committee or to any other authorised official when called upon to do so according to the provisions of Article 26(2). The same applies to anyone who, in giving evidence, knowingly makes a false statement, denies or conceals the truth. In case of relapse, the aforementioned limits shall be doubled.

Article 30

Liability of Natural Persons

1. The persons liable for observing the provisions of Articles 1(1) and 2 of the present Act, against whom criminal prosecution is exercised and a penalty is imposed pursuant to Article 29(1), shall be, in the case of personal undertakings the entrepreneurs, in the case of partnerships the general partners, in the case of limited liability companies and co-operatives the administrators, and in the case of joint-stock companies the members of the Board of Directors. The designation of any other person, to be the person liable, shall be prohibited. In the case of decisions taken by majority vote, those who voted with the majority shall be liable. The same natural persons shall be liable to the extent of their personal property and by personal detention, jointly with one another and along with the legal entity concerned for the payment of the fines imposed on the latter in accordance with the provisions of the present Act.

2. As long as the conditions provided for in the present Act are met, the aforesaid natural persons shall be liable as stated in the previous paragraph, regardless of the validity of the respective agreements, decisions or concerted practices.

3. The notification of an agreement, decision or concerted practice of the kind described in Article 1(1), by the respective undertaking or association of undertakings pursuant to Articles 20 and 21, exempts the persons mentioned in the paragraph 1 of the present Article from being held criminally liable according to Article 29(1). However these persons may be held criminally liable, where the undertaking or association of undertakings concerned does not comply with the decision of the Competition Committee ordering the cessation and the future omission of the offence committed, within fifteen days as from its notification.

4. The provisions of the aforementioned paragraph, shall apply by analogy to the case of the abuse of the relation of economic dependence and in the case of concentrations between undertakings referred to in Articles 2a and 4 to 4f respectively.

Article 31
Duties

1. The notifications pursuant to Articles 4a and 4b, the requests pursuant to Articles 4d(7) and 4e(3), the notifications pursuant to Articles 20 and 21, the application for the implementation of the provisions of Article 1(3) or for the renewal of a relevant decision pursuant to Article 10 and the application for negative clearance pursuant to Article 11 must be accompanied by a voucher evidencing the deposit of Drs 40.000 to the appropriate Treasury; otherwise, the aforementioned actions shall be deemed inadmissible.

2. The appeal, the appeal by a writ of error, the opposition, the appeal for revision and the intervention which are brought to the Administrative Courts according to the provisions of the present Act; as well as, any application made to the Competition Committee for the reopening of hearings, must be accompanied by a voucher evidencing the deposit of Drs 30.000 made payable to the appropriate Treasury and a voucher evidencing the payment of Drs 10.000 as hearing charges issued by the appropriate Treasury; otherwise, the aforementioned actions shall be deemed inadmissible. The deposit shall be refunded in accordance to the provisions of Article 171(5) of the Code of Fiscal Procedure and Article 36(4) of the Legislative Decree No. 170/1973 re the Council of State. The State is exempted from the aforementioned obligation.

3. The stamp duties payable to the State in connection with the legal documents, the pleadings and the duties payable to the Lawyers' Pension Fund, the Fund for the Financing of Judicial Buildings and the Athens Lawyers' Welfare Fund for enrolment in the Courts' register, legal representation, submission of legal documents or memoranda and in general for the hearing, shall be of the same amount to the duties paid for the proceedings before the Administrative Court of First Instance in the case of proceedings before the Competition Committee; while, in the case of proceedings before the Athens Administrative Court of Appeal and the Council of State, they shall be at the double rate of the duties fixed to apply in the usual proceedings in question.

4. The State General Commissioner for the ordinary administrative courts shall enjoy the same exemptions as the State in respect of any legal remedy exercised by him in accordance with the provisions of the present Act and its proceeding.

5. By Presidential Decree issued on the proposal of the Ministers of Finance and Commerce, the details for the application of the provisions of the present Article shall be determined.

CHAPTER VIII

FINAL AND TRANSITORY PROVISIONS

Article 32
Extent of Application of the Act

The present Act shall apply to all restrictions of competition that have effects or may have effects within the country, even where they are due to agreements between undertakings, decisions of associations of undertakings, concerted practices thereof or mergers, concluded, taken practised or effected outside the country or are due to undertakings or associations of undertakings having no establishment therein. The same shall apply to any abuse of dominant position or economic dependence manifested within the country.

Article 33
Publication of Decisions

The joint decisions of the competent Ministers, the decisions with regulatory content issued by the Minister of Commerce and the Competition Committee's decisions, opinions and reports provided by the present Act, shall be published in the Government Gazette.

Article 34
Application of Provisions Regarding the Service of Summonses

The provisions of Articles 56 to 67 of the Code of Fiscal Procedure concerning the service of summonses shall be applied by analogy to the service of notices to appear before the Competition Committee according to the provisions of the present Act; as well as, to the service of decisions and documents.

Article 35
Collection of Fines

1. The fines provided for in the present Act, shall be deemed as a public revenue and shall be collected in accordance to the Code for the Collection of Public Revenues.

2. The limits of the fines and money penalties imposed in accordance with the present Act may be readjusted by a Presidential decree issued on the proposal of the Ministers of Justice and Commerce.

Article 36
Provisions Remaining in Force

Specific provisions protecting the freedom of competition or providing for compulsory cartels of undertakings, shall remain in force.

Article 37
Legal Remedies - Pending Lawsuits

The exercise of legal remedies and the judication of pending lawsuits, initiated on the basis of the legal status that existed before Act No 1934/91 entered into force, shall be judged by the courts accordingly.

Article 38
Commencement of the Competition Committee's Functions

The commencement of the Competition Committee's functioning shall be determined by decision of the Minister of Commerce. Until the appointment of the Competition Committee's members and its composition under the new structure provided by Article 8a of the present Act, the provisions of Act No 703/77 concerning the Competition Committee and the Directorate for Market Research & Competition as they were in force before the amendment introduced by Act No 2296/95, shall remain into force. Until the formation of the National Consumers' Council and the designation of its representative and deputy, a representative and its deputy from the General Confederation of Greek Workers will participate in the Competition Committee. Since the appointment of Competition Committee's members and its composition and until its Secretariat starts functioning, the Competition Committee will be served by temporarily transferred personnel in derogation of the existing provisions. The transfer will be effected by joint decision of the Ministers of Presidency of Government, Commerce and the competent Minister, as the case may be. For the same period of time the settlement of expenditure accounts shall be carried out by the competent Directorate of the Ministry of Commerce.

Article 39
Codification of Provisions

The provisions of present competition legislation may be codified in a unified text by Presidential Decree issued upon proposal of the Minister of Commerce.

During codification the change in the order of Articles, paragraphs and subparagraphs, the deletion, the contradiction or the addition of new Articles; as well as, any necessary phrasal change is allowed, provided that the meaning of the text in force is not being altered.

Article 40
Abolished Provisions

After Act No 2296/24.2.95 is being entered into force Articles 13, 14, 15, 16(1), (2) and (4) of Act No 1934/91 on "Amendments of competition legislation and other provisions" shall be abolished.

Article 41
Entry Into Force of the Act

The present Act enters in force after its publication in the Government Gazette, unless otherwise provided herein.

IRELAND*

(1st January 1995 - 31 December 1995)

The Competition Act does not give the Competition Authority a direct role in the enforcement of competition law in Ireland. Amending legislation was introduced, in 1994 and 1995, which would confer upon the Authority power to enforce the Act by way of court actions. While the legislation is not yet finalised, it is now proposed that the courts should be enabled to impose fines and imprisonment for breaches of the Act, as well as imposing injunctions, on foot of actions taken by the Authority.

During the year, 38 notifications of agreements were made to the Authority, bringing the total of notifications since the Act came into force in 1991 to 1 312. The Authority disposed of 179 notifications in 1995, bringing the total disposed of to date to 984, or 75 percent. The Authority took 70 decisions in 1995, bringing total decisions to 456.

One interesting decision concerns agreements relating to the assignment of copyright in musical works by individual creators and publishers to IMRO, an exclusive collective copyright enforcement agency, which had become independent of the UK Performing Right Society at the end of 1994. When the arrangements were amended so that a member could require the grant-back of a non-exclusive licence for any of the performing right, and by the deletion of arrangements for the appointment of directors of IMRO by PRS, the Authority granted a licence. Subsequently, because users could obtain licences from the individual owners of the copyright material who were members of IMRO, and from overseas licensing organisations, certificates were issued for an agreement between IMRO and the national broadcasting organisation, and for standard agreements with independent radio stations and public performance users, such as public houses, shops, discos and concert venues.

The Minister had requested the Authority to undertake a wide-ranging study of competition in the newspaper industry. An interim report was submitted in March, and published in April, concerning the pricing 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. The Authority concluded that there was no evidence to support claims that UK newspaper groups had engaged in predatory pricing within the State. On the other hand, the Authority considered that the share acquisition and loan represented both an abuse of a dominant position and an anti-competitive agreement. It regarded these as serious breaches of the Act, and recommended that the Minister take court action against the arrangements.

During the year, 126 mergers were notified to the Minister under the Mergers Acts. One was referred to the Authority for investigation at the end of the year, but none was prohibited in 1995.

A second mobile telephone licence was awarded during the year, and it was announced that it was intended to introduce competition in electricity.

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* The original language of this report is English.

Changes in Competition Laws and Policies Adopted or Envisaged

Enforcement of Competition Laws and Policies

Action against anti-competitive practices

(a) Under the 1972 Act - the work of the Director of Consumer Affairs

(b) Under the 1991 Act - the work of the Competition Authority.

Notifications

Decisions

Assignment of copyright and related licensing agreements

(i) IMRO/Writers and Publishers
(ii) IMRO/Independent radio stations
(iii) IMRO/Radio Telefis Eireann
(iv) IMRO/Public Performance users

Mergers and sale of business

Fexco Innovations Ltd/BIG Estates Ltd

Exclusive purchasing agreements

(i) Flogas bulk customers
(ii) Conoco distributor agreements

Exclusive use of equipment agreements

(i) Burmah Castrol hire purchase and equipment loan agreements
(ii) Shell lubrication equipment loan

The Newspaper Study

Mergers and Concentrations

Competition Authority

Statistics on Concentrations

Deregulation and Privatisation

Changes in Competition Laws 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, and was further amended in November 1995. Its main proposal was that power to enforce the Act would be conferred upon the Authority. Thus the Authority would be enabled to investigate, either on its own initiative or acting on third party complaints, suspected infringements of Sections 4 and 5 of the Act, which relate to anti-competitive agreements and abuses of a dominant position, and to institute proceedings in the courts, as follows, for:

(a) a declaration or injunction, in civil law actions; and/or

(b) substantial fines or sentences of imprisonment, in criminal law actions.

In addition, the Bill proposed, *inter alia*, that the Authority should be able to issue certificates for categories of agreements, and that the Minister might prescribe a fee to accompany merger notifications. At the end of 1995, the Bill remained at Committee Stage in Parliament.

While it had been proposed, in the 1994 Bill, to remove all merger and take-over agreements from the scope of Section 4 of the Act, this was omitted from the 1995 amendments. The Minister, however, announced that he would establish, on the enactment of the Bill, an independent Competition and Mergers Review Group to examine the scrutiny of mergers under the Competition and Mergers Acts, and to investigate the effectiveness of competition legislation generally.

Enforcement of Competition Laws and Policies

Action against anti-competitive practices

(a) Under the 1972 Act - the work of the Director of Consumer Affairs

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 1995 were as follows:

(a) Milk - Complaints were made that milk which was alleged to have been imported from Northern Ireland was being sold below cost. Neither of these allegations were substantiated following an investigation.

(b) Sugar - Allegations continued to be received concerning the major sugar supplier in the State. While some progress was made concerning terms and conditions of supply the market situation remained unsatisfactory. This market continued to receive attention from the European Commission (DGIV).

(c) Credit Terms - Complaints were received from a trade association alleging that a major retailer was not complying with the credit terms in its Terms and Conditions of supply. The matter was resolved on two occasions on the basis of a phone call from the Director.

(b) Under the 1991 Act - the work of the Competition Authority

Notifications

The number of notifications of agreements made to the Authority in 1995 was 38 compared to 34 in the previous year. Up to the end of 1995, a total of 1 312 notifications had been made, of which 805 had been dealt with at the start of 1995.

Decisions

During 1995 the Authority took 70 decisions and disposed of 179 notified agreements so that by the end of the year 984 of the 1 312 notifications made under the Act had been dealt with. This was achieved in spite of the Authority having very limited staff resources. Some of the decisions are discussed below.

Assignment of copyright and related licensing agreements

In a series of related decisions the Authority dealt with various agreements involving the licensing of copyright in musical works. These agreements involved complex issues regarding the relationship between competition law and intellectual property rights and the decisions represented the culmination of several years' work. One decision concerned standard agreements relating to the assignment of copyright in musical works by individual creators (composers and authors) and publishers to the Irish Music Rights Organisation (IMRO). Other decisions related to agreements permitting the use of the copyright musical works between IMRO and independent radio stations, the State broadcasting authority (RTE) and other users.

i) IMRO/Writers and Publishers

The three standard copyright assignment agreements were between IMRO and individual creators (composers and authors), publishers (individuals) and publishers (companies) respectively. They were similar to agreements previously notified by the Performing Right Society (PRS), of which IMRO was a subsidiary at that time. The PRS agreements were refused a certificate or licence by the Authority in Decision No. 326 (18 May 1994). In December 1994, IMRO became an independent company, and entered into copyright assignment agreements with its members. Besides the notified agreements, the Authority also took into consideration the Memorandum, Articles of Association and Rules of IMRO, regarding them all as part of the overall agreement between undertakings.

Under the assignment agreements the creators or publishers assign exclusively to IMRO the performing rights in their musical works to enable IMRO to exploit those rights for the period of the agreement. Provision is also made for the payment of royalties collected by IMRO to the copyright owner. In the Memorandum, *inter alia*, provision is made for IMRO to make rules relating to the terms and conditions under which it might be required by a member to grant back a non-exclusive licence in respect of his works. Among other things, the Articles provide that the member shall assign to IMRO all the rights to be administered by IMRO, and permits IMRO to decline to exercise all or any part of the performing right at

the request of a member. The Articles also provided that a member, subject to compliance by the member with the Rules of IMRO, could require IMRO to grant to the member a non-exclusive licence for any work for the public performance of the work at a particular event or series of events. The Rules of IMRO defined an event as one day's performance of the work or works in public and set out a number of pre-conditions for the grant of the licence. The Articles provide that a member may terminate membership each year by giving three month's notice. They also provided that, for the first two years, three of the directors shall be nominated by PRS, and two thereafter, and there were special provisions in relation to the PRS-nominated directors. Finally, the Authority was aware that IMRO had entered into non-exclusive reciprocal arrangements with PRS and other foreign collecting societies, although these agreements were not notified to the Authority.

The Authority expressed its concerns to IMRO regarding the limitations and restrictive pre-conditions for the grant back of a non-exclusive licence to a member, and at the fact that PRS, a potential competitor, was entitled to appoint directors of IMRO, even though IMRO was now independent of PRS. IMRO then amended its Memorandum, Articles and Rules to meet the concerns of the Authority. The amendments provide that the member can require the grant back of a non-exclusive licence for any part of the performing right, and not just those relating to public performance at a particular event or events, eliminated the more restrictive pre-conditions and deleted the arrangements for the appointment of directors by PRS.

As in the earlier PRS decision, the Authority took the view that the arrangements constituted an exclusive collective copyright enforcement system involving independent undertakings (creators and publishers), and offended against Section 4(1). It considered that the opportunity given to a member to terminate membership at one yearly intervals did not offend against Section 4(1). The Authority considered that the Articles and Rules as notified relating to the grant back of a non-exclusive licence were restrictive and offended against Section 4(1), but since these were amended to extend to all performing rights they no longer offended. The Authority considered that the arrangements relating to directors nominated by PRS offended against Section 4(1) but these arrangements were deleted. The amendments removed terms which the Authority regarded as not indispensable and it granted a licence for the amended arrangements to apply for 15 years.

ii) IMRO/Independent radio stations

This concerned the copyright music licence agreement between IMRO and independent radio stations, under which IMRO licensed the broadcast of its repertoire of musical works in return for the payment of royalties. The Authority noted that the licence granted by IMRO was non-exclusive and covered all its repertoire, and was a blanket licence to use all copyright music. It was not, however, the only means by which the users could secure the right to use copyright music. They could deal directly with IMRO members and with overseas societies. Taking into account transactions costs of individual agreements, the Authority accepted that the IMRO blanket licence, even though it meant that all copyright music was sold collectively, was not anti-competitive *per se*. The licence was non-exclusive, and any person could obtain one; users were not compelled to play only music covered by the licence, or any particular selections from the repertoire. In the Authority's opinion, IMRO did not apply dissimilar conditions to equivalent transactions. Since the Authority considered that the arrangements did not offend against Section 4(1), it issued a certificate.

iii) IMRO/Radio Telefis Eireann

This decision related to the copyright music licence agreement between IMRO and Radio Telefis Eireann. The Authority took the same view of this agreement as it had done in the case of the agreement with independent radio stations, and it issued a certificate in respect of the agreement.

iv) IMRO/Public performance users

This concerned the standard copyright music licence contract under which IMRO licenses public performance users - public houses, hotels/restaurants, retail shops and centres, cinemas, clubs, theatres, industrial and commercial companies, dance halls, discos, stadia and premises used for individual events and concerts. The contract licenses the public performance of musical works in return for the payment of royalties. The number of such licences issued at the end of 1994 was well over 9 000. While the Authority took the same view as in the case of the agreements with broadcasters as was outlined above, there were some important differences in the decisions.

The Authority considered the general arrangements for the licensing by IMRO of its repertoire and the standard conditions in the licence. It did not consider the tariff and user category which was applied to each of the licences in existence, since such individual agreements were not notified. The individual members of IMRO were undertakings, and IMRO was an association of undertakings. The notified standard licence was considered by the Authority to be a decision by an association of undertakings.

Again the Authority considered that the IMRO blanket licence was not the only means by which the users could secure the right to use copyright music. The Authority stated that the financial terms inserted in an individual agreement could cause that agreement to offend against Section 4(1) in certain circumstances, but it would be the individual agreement containing such terms which would offend, rather than the standard agreement. It was alleged that IMRO had abused its dominant position. The Authority stated that such behaviour was prohibited under Section 5 of the Act, but pointed out that, as the Act stood, the Authority could not take a view on any Section 5 issues that might arise out of the notified agreements. The Authority issued a certificate in respect of the standard contract.

Mergers and sale of business

Although the Authority has decided that merger and sale of business agreements come within the scope of the Competition Act, and might on occasion offend against Section 4(1), very few merger agreements were notified in 1995. In its decisions, the Authority examines both the merger/sale aspect and any non-compete clauses. One decision may be of some interest.

Fexco Innovations Ltd/BIG Estates Ltd

In Fexco/BIG, the Authority dealt with two related agreements establishing a joint venture to operate in the business of providing VAT refunds to visitors from non-EU countries. Although there were only a small number of firms competing in the market, and one of the parties had a large share of the market (43 percent), while the other (with only one percent) was a subsidiary of one of the largest banks in the State and therefore potentially a significant competitor, the Authority concluded that the agreement did not offend against Section 4(1), since it was relatively easy to enter the relevant market.

Exclusive purchasing agreements

i) Flogas bulk customers

This decision concerned the standard agreement of Flogas with bulk LPG customers, which provides for exclusive purchasing by the customers of all of their LPG requirements from Flogas for a maximum period of five years. Storage equipment is provided on a rental basis by Flogas, and the equipment must be used solely for Flogas LPG. Given the large number of Flogas bulk agreements, and the fact that Calor and Blugas, the other main suppliers, also had similar agreements, the Authority concluded that the standard Flogas exclusive purchasing agreement for bulk supplies of LPG offended against Section 4(1) of the Act. The Authority considered that none of the other clauses offended against Section 4(1).

The Authority considered that the exclusive purchasing agreement for a maximum term of five years satisfied all the conditions for the grant of a licence under Section 4(2). Any longer period, however, would not be regarded as indispensable. Licences were also granted in respect of the exclusive purchasing agreements, for a period of five years, of the other main suppliers, Calor and Blugas, subject to the same reporting conditions.

ii) Conoco distributor agreements.

This decision concerned standard agreements between Conoco and its distributors. The essential feature of the agreements was that the distributor was to purchase exclusively from Conoco. The term of the agreements was stated not to exceed ten years. There was a network of Conoco exclusive purchasing agreements, and other oil companies also had agreements which involved exclusive purchasing, and, in those circumstances, the Authority considered that the Conoco agreements offended against Section 4(1). The agreements also contained a non-compete clause for nine months after termination of the agreement, which offended against Section 4(1), but this was deleted. The Authority granted a licence after Conoco agreed to amend the agreements so that they would not involve exclusive purchasing for a period longer than five years.

Exclusive use of equipment agreements

i) Burmah Castrol hire purchase and equipment loan agreements

In 1994, the Authority had refused to grant a licence to two standard agreements notified by Burmah Castrol (Ireland) Ltd. relating to hire purchase loans and equipment loans, even after some amendments had been proposed. These involved exclusive purchasing and/or exclusive use of equipment for Castrol lubricating oils for extended periods. Burmah Castrol notified amended versions of the agreements in 1995. The hire purchase agreement required exclusive use of equipment, and the agreement had a duration of five years, after which the equipment became the property of the customer. Where the agreement involved the loan of equipment, again there was an exclusive use of equipment requirement, and the agreement lasted for five years, at the end of which period the equipment could either be returned or purchased for one pound. The Authority repeated its previous view that the exclusive use of equipment requirements represented, in many cases, an exclusive purchasing requirement, and that, because there was a

network of such agreements, the standard agreements offended against Section 4(1), but granted a licence as they were limited to five years' duration.

ii) Shell lubrication equipment loan

This decision related to a standard form agreement concerning the loan of lubrication bay equipment by Shell to certain resellers. In return for the loan, the user agreed to use the equipment exclusively for brands marketed by Shell. The user could terminate the agreement on giving not less than three months notice, and he had the option to either return the equipment or to purchase it at a discounted price. The agreement was stated normally to be for a period of ten years. The Authority took a similar view to that in the case of the Burmah loan agreements, and it granted a licence after Shell agreed to amend the agreement so that it had a duration of five years.

The Newspaper Study

The Competition Authority was requested on 11 October 1994, by the Minister for Enterprise and Employment, to undertake a study and analysis of the practice and method of competition affecting the supply and distribution of newspapers in Ireland, including an analysis of any developments outside the State which impinge on the State. On 24 October 1994, the Authority was requested by the Minister to undertake an interim study to address the issues arising from transfrontier competition in the Irish newspaper industry. On 22 December 1994, in the light of possible implications of the announcement that Independent Newspapers plc had purchased a 24.9 percent interest in Irish Press Newspapers Ltd and Irish Press Publishing Ltd, a major competitor, and had made a loan of £2 million to these companies, the Minister requested that the study be extended to include the issue of possible dominance and its implications for competition in the newspaper industry, and that an early report be submitted. The Authority submitted an interim report on these two issues to the Minister on 30 March 1995. The Minister published a summary of the report on 11 April 1995 and an expurgated version of the report on 27 April.

In the Authority's opinion, there was no evidence to support claims that UK newspaper groups, particularly News International, had engaged in predatory pricing of newspapers within the State, and it recommended that no action be taken in respect of their pricing behaviour. The Authority considered that the acquisition by Independent Newspapers of a shareholding in the Irish Press companies, and the provision to it of loans by the Independent represented both an abuse of a dominant position, contrary to Section 5 of the Competition Act, and an anti-competitive agreement, contrary to Section 4 of the Act. Since it regarded these actions as very serious breaches of the Act, the Authority strongly recommended that the Minister take action under Section 6 of the Competition Act against these arrangements.

Mergers and Concentrations

Competition Authority

On 22 December 1995, the Minister announced that he had decided to refer to the Competition Authority, for investigation under the Mergers Acts, the proposal whereby Statoil Ireland Ltd would acquire the entire issued share capital of Conoco Ireland Ltd.

Statistics on Concentrations

Concentrations notified to the Minister in 1994 and 1995 were:

	1994	1995
Carried forward	4	2
Notified in year	124	126
Outside Act	73	71
Did not proceed/withdrawn	4	--
Allowed	48	52
Prohibited	--	--
Referred to Competition Authority	--	1

Deregulation and Privatisation

In November 1995, the Minister for Transport, Energy and Communications announced the award of a second mobile telephone licence, thus introducing some element of competition in the mobile telephone market. The Minister also announced his intention to introduce competition in electricity. To this end, it was announced that the construction and operation of a proposed new peat powered generating station would be decided on the basis of a tender process and would not necessarily be built and operated by the State-owned ESB. The Minister also announced that he would make proposals for the establishment of new regulatory regimes for electricity and telecommunications. No proposals had been published by the end of the year.

ITALY*

(1995)

With the passing of Act No. 52/96 in February 1996, the Anti-Trust Authority has been empowered to directly enforce articles 85(1) and 86 of the EC Treaty.

Enforcement of competition laws and policies

Summary of action taken by the Authority

In 1995 and in the first three months of 1996, in implementing the Competition Act, No. 287/90 (the Act) the Authority ruled on 47 agreements, 43 cases of abuse of dominant position and 378 mergers between independent companies. Seven agreements were ruled to be in violation of section 2 of the Act and 8 alleged abuses of dominant position were ascertained as infringements of section 3. None of the mergers examined by the Authority during the year was prohibited. One operation which had originally been deemed to restrict competition when first notified to the Authority was subsequently cleared following acceptance of commitments by the parties to the merger, during the inquiry phase, to remove the sources of concern identified. The Authority also issued 70 opinions to the Bank of Italy and the Broadcasting and Publishing Authority, pursuant to section 20 of the Act. Five fact-finding surveys of a general nature were conducted in data transmission, the electricity industry, rolling stock, the High Speed railway system, and the distribution of liquefied petroleum gas for heating.

One particularly important area of work by the Authority has been its reporting and consultancy activities to Parliament and the Government under sections 21 and 22 of the Act, to identify statutory provisions, regulations and draft legislation that might impose unjustified restrictions on competition. In the course of 1995 and the first three months of 1996 the Authority submitted eleven reports and expressed twenty opinions to Parliament and the Government, aimed at promoting competition in a variety of different sectors.

Moreover, the Authority ruled on 358 reported cases of misleading advertising, finding 243 infringements of Legislative Decree No. 74/92.

Authority decisions (number of cases)

	January 1995	March 1996
Agreements	31	16
Abuse of a dominant position	31	12
Concentrations	282	96
Misleading advertising	244	114

* The original language of this report is English.

Competition advocacy: Authority reports and opinions to Parliament and the Government (January 1995-March 1996)

- *Sector*

Agriculture and manufacturing	2
Electricity and natural gas	3
Commercial distribution	2
Transport and allied services	7
Telecommunications	6
Brokerage	2
Public contracts	2
Professional services	3
Others	4
Total	**31**

Agricultural and food products

Agreement in the dairy industry

In 1995, the Authority concluded its investigation of Parmalat Spa and Consorzio Emiliano Romagnolo Produttori Latte, both of which operate directly or through their subsidiaries on the dairy and cheese markets, with significant market shares. Under the agreement concluded between these companies, Parmalat was to acquire 10 per cent of the equity of Granarolo Felsinea Spa (a subsidiary of Consorzio Emiliano) together with certain rights, including the appointment of its own representative to the Board of Directors of Granarolo. In a later phase the parties also proposed to conclude cooperation agreements involving their commercial activities. From the findings of the investigation the Authority dismissed the contention that the equity acquisition was a purely financial investment, and found that the parties intended to establish a stable and permanent co-ordination structure between them.

The two parties to the agreement account for a very substantial share of the national market for UHT milk and UHT cream and also the fresh milk market in Emilia Romagna. In view of the major position held by Parmalat and Consorzio Emiliano on the relevant markets, the agreement was deemed likely to substantially restrict competition, and was therefore ruled to be in violation of the prohibition provided by section 2 of the Antitrust Act.

Opinion on "protected denominations of origin"

In August 1995 the Authority expressed an opinion under section 22, noting a number of provisions which imposed unjustifiable restrictions on competition in a Government Bill providing "Measures governing protected denominations of origin, protected geographical indications and certification of specificity for agricultural and food products in implementation of Community law". In particular, this bill vested the consortia for the protection of "protected denominations of origin", "protected geographical indications" and "certification of specificity" with programming powers that enabled them to adopt such measures as the imposition of production quotas, likely to restrict competition between the companies producing the protected commodities. For the same reason, competition was likely to be distorted by the ancillary provisions in the bill vesting the National Committee for the Protection and Enhancement for Controlled Marks of Origin with the power to express an opinion on

production programmes and schedules, and requiring the Ministry of Agriculture, Food and Forests to approve these programmes.

In the opinion of the Authority, the quota system was not necessary for the purposes of enhancing and promoting the agricultural products for which the law was proposed. These were objectives that could easily be pursued using other instruments such as monitoring, controlling and supervising the quality of the protected commodities.

Petroleum products

Agreement on the market for the primary marketing of bitumen

In March 1993 the Raffineria di Roma Spa company took over from its shareholders Fina Italiana Spa, Monteshell Spa, Isab Spa the marketing of the bitumen it produced, and which had previously been marketed independently by each of these three companies. The relevant market taken by the Authority was the production and primary marketing of standard bitumen; in view of the high cost of transporting the product as a percentage of the end price, the geographical extension of the relevant market was taken to be central/southern Italy alone.

During the investigations it was found that the parties had concluded an agreement to lay down a uniform price for selling the bitumen to Raffineria di Roma and to spread the shares of each partner's sales according to a pre-established criterion. The Authority ruled that competition had been substantially restricted considering the combined share of the parties on the relevant market.

Pharmaceuticals

Opinion on generics

During 1995 the Authority submitted a report regarding measures to be adopted to encourage the dissemination throughout Italy of generic drugs. A generic drug is the imitation of an original once the original patent protection has expired. It can therefore be potentially manufactured by many different companies, at comparatively lower costs.

In Italy, however, statutory shortcomings have hampered the spread of generics and the consequent price benefits. Until EEC Regulation 1768/92 became operative in Italy, law No. 349/1991 had provided a considerably longer period of patent protection for certain specialist drugs than was the case in other European countries. Moreover, Italy did not have an adequate system to provide information on the expiry dates of patent protection for drugs.

To be able to substitute speciality drugs having the same therapeutic effects as a generic product, it is essential to have an appropriate legal framework to guaranteeing that the generic drug is fully interchangeable with the corresponding speciality drug which no longer enjoys patent protection. Without this statutory guarantee, it is difficult and risky for a physician to prescribe a generic drug and for the National Health Service to include it in the national pharmacopoeia. In this connection the Authority noted that the lack of any specific definition of a "generic drug" in Italian legislation created a major problem. It also emphasised that any generic drugs in a given class of treatment or products should be publicised so that they could be more easily marketed.

Furthermore, the average time required to register a drug in Italy is extremely long, and far exceeds the period laid down in the law (120 days). These delays hamper both the registration of new speciality drugs and generic drugs, or drugs whose active ingredient is already being marketed on the European or domestic market.

Lastly, before less costly drugs with the same therapeutic effects can be widely prescribed, the doctors and pharmacists must be given adequate incentive to recall the need to reduce public and private expenditure on drugs and medicines when prescribing them. At the present time, the fact that wholesalers and pharmacists earn a proportional margin on the final selling price makes it less attractive for them to sell a low-cost drug when an equivalent more expensive drug is also available.

Considering all these factors, the Authority stated in its opinion that when the regulation of the pharmaceuticals industry is overhauled, statutory provisions should be enacted to permit the generic drugs sector to develop more widely.

Report on the legislation governing blood derivatives

When laying down the qualifications by which the Ministry of Health must identify companies to be licensed for the fractionation of human plasma and the production of blood derivatives, Law No. 107/90 lays down conditions under which a company may not process plasma of national origin if it is unable to complete the full production cycle in Italy. The Authority pointed out that there seemed to be no technical justification for this restriction, and it did not guarantee any more stringent control over the processing of the plasma or make the end product any more reliable or enhance its safety.

Cement and concrete

The SIPAC agreements

These agreements were between Italy's three leading cement manufacturers (Italcementi Spa, Unicem Spa, and Cementir Spa, hereafter referred to as I-U-C), Italy's largest concrete manufacturer, Calcestruzzi Spa, and Società Italiana per le Promozioni e Applicazioni del Calcestruzzo Spa-Sipac. The latter company had been incorporated in 1987 by Calcestruzzi and subsidiaries of Italcementi and Unicem. Subsequently, Cementir and other cement manufacturers had previously acquired equity interests in the company. The role of the I-U-C cement manufacturers in the management of Sipac had been decisive, for they played an active part in the ordinary management of the company.

Following the incorporation of Sipac, the parties had concluded a number of agreements and contracts between them. The system for offering discounts to Calcestruzzi under the original agreement required the I-U-C cement manufacturers to exchange information on the best prices they were willing to apply in each area in which Calcestruzzi was to be supplied. Any competition by any one of the three cement manufacturers involving a reduction of the best price offered on the market had to be notified to Sipac and the other competitors.

The participation of other cement manufacturers indicated by I-U-C as suppliers to Calcestruzzi had extended the anti-competitive effects of the agreement, because since these manufacturers were also bound to comply with the rules regarding the supply of data to Sipac, they also contributed to this exchange of information. Other evidence that emerged during the investigation showed that the manufacturers that were permitted to supply Calcestruzzi through Sipac had agreed to apply the same pricing terms and conditions that were applied by I-U-C.

As far as Calcestruzzi's role was concerned, the Authority noted that the main reason for its acceptance of this agreement was that it guaranteed the company a lower buying price for cement than its competitors throughout the whole of Italy. It had also played a decisive role in facilitating the agreement between the cement-makers regarding sharing supplies and setting the prices for them.

In 1995 Sipac was wound up; the three cement manufacturers had simultaneously standardised the contractual terms set out in the bilateral contracts concluded between I-U-C and Calcestruzzi through mutual consultations and exchanges of correspondence. The Authority ruled that this conduct amounted to agreements that were likely to substantially distort competition on the cement and concrete markets.

Steel industry

Agreement between producers of steel pipes

In December 1995 the Authority completed its investigation into alleged anti-competitive behaviour by Italy's main manufacturers of coated steel welded pipe used for natural gas mains (Tubi Dalmine Ilva, General Side Italiana, Arvedi Tubi Acciaio). It resulted that these companies had concluded a number of agreements to divide up the market between them by establishing a sales quota for each company and to coordinate their pricing policies and other contractual terms and conditions. Between them, they accounted for more than 70 per cent of the market. In particular, they had pooled their information on sales in order to jointly control any deviations from the historic benchmark figures they had agreed upon. Information on meetings held at the headquarters of Federacciai the industry association at which the companies discussed their pricing policies and the new price lists for welded steel pipe to be used for pipelines, was of particular importance.

Concentration between Mannesmann and INNSE

In December 1995 the Authority began investigations into the merger under which Mannesmann Demag AG intended to acquire control of Innocenti Santeustacchio Spa (Innse), with particular reference to its effects on the market for the design, manufacture and marketing of seamless pipe rolling mills. In order to define the relevant market it was necessary to identify all the rolling technologies for the production of different types of seamless pipe which cannot be interchanged on the demand side. Accordingly, the relevant market for the product for the purposes of the inquiry was identified as the group of three technologies: Pilgrim Mill, Plug Mill and MPM, used for the design, manufacture and marketing of medium and high-range seamless pipe rolling mills. The geographical relevant market for the design and manufacture of seamless pipe rolling mills using the MPM, Plug Mill and Pilgrim Mill technologies is world-wide.

In the original form submitted to the Authority, the merger was alleged to have created a dominant position on the relevant market in such a way as to substantially restrict competition on a lasting basis. A number of elements conspired to this end: the absolutely paramount position that the new company resulting from the merger would have acquired over the relevant market; the fact that as a result of this operation Mannesmann had come into possession of the MPM technology developed by Innse, considered to be the most advanced and efficient technology for the production of medium-range seamless pipe; the excellent repute of Innse; the fact that as a result of the merger the relevant market leader and the company which had been the only one in recent years able to be competitive in the technologically more advanced segment of MPM became under the control of one and the same parent; and the many entry barriers that existed (excess capacity due to weak demand, the need for unrecoverable investment,

the decisive effect of a company's reputation) such that it was improbable that any potential competitors would be able to enter the market.

Following the points raised by the Authority, Mannesmann undertook a number of commitments which included removing the existing exclusive co-operation agreements between Innse and the Dalmine pipe manufacturer and the undertaking to permit the MPM technology to be used under licence for seven years for projects to be implemented with the European Union by a major mill manufacturer under the usual terms and conditions, enabling the licensee *(i)* to tender in the event of a demand for investment in MPM mills, *(ii)* to design and build a MPM mill if a contract were to be awarded, for a royalty of up to five per cent of the value of the supply contract payable to the Mannesmann Demag AG company.

The effects of the commitments undertaken by MD, especially in terms of lowering entry barriers, were such that the Authority found that the merger would not substantially reduce competition within the European Union to a lasting degree.

Electricity and gas production and distribution

Promotion of competition in the electricity sector

The Authority has emphasised on many occasions that the planned privatisation of the Italian State electricity corporation, ENEL, provides a major opportunity to reorganise the electricity industry along more competitive lines. In December 1995 the Authority expressed concern with the draft ENEL convention which the Minister of Industry had proposed. When setting out the risks connected with the adoption of regulations governing relations between the Ministry as the franchiser and ENEL as the franchisee on the eve of the reform of the whole industry, the Authority pointed out in particular that regulations governing the franchise must not hamper or condition the necessary competitive reform of the electricity industry. The Authority recalled, lastly, that any decision regarding the industrial arrangements within the electricity industry had to take account of Community law. It would be difficult for a vertically integrated electricity industry to encourage national and foreign competitors to enter the market.

Report on the distribution of natural gas for civil uses

This report related to a number of provisions of Presidential Decree No. 902/1986, introducing an unjustified disparity in the basic terms and conditions under which the "special corporations" (the former municipal companies) and private companies can accede to the gas distribution market. In particular the law provided that the special corporations operating in a municipality may distribute natural gas in another municipality on the mere basis of an agreement between the local authorities, whereas private companies may only operate in another municipality after tendering for the franchise for the service. The Authority found no justification for this difference of treatment, and expressed the hope that the rules would be changed to place potential tenders of the gas distribution service on the same footing.

Transportation services

Report on minimum tariffs for chauffeur-driven hired buses

In the Lazio region, municipalities are required to hire buses with a driver for the provision of school transport services, according to a 1992 Regional Law. Another Regional Law vested the regional government with powers to set minimum charges for hiring buses with a driver, acting on a proposal of

the most representative organisations of the vehicle hire market. The Authority highlighted the unjustifiable barriers to competition resulting from setting minimum administrative tariffs. Moreover, the regional legislation contrasted with the EC Directive 92/50, which made it compulsory to tender, or at all events compete, for contracts worth more than 200 000 Ecu, and identified two ways of adjudicating tenders, namely the criterion of the lowest price, or the most beneficial economic offer in cases where price was not the only issue at stake.

Report on the regulation of the taxi service

This report expressed the hope that some of the regulations and statutory provisions preventing competing taxi fares would be revised, where the existing ones placed artificial restrictions on the taxi service to the detriment of consumers. Recognising the importance of protecting the public when determining the quality and the quantity of the service, the Authority considered that there were good reasons why the administrative authorities should impose limits on maximum charges, make the service mandatory and set professional standards for taxi drivers, but that there was no justification, as far as protecting consumers was concerned, for the administrative control of minimum taxi fares.

The plan to reorganise the Finmare Group

In the opinion submitted to the Minister of Transport regarding the plan under which the IRI group shipping companies (Finmare group) would be sold off to Ferrovie dello Stato, which holds a dominant position in the railway industry, the Authority raised a number of doubts regarding the possibility of maintaining sufficient competition in the shipping industry. If the plan were to be implemented, the Authority felt that Ferrovie dello Stato should be required to comply with specific obligations regarding the commercial conditions applicable to railway customers in order to prevent discrimination against companies competing on the shipping markets. In its opinion it also emphasised the need to reform the whole system of government subsidies simultaneously with the assignment of the Finmare Group. For the services deemed non-essential the Authority reiterated the need for all further public subsidies and grants to cease immediately, because the well-established presence of private companies serving major national routes was proof that the market was now in a position to guarantee an adequate supply of services.

Moreover, putting in place appropriate procedures to provide access to essential minimum services in such a way as not to exclude private companies from providing them if they possessed the necessary technical requisites would have positive effects, because it could reduce the cost of subsidies to the whole community and increase competition in the industry.

Agreement between ferry service operators

The investigation concerned an agreement concluded by three companies that are the only ferry service operators across the Strait of Messina. The Authority ruled that the agreement which had been notified to it contained a number of clauses which were likely to substantially restrict competition on the relevant market, including provision for the joint setting of fares and the sharing of profits. There did not seem to be adequate justification for these clauses in terms of the declared aim of that agreement, which was to reduce traffic congestion towards the Strait of Messina.

Abuse of dominant position in the harbour services industry

The Nuova Italiana Coke company had reported the "Provveditorato for the Venezia harbour" to the Authority for having refused to give permission for ships to dock at its own quays, thereby obliging

the company to use the quays which the Provveditorato itself managed, and to use the services of the personnel of the Provveditorato and the local harbour company. Nuova Italiana Coke also reported that the Provveditorato had rejected the application by the company, and two other companies, for authorisation to carry out their own harbour activities.

First of all, the Authority pointed out that even though the Provveditorato was a public agency responsible for regulating Venice harbour, it had been engaged in economic activities directly and through subsidiary companies following the enactment of Law No. 84/94, and could therefore be considered to be an "undertaking" within the meaning of the Anti-Trust Act. It therefore held a dominant position on the market for harbour operations within the port of Venezia-Porto Marghera in view of its market share and the prerogatives vested in it by law as a regulatory body with authority over Venice harbour, such that it was able to impede or restrict access to the market.

The refusal by the Provveditorato to authorise ships to put into shore at quays managed by Nuova Italiana Coke was deemed to be an abuse of dominant position because it had led to an unjustified restriction on that company's activities to the benefit of the harbour activities performed and provided by the Provveditorato itself. Similarly, the Authority considered that the Provveditorato had abused its position by rejecting the request for authorisation to provide harbour services, and by imposing unjustified restrictions on companies already operating in that market, because these measures were likely to prevent entry to the harbour operations market for commercial traffic by competing companies.

Statutory changes and action by the Authority in the airport sector

Law No. 351/1995 providing urgent measures regarding airport management was also the subject of a report by the Authority during its passage through Parliament. The main criticisms raised by the Authority related to the fact that each airport would be given over to one single operating company. The lack of a distinction between infrastructure management and service providers might facilitate abusive behaviour to perpetuate or extend dominant positions by placing obstacles to access to the infrastructure needed to provide the services.

Agreements between driving schools

The investigation firstly examined a joint notification by two national driving school associations, Unasca and Federtaai, of the prices which their member driving schools were supposed to charge for services to private driving test candidates. The investigation showed that Unasca and Federtaai had not only invited the driving school members to align their prices to the level indicated, but they had also urged them to try to keep down the number of candidates taking the test privately without attending lessons given by the schools.

It was also noted that the price level suggested by Unasca and Federtaai had not only been notified to their membership but had also been publicised in a press release. This meant that even non-members of the two associations were aware of this instruction, spreading the possible anti-competitive effects of the agreement. This conduct was found in violation of section 2 of the Act.

Report on the regional laws governing travel and tourism agencies

In June 1995, the Authority reported a number of potential barriers to competition stemming from the regional regulations governing administrative permits for travel and tourism agencies. The Framework Tourism Act No. 217/1983 introduced a system of permits for travel agents. Many Regions had introduced a structural type of regulation for the market which was not provided by the national Act

No. 217/1983. Most of the regional laws provided that when considering a request for a permit, authorities should not only ascertain compliance with the provisions of the Framework Act but also the compatibility of opening a new sales outlet for the services in question with a plan adopted by the local government indicating the maximum increase in the number of agencies. Some regional legislation also provided that these plans should set the minimum distances between travel agencies.

The Authority pointed out that there was no connection between restricting the number of travel agencies, the choice of siting the agencies, and protecting the consumer public.

Telecommunications

Developments in national legislation and competition

In 1995 the EC directive 90/388 was incorporated, after a long delay, into Italian law. The particularly important provisions of the Legislative Decree incorporating the directive, DL No. 103/95, include those governing the liberalisation of all telecommunications services through switched links or directly routed through the public network, except for voice telephony and the other services that were excluded from the original version of directive No. 90/388.

The development of the telecommunications markets last year was marked by the entry of the second cellular telephone provider, Omnitel Pronto Italia, which was awarded a 15-year franchise for the public GSM service to compete against the Telecom Italia Mobile Spa company which is controlled by the STET Spa company.

Opinions on proposed regulations concerning telecommunications

In December 1995 the Authority submitted an opinion on a Bill on the organisation of the telecommunications industry, drawing the legislators' attention to the Bill s shortcomings regarding the liberalisation of alternative networks. For the Bill, which following the Authority intervention was withdrawn, not only would not allow Telecom Italia to use alternative networks, but also maintained the prohibitions set by previous legislation on the use of these networks by Telecom's potential competitors. Furthermore, on the subject of the installation of new cable networks, Telecom Italia was permitted to cable the territory at its discretion under an agreement with the Ministry of Posts and Telecommunications dating back to 1984, while any new market entrants required a license, with a ceiling on the number of licenses available, not to exceed a total of five million users altogether.

The Authority stressed that ceilings on the number of subscribers would prevent any new entrants from gradually cabling the country to keep pace with the increase in demand. In order to encourage the development of true competition on the transmission capacity market, it expressed the hope that, subject to a simple system of permits, free access to new network providers would be ensured. The Authority also deemed it urgently necessary to derestrict the commercial use of alternative networks currently owned by public service companies, in order to make it possible for different providers to compete with the public carrier by offering a sufficiently widespread system of transmission lines throughout the country. Furthermore, to make the development and establishment of telecommunications networks economically viable by exploiting economies of scale resulting from supplying a variety of television and telecommunications services on one and the same network, the Authority considered it appropriate to bring forward by one year the liberalisation of telephone services required by Community directives to start by 1st January 1998. Lastly, considering the substantial competitive advantages enjoyed

by the present statutory monopoly-holder, the Authority expressed the hope that Parliament would confirm the ban on the use by Telecom Italia of alternative networks.

It also emphasised the need to set up procedures to guarantee the new providers, on a fair and non-discriminatory basis, access and links to the present statutory monopoly-holder's network, and stressed the need to define the scope of universal service obligations taking account of the fact that technological development altered this notion in the course of time, narrowing it or broadening it depending upon the features of the market and the state of competition. The Bill, because of the renewal of Parliament, was not thoroughly analysed and was not enacted.

Opinion on the proposed revision of telephone tariffs

In January 1996 the Authority submitted an opinion regarding the plan to revise telephone tariffs announced by the Ministry of Posts. The Authority reiterated the need for the revised tariffs to take account of the effects of the tariff structure on competition in order to avoid imposing unjustified burdens on the users of monopoly services and to prevent the use of income from monopoly services being used to shore up the position of the company enjoying a dominant position in the provision of competing services.

Report on subsidised press tariffs

In November 1995 the Authority reported a distortion of competition due to a number of statutory provisions under which publishing and radio companies were charged specially reduced tariffs for different types of telecommunications services. These reductions were granted by the service-providing franchisees to which the Ministry of Posts and Telecommunications subsequently refunded the difference between the standard tariffs and the subsidised tariffs.

These regulations had been issued at a time when the telecommunications services was supplied under a statutory State monopoly. The provision that only entitled the public franchisee to a refund in respect of subsidised tariffs charged to publishing and radio companies hampered the development of genuine competition between the public carrier and the private providers of the liberalised telecommunications services.

Report on the statutory rules and regulations regarding telecommunications via satellite

In order to open up the satellite communications networks to real competition and thereby encourage competition on the telecommunications services market, in January 1996 the Authority reported the need for a number of liberalisation and de-regulation measures in the satellite communications sector under Community directives already issued but still waiting to be received into Italian law and enforced in Italy.

The Authority considered that the entrepreneurial functions (supplying transmission capacity and providing services) should be separated as soon as possible from regulatory functions within the inter-governmental organisations, removing Telecom Italia's direct and indirect powers to decide on the satellite transmission capacity provided by Intelsat, Eutelsat and Inmarsat; these responsibilities should be vested in some other authority (the Ministry or a an industry regulator) to work in the interests of the market and consumers, acting as the new signatory of these organisations.

Moreover, the Authority considered that it was appropriate for the government to ensure that measures were adopted in the appropriate international fora to reform the treaties and the operating agreements governing these organisations to eliminate both the sole rights to have direct access to the

space segment which the signatories of the inter-governmental organisations enjoy, and to remove the institutional barriers to unfettered access to the transmission capacity market which is closely controlled by the signatories of these organisations. In the view of the Authority, it was high time for the government to promptly issue the Legislative Decree implementing directive 46/94 EEC, to immediately liberalise the equipment market, including earth stations connected to the switched public network, and the services market, particularly the market for satellite transmission capacity.

With reference to satellite broadcasting services, the Authority pointed out that the dissemination of direct broadcast television services is limited to a very great extent by the difficulty in gaining access to the space segment and by an incomplete and unjustifiably restrictive legislative framework. It was therefore appropriate for satellite broadcasting legislation to be re-examined by Parliament.

Abuse on the markets for services based on telephone subscriber information

In April 1995, the Authority found an abuse of dominant position on the part of the Telecom Italia and Seat Divisione Stet companies to the detriment of other companies supplying products and services based on telephone subscriber information. Obtaining information on telephone subscribers (name, address and where indicated the professional or economic activity of the subscriber) is a fundamental condition for being able to operate on the commercial year-book market (Yellow Pages) or in direct marketing and the off-line and on-line telephone subscriber information market. Exclusive possession of such information enabled Telecom and Seat to acquire a dominant position on most of the markets using subscriber information. Postal legislation requires Telecom to gather information on its subscribers when the telephone service contract is concluded in order to produce local telephone directories (the white pages); Seat is required to use the information supplied by Telecom to produce a general list of all Italian subscribers, which it has never yet published.

During the investigations, it emerged that Telecom and Seat had acted according to a single strategy designed to preserve and extend the dominant position of the Stet group, to which both belong, over all the information services based on the use of subscriber data, and therefore refused to make that data available to other companies requesting it, preventing or restricting its production, outlets or market access and technological progress to the detriment of consumers. Since it considered this conduct to be an abuse of a dominant position, the Authority ordered Telecom and Seat to immediately refrain from committing further such infringements of the law, and to provide data on subscribers on equitable and non-discriminatory conditions to any companies requesting it.

Abuse on the private switching systems installation and maintenance markets

In May 1995 the Authority ascertained an abuse of dominant position by Telecom Italia on the private switching systems installation and maintenance markets. The Authority ascertained that Telecom Italia had applied reductions on the advances due from subscribers for long-distance calls when selling liberalised services and products. These reductions could only be applied by the public network carrier, and could lead purchasers of equipment to prefer Telecom Italia's offering over that of private installers. The Authority also considered that it was restrictive of competition for Telecom to oblige its installers not to compete with it when selling, installing or maintaining facilities for clients supplied by Telecom, or those with whom commercial negotiations were continuing. This prevented these operators not only from working independently on the installation market, but also from acceding to the market for the maintenance and sale of equipment. The Authority also considered that the present form of the telephone bill was a possible abuse of dominant position, by not making it possible to distinguish between payments

for statutory monopoly services and services provided under competition (equipment, hire and maintenance). Failure to make this distinction enabled Telecom Italia to use instruments for recovering credit that other operators were unable to use, such as the suspension of telephone service.

Insurance and pension services

Opinion on the provision by INPS of administrative services for pension funds

At the request of INPS, the largest provider of services in the public pensions industry in Italy, in October 1995 the Authority expressed an opinion under section 22 of the Act relating to a "draft regulation for the provision by INPS of administrative services under contract for the management of supplementary pension funds", drawn up by the Board of Directors of INPS. Considering that INPS operates simultaneously in the statutory pensions and supplementary pensions industries, the Authority emphasised the need for the management of these activities to be carried out according to principles of accounting transparency, ensuring that costs and profits are clearly identified thanks to the use of an effective separate accounting system.

A number of criteria were also laid down for compliance by INPS consistently with the principles of protecting competition when providing administrative services to the pension funds. First of all, the conclusion of agreements with the funds should not be such that INPS could discriminate between different customers, for example by applying different conditions, depending upon the identity of the party managing the financial resources of the fund. Similarly, any agreements with other operators for the joint supply of administrative and financial services should not contain any provisions that would discriminate against other operators or against the pension funds.

The Authority would at all events appraise the Anti-Trust law conformity of any individual agreements concluded by INPS for the supply of administrative and accounting services to pension funds, on a case by case basis, to ensure that they are in compliance with the principles of the sound operation of the market.

Agreement on the market for insurance of small aeronautical risks

In April 1995, following complaints from the Aeroclub di Roma and the Aircraft Owners and Pilots Association Italy, the Authority began an investigation into alleged infringements of section 2 of the Act by Consorzio Italiano di Assicurazioni Aeronautiche-CIAA, to which virtually all the insurance companies working in the aeronautical risks branch of insurance belong.

The conduct that had been complained about mainly related to the market for small aeronautical risks. During the investigation it was found that CIAA distributed a tariff list to the participating companies, so that insurance policies could be coordinated in terms both of the premiums charged and the contractual terms and conditions. For risks not included in this list of tariffs, CIAA indicated identical quotations to companies, thereby further facilitating the co-ordination of the offering. The companies belonging to the consortium also made substantial discounts provided that the customer bought all the aeronautical policies from companies belonging to the consortium.

Lastly, the Authority examined the conditions under which small aeronautical risks were reinsured. The companies belonging to CIAA assigned aeronautical risks which they had underwritten to the consortium, which then reinsured them. During the investigation it emerged that the retrocession quota of the various companies were calculated using fixed amounts, with a different distribution from the one

which would have resulted by calculating the retrocession quota on the basis of premiums actually paid to them. The distribution of the profits of the consortium to the participating insurance companies was also affected by this difference of relative positions occupied by the different companies.

When assessing the conduct through CIAA, the Authority observed that none of this formed part of any category-based exemption referred to in Regulation No. 3932/92/EEC on co-operation between insurance companies. It pointed out in particular that the application of the Regulation to co-insurance and co-reinsurance consortia was conditional upon the fact that the participating companies did not possess overall a market quota in excess of 10 per cent or 15 per cent depending upon the type of risk covered, and this condition was certainly not met by the CIAA member companies. The Authority deemed the conduct of the CIAA to be in violation of section 2 of the Act because its purpose and effect was to substantially restrict competition on the national small aeronautical risks market.

Professional services

Opinion on the legislation relating to tax consultants

In June 1995 the Authority issued an opinion regarding the distortive effect on competition of a number of provisions contained in Decree Law No. 132/1995. This Decree Law provided particular tax benefits for taxpayers who submitted their returns stamped with a certificate of purely formal conformity, evidencing the fact that all the data set out in the tax return was in accordance with the accounting records. The measure provided that the categories authorised to issue this clearance stamp were only accountants, bookkeepers and labour consultants which were members of professional associations.

The Authority pointed out that membership of a professional association cannot in itself be considered an indispensable condition for the provision of an adequate professional service with regard to tax consultancy activities and issuing a clearance stamp attesting conformity. The Authority pointed out that the service of appending the conformity clearance stamp should be supplied by the largest possible number of qualified professionals willing to take on the responsibility for so doing. It hoped that a system for selecting persons based on the possession of professional qualifications would be introduced. In order to encourage only those offering sufficient guarantees of professionalism to enter the market, the Authority suggested that it was appropriate to introduce procedures to facilitate the "self-selection" of operators, such as laying down fines for tax consultants committing any irregularities on the tax returns stamped by them.

Broadcasting

Exclusive assignment of broadcasting rights

The Authority expressed an opinion to the Broadcasting Authority regarding the exclusive assignment to Telepiù 2, which manages thematic pay-TV services, of television broadcasting rights for all the world motorcycling and Super Bike championships for the years 1992-96 by Dorna and TWP, which had acquired them from the International Motor-cycling Federation, to which the Italian Motorcycling Federation belonged. The latter, which had reported the fact, also alleged an abuse of dominant position by Telepiù 2 consisting in the encoded broadcasting of the competitions for which it had acquired television rights. The complaint was that this reduced the sponsorships of the motorcycling sports teams because of the smaller public able to receive encoded broadcasts, and hence limited the possibility to develop the motor cycling sport. With regard to the exclusive acquisition by Telepiù 2 of

television broadcasting rights for motorcycling competitions, the Authority felt that the non-availability of this product for broadcasters other than the exclusive assignee of these rights, including for the whole period 1992-1996, was not a substantial obstacle to entry to the television services market.

With regard to alleged abuse of dominant position, the Authority felt that the violation did not exist because assigning rights to Telepiù 2 was the result of a free negotiation between the parties to the agreement, and was not constrained by any previous undertakings to exclude the encoded broadcasting of sports events.

Recreation activities

Abuse of a dominant position in the management of copyrights for music works

In July 1995 the Authority concluded an investigation into Società Italiana Autori e Editori-SIAE relating to alleged abusive behaviour on the market for the mediation and management of copyright over the musical works, with specific reference to public performances on the occasion of entertainment with dancing. The behaviour it analysed, which was brought to the attention of the Authority by two associations of ballroom managers (Sindacato Italiano Locali da Ballo-SILB and Federazione Italiana Esercenti Pubblici e Turistici-FIEPET) consisted in the imposition by SIAE of tariffs for the use of musical works in ballrooms substantially higher than those charged in other member states of the European Union, and also unjustified differences in the fees payable for the public broadcasting of musical works in ballrooms, depending upon the professional association to which the management of the ballrooms belong.

Law No. 633 of 22nd April 1941 provided that copyright in Italy would be handled exclusively by SIAE. By stipulating mutual representation contracts with authors' societies in other countries, SIAE played the same functions for foreign repertoires on Italian territory, authorising the use of works and collecting the fees due by way of royalties. In view of the present statutory framework and the agreements of mutual representation with copyright entities in other countries, SIAE held a dominant position on the market of copyright management and intermediation services for musical works for entertainment with dancing throughout Italy.

The Authority found that even though the overall amount of the money collected by SIAE seemed to put Italy at a very high level of copyright protection than other European countries, not all the authors of the musical works that were performed in ballrooms were given adequate protection. In particular for recorded music, which represented almost 60 per cent of the dance music played, SIAE considered that the musical programmes handed in by the ballroom managers were not reliable and used breakdown criteria which only reflected the actual performances to a very small degree. Only 15 per cent of the royalties collected net of commission were in fact attributed on the basis of a sample of actual performances using recorded music in dance halls; the remaining 85 per cent was shared out using indirect criteria relating to other uses (dances with live music, concerts, revenues for mechanical recordings using disks) which were not necessarily correlated to the performance of music for dancing using mechanical facilities. The criteria adopted by SIAE to share out the overall revenues from the persons entitled to them therefore unjustifiably favoured some authors over others. The Authority ruled that the conduct of SIAE, by not guaranteeing a fair distribution of revenues to those entitled to them and thereby imposing unjustifiably high tariffs imposed on ballroom managers, was in violation of section 3 of the Act. Following the intervention of the Authority, SIAE resolved to change the criteria for sharing out royalty revenues, introducing a substantial improvement in the protection granted to authors.

With regard to the differing fees charged by SIAE to ballroom owners depending upon the professional category to which they belonged (fees which were charged at the maximum rate if they did not belong to a professional association and with reductions depending upon the size of their associations), the Authority pointed out that the amount of co-operation provided by the associations did not seem to be proportional to the number of members in each association, and therefore the different contractual terms applied to ballroom managers was unjustified and in violation of section 3 of the Act.

Abuse on the horse racing betting market

Unire is an entity which was given the sole rights to manage horse racing betting under Law No. 315/1942, both on and off the race course. Unire is empowered to manage betting either directly or through other natural or legal persons. According to the complainants, in March 1993 Unire is alleged to have failed to appraise the offer submitted by SNAI Servizi to be admitted to the private tender that Unire was supposed to have called to award contracts for betting on the Totalizzatore Interurbano Unire (TIU) collected at betting shops throughout Italy to be paid to the tote of the race course on which the bet was placed. On 1 April 1993 the Unire board resolved to renew the franchise tom Spati Srl to taking these bets until the year 2001 under a private negotiation without taking any account of the bid put forward by SNAI Servizi.

The Authority considered that even if under Law No. 315/42 Unire had been empowered to directly manage betting itself, as soon as it decided to waive that possibility by delegating to third parties, it should not have failed in its obligation to avoid discrimination which is incumbent on all entities having a dominant market position. The Authority ruled that the exclusion of a competitor that had presented a genuine bid within the stipulated deadlines to perform this service, and the fact that that bid had never been entertained, as well as resorting to private negotiations in order to favour a particular bidder, constituted an abuse of dominant position.

JAPAN*

(1995)

Summary

The summary of the activities undertaken by the Fair Trade Commission in 1995 is as follows:

For the purpose of enabling even more vigorous implementation of competition policy, the Government of Japan sent a Bill to the Diet to amend the Antimonopoly Act so as to strengthen the organisational structure as well as the functioning of the Fair Trade Commission.

Activities that violate the Antimonopoly Act were strictly dealt with. Legal measures were taken in 25 cases of price-fixing cartels, bid-rigging and other illegal acts. In addition, warnings were given in 13 cases. There were 30 cases of price-fixing cartels and bid-rigging in which the businesses concerned were ordered to make total surcharge payments of 6 952 100 000 yen. Criminal accusations were filed with the Public Prosecutor General regarding bid-riggings in tenders for electrical facilities contracts commissioned by the Japan Sewage Works Agency.

"The Antimonopoly Act Guidelines Concerning the Activities of Trade Associations" were fully revised and released for the purpose of preventing violations of the Antimonopoly Act by trade associations and of assisting them in carrying out appropriate activities.

Ministries and agencies concerned have been urged to actively review exemptions to the Anti-monopoly Act.

The FTC worked with other governmental ministries and agencies through such fora as liaison officers' meetings, encouraging them to review the Antimonopoly Act exemption clauses in the laws under their jurisdiction, with a view to abolishing such systems, in principle by the end of FY 1995.

With regard to the exemption systems concerning the prohibition of resale price maintenance applied to items designated by the FTC, the FTC announced in March 1992 its policy on reviewing such exemptions, based on which exemptions granted to certain types of cosmetics and over-the-counter medicines have been revoked step by step. With regard to the remaining items, required procedures will be taken so that all such exemptions will be eliminated by the end of March 1998. Concerning copyrighted works for which resale price maintenance prohibition is exempted by the Antimonopoly Act itself, the scope of such works will be redefined and clarified by the end of March 1998.

Under regulations set forth in Sections 15 and 16 of the Antimonopoly Act, prior notifications of mergers and acquisitions are required to be submitted to the FTC. In 1995, 2 262 merger notices and 1 426 acquisition notices were submitted.

* The original language of this report is English

With regard to government regulations, study groups consisting of people with expertise or academic standing were organised. These groups carried out studies, from the standpoint of competition policy, on appropriate ways of reforming government regulations in the fields of commodity distribution and telecommunications. They publicised reports on the current condition of, and problems concerning, government regulations in these fields.

Regarding studies on business activities and the current economic situation from a competition policy perspective, transactions between enterprises in the fields of "earthwork equipment" and "rolled aluminium products" were taken up as subjects of such studies. Furthermore, surveys were conducted on transactions between large-scale retailers and their suppliers as well as on the credit card industry. The results of all such cases have been publicised.

To ensure proper subcontracting transactions as well as to protect the interests of subcontractors, 1 509 parent companies which had been conducting illegal activities, such as unilateral reduction of subcontracting charges, were given warnings and measures were taken to make these companies return the differences to their subcontractors.

Under the Premiums and Representations Act, the FTC worked to prevent the obstruction of informed choices of products by consumers by eliminating misrepresentations and other such activities. In 1995, the FTC handed down three cease-and-desist orders as well as 578 warnings in this area.

Furthermore, to revise and clarify regulations on premiums, the FTC's notifications relating to general regulations on premiums were revised. The revisions are to be implemented from 1 April 1996.

Regarding technical co-operation with other countries, the FTC accepted officials from competition authorities of Asian and Eastern European countries as well as from the Russian Federation in 1995. Lectures on the Japanese Antimonopoly Act as well as discussions on cases reported by the participants were conducted during these sessions.

The "Osaka Action Agenda", adopted at the APEC Economic Leaders' Meeting of November 1995, includes the implementation of technical assistance, promotion of dialogue and encouragement of co-operation. The FTC will engage in work, such as technical co-operation in APEC, in line with this Action Agenda.

This annual report summarises the developments in Japanese competition policy for the 1995 calendar year, and also includes some developments occurring in early 1996.

I. Changes in Competition Laws and Policies Adopted or Envisaged

The "Deregulation Action Programme", approved at the Cabinet Meeting in March 1995 proclaims that, in order to make the Japanese market more competitive and open by further promoting fair and free competition in Japan, competition policies, as well as deregulation, will continue to be actively pursued.

Summary of New Provisions in Competition Laws and Related Legislation

Japanese competition policy is based upon the Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (Act No.54 of 1947, hereafter referred to as "the Antimonopoly Act" or

"AMA") along with two other supplementary Acts: the Act Against Delay in Payment of Subcontract Proceeds, etc., to Subcontractors (Act No.120 of 1956, hereafter referred to as "the Subcontract Act"); and the Act Against Unjustifiable Premiums and Misleading Representations (Act No.134 of 1962, hereafter referred to as "the Premiums and Representations Act"). Of these Acts, within the reporting period, the Antimonopoly Act is in the process of undergoing certain revisions. The main contents of the revision plan are as follows:

To strengthen the executive office structure, the current Executive Office (*jimukyoku*) of the Fair Trade Commission (FTC) will be replaced by a General Executive Office (*jinusokyoku*). This office will house a secretariat and two bureaux. Furthermore, to gain a wider pool of personnel, the retirement age for the Chairman and the commissioners of the FTC will be raised from the current age of 65 years to 70 years.

Strengthening Deterrence, Power of Enforcement and Other Related Measures

Rigorous Actions Against Violations of the Antimonopoly Act and Measures to Enhance

Deterrence

The strict enforcement of the Antimonopoly Act is fundamental in promoting fair and free competition. To this end, the FTC has always dealt rigorously with price-fixing cartels, bid-rigging, resale price maintenance, obstruction of parallel imports, and other acts which violate the Antimonopoly Act. The FTC also vigorously investigates violations in such areas as commodity distribution, services and government-regulated industries.

The FTC, to strengthen deterrence against actions that violate the Antimonopoly Act and to heighten powers of enforcement against illegal acts, undertook the following activities in 1995:

Expanding and enhancing the investigative organisation of the FTC

To strengthen detection and investigation mechanisms against acts that violate the Antimonopoly Act, the Government has proposed a 1996 draft budget which allocates funds to establish an Investigation Bureau as well as a Special Investigation Department within the Bureau. Funds are also allocated for the addition of investigation divisions in the regional offices (two units). The number of staff dealing with investigations will be increased from 220 in FY 1995 to 236 in FY 1996. It is noteworthy that the FTC, and in particular its investigation department, has continued to expand annually, both in terms of personnel and organisational structure, despite a general down-sizing of governmental organisations under various administrative and fiscal reforms. The prescribed number of investigation department personnel will have increased by 82.9 per cent in seven years, from 129 in fiscal year 1989 to the above-mentioned 236 in fiscal year 1996.

Publication of legal measures

In order to ensure transparency, enhance the deterrent effect and prevent other similar illegal activities, the contents of all formal legal measures, such as recommendations and surcharge payment orders, including the names of the offenders, the nature of the offence and the circumstances surrounding it, are made public. Warnings have also been made public in the same way as for legal measures, barring exceptional circumstances.

Ensuring the Transparency of Law Enforcement and the Prevention of Illegal Acts

Formulation of guidelines

For strict and effective enforcement of the Antimonopoly Act, it is imperative that the purpose and the content 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 activities. From this point of view, the FTC, in addition to ensuring the strict enforcement of the Antimonopoly Act, has also formulated and published related guidelines.

The opinions of as wide a spectrum as feasible of related agencies, firms, associations and other parties have been sought regarding the original draft of the guidelines. In addition to the prior consultation system provided for by some of these guidelines, the FTC responds appropriately to other requests for individual consultation by firms, etc. In 1995, the FTC published "Precedent for Consultations on Unfair Trade Practices" and "Major Cases of Corporate Combination, Fiscal Year 1994".

During the term of this Report, in order to prevent trade associations from actions that violate the Antimonopoly Act and to assist them in continuing their proper activities, the "Antimonopoly Act Guidelines Concerning the Activities of Trade Associations" were completely revised and made public on 30 October 1995.

Support for the development of Antimonopoly Act compliance programmes

Triggered by such occurrences as the publication of the "Antimonopoly Act Guidelines Concerning Distribution Systems and Business Practices" (July 1995), interest in developing Antimonopoly Act compliance programmes has been increasing. A growing number of firms has initiated the compilation and implementation of Antimonopoly Act compliance manuals. The FTC has been providing active support and assistance to voluntary attempts by firms and others regarding the development of compliance programmes.

Measures Addressing Bid-rigging

Active elimination of Antimonopoly Act violations

The FTC is making every effort to eliminate bid-rigging. Of the 25 cases of legal measures taken in 1995, 14 were related to bid-rigging and the Commission will continue to deal strictly with this practice.

Establishment of co-operative relations with commissioning government entities

To develop a liaison system with commissioning government entities, the FTC convened a third Meeting of Liaison Officers with the Commission to Discuss Public Bidding in September 1995. In addition, at the regional block level, 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. The Commission also provided active support for educational sessions regarding the Antimonopoly Act and other similar acts 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 Passing On of the Benefits of the Strong Yen to Customers

As one of the factors in the price differentials between domestic and overseas markets, non-competitive formation of prices for products and services through government regulation and/or anti-competitive distribution and trading practices is a problem to be dealt with from the perspective of competition policy.

If, as a factor in the price differentials between domestic and overseas markets, there are acts that violate the Antimonopoly Act by impeding fair and free competition, it is important that these acts be eliminated through the strict enforcement of the Antimonopoly Act. It is also important to expand the areas in which market mechanisms effectively function, through the use of means such as a review of government regulations.

With these factors in mind, the Fair Trade Commission will address the issue of price differentials through such means as the application of strict measures against acts that violate the Antimonopoly Act, effective law enforcement, implementation of surveys on the current state of distribution and trade practices, and reviews of both the government regulation system and systems which allow exceptions to the Antimonopoly Act.

To further strengthen its activities concerning conduct restricting imports that violates the Antimonopoly Act (including import-restricting cartels and group boycotts of import goods) and other violations of the Act which would invite price differentials between domestic and overseas markets (price-fixing cartels and resale price maintenance related to merchandise with large price differentials between the domestic and overseas markets, unreasonable obstructions of parallel imports, etc.), the FTC decided to establish a task force in March 1995. The mandate of the task force is to focus on such issues as import restrictions and price differentials between domestic and overseas markets. The task force deals with cases such as the one in which retailers of natural gas for automobiles in Kochi City raised the prices of natural gas by forming a cartel and another in which wholesalers of propane gas in Kochi Prefecture increased the wholesale price of propane gas through a cartel. The FTC issued decisions on these cases on 21 November 1995. The FTC will further utilise this task force to eliminate violations of the Antimonopoly Act in these areas.

The FTC conducted surveys on consumer goods to gain an understanding of the factors which facilitate or impede lower retail prices, and published the results in June 1995 (see Appendix). Furthermore, the FTC is conducting a survey on the distribution structure and trade practices related to house construction and housing materials and equipment. This survey is being conducted from a perspective of competition policy to gain an understanding of the current situation regarding the presence or absence of anticompetitive trade practices, including those which lead to the factors of price differentials between domestic and overseas markets.

II. Enforcement of Competition Law and Policies

Measures Taken Against Violations

Investigations

In 1995, the FTC investigated a total of 208 cases of alleged violations of the Antimonopoly Act. Of these, 84 were brought forward from the preceding year, while 124 were initiated in the period covered

in this report. The FTC concluded 130 of these cases, and the remaining 78 cases were carried over to 1996.

Contents of Legal Measures

Among the 130 cases completed, 25 cases resulted in formal actions (20 cases by recommendation and five cases by surcharge payment order without recommendation) where orders were given to cease and desist illegal practices, and warnings were given in 13 cases in which violations were suspected but not substantiated.

Legal Measures

The details of the violations for the 25 cases in which legal measures were taken are the following: 14 cases of bid-rigging; four cases of price cartels (excluding bid-rigging); one case of another type of cartel; four cases of unfair trade practices; and two other cases. Of the legal measures taken, five were applied against 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:

i) pertains to the prices of goods or services; or,

ii) affects prices by substantially restricting the supply of goods and services.

The amount of the surcharge is determined by multiplying the sales turnover relating to the goods or service under the cartel during the operative period of the cartel by a certain percentage. In 1995, the FTC ordered 849 enterprises involved in 30 cartels and bid-rigging cases to pay a total of 6 952 100 000 yen in surcharges.

Criminal accusations

In June 1990, the FTC announced its adoption of a policy to bring actions to seek criminal penalties against violations that substantially restrain competition in a particular field of trade, such as price cartels, supply restricting cartels, market allocation agreements, bid-rigging, and boycotts which:

i) constitute serious violations that are likely to have widespread influence on people's lives; or

ii) involve firms or industries that are repeat offenders, or that do not abide by the measures to eliminate the violation, and where the administrative measures of the FTC are not considered to fulfil the requirements 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 that had committed bid-rigging to ensure that a particular company would be given the order in the installation of electrical equipment commissioned by the Japan Sewage Works Agency. The FTC judged that the case constituted a crime

violating Section 3 of the Antimonopoly Act (which prohibits the unreasonable restraint of trade). Furthermore, on 7 June of the same year, the FTC filed further accusations with the Prosecutor General with regard to 17 persons who worked in the order department of the aforementioned companies, as well as one person who was engaged in ordering work in the Japan Sewage Works Agency. (The Tokyo High Public Prosecutor's Office indicted them on 15 June. The case is currently being tried).

Hearing procedures

In 1995, the FTC initiated hearing procedures under the Antimonopoly Act in a total of four cases. These included a surcharge payment order case relating to an agreement to uniformly raise the price of paints and paint-thinners used in ship painting, a surcharge payment order to companies that sought to rig the bidding of large colour display equipment, a case of restrictions on resale prices for cosmetics, and a case of refrigerated storage rate increases.

In 1995, the FTC handed down a decision in a case regarding rate fixing by a trade association of rental bus fares. The FTC also issued a consent decision in a case (with regard to restrictions on the resale prices of cosmetics) which has been under hearing procedures. As of the end of December 1995, a total of 13 cases of suspected violations of the Antimonopoly Act were going through hearing procedures.

Major Cases

Major cases on which the FTC took legal measures during 1995 are as follows:

Case against suppliers of equipment and materials for Official Development Assistance (ODA)

The FTC found that Kanematsu Corporation and 36 other companies had colluded to designate which company would be given the tender for equipment and materials used to implement technical co-operation, etc., that were ordered through a bidding process among nominated participants by the Japan International Co-operation Agency (JICA). Since this type of collusion violates Section 3 of the Antimonopoly Act (prohibition of unreasonable restraint of trade), a recommendation was given on 27 March 1995. (A recommendation decision was rendered on 24 April).

Case against large-screen colour display equipment manufacturers and suppliers

The FTC found that Matsushita Electric Industry Co., Ltd., and two others (major manufacturers of electrical appliances), colluded to designate the company to be given the tender for large-screen colour display equipment that had been ordered by government and municipal offices. Since this type of collusion violates Section 3 of the Antimonopoly Act (prohibition of unreasonable restraint of trade), a surcharge payment order was given on 28 March 1995. (Sony Corporation requested a hearing procedure, and the procedure began on 16 May 1995); the process is ongoing.

Case against Shiseido Co., Ltd.

The FTC found that Shiseido Co., Ltd., Japan's largest cosmetics manufacturer:

i) supplied cosmetic products that are outside the resale price maintenance exemption system to major retailers (who had planned a reduction of prices on these items) with the conditions that Shiseido set the resale price and the retailers maintain it; and

ii) supplied products that are subject to the resale price maintenance exemption system to consumer co-operatives (to which the resale price maintenance exemption does not apply) with a condition of resale price maintenance.

Since this type of resale price maintenance violates Section 19 (prohibition of unfair trade practices), a recommendation was given on 21 June 1995. (The company did not accept the recommendation, and the hearing procedures were initiated on 26 July. Later, however, Shiseido Co., Ltd. requested a consent decision, which was rendered on 30 November 1995).

Case against electrical equipment contractors related to orders by the Japan Sewage Works Agency

The FTC found that Hitachi, Ltd. and eight other companies colluded to designate the company to be given the tender for electrical equipment work commissioned by the Japan Sewage Works Agency. This violated Section 3 of the Antimonopoly Act (prohibition of unreasonable restraint of trade), and a surcharge payment order was given on 12 July 1995. (See paragraph 23 for the criminal accusation).

Case against the manufacturers of digital measuring equipment related to water supply facilities

The FTC found that Yokogawa Electric Corporation and three other major heavy electrical equipment manufacturers colluded to designate the company to be given the tender for water supply facilities commissioned by the municipals through tenders among nominated participants. This violated Section 3 of the Antimonopoly Act (prohibition of unreasonable restraint of trade), and a surcharge payment order was issued on 8 August 1995.

Case against manufacturers and retailers of epoxy-type plasticiser

The FTC found that Asahi Denka Kogyo K.K. (a chemicals manufacturer) restricted the supply of epoxidised soy bean oil (esbo) and other materials to Japan from a Taiwanese chemicals manufacturer with whom it concluded a contract for the provision of know-how for epoxy-type plasticiser, and that this restriction was in force even after the contract period expired. This violated Section 19 of the Antimonopoly Act (prohibition of unfair trade practices - dealing with restrictive terms) and a recommendation was given on 20 September 1995. (A recommendation decision was rendered on 13 October of the same year).

Case against the Japan Association of Refrigerated Warehouses

Setting or changing of rates for refrigerated storage must be filed beforehand with the Minister of Transport by each enterprise which operates this type of business. However, it was found that the Japan Association of Refrigerated Warehouses, the trade association of such enterprises, set a price hike for the refrigerated storage rate charged by individual member enterprises, and that members followed this decision and reported new rates to the Minister of Transport. The FTC deemed this a violation of Section 8 of the Antimonopoly Act (prohibition on acts of trade association) and a recommendation was given on 17 November 1995. (The recommendation was not accepted, and a hearing process was initiated on 25 December 1995).

Follow-up Surveillance

By monitoring the behaviour of the parties concerned after decisions are rendered, the FTC observes the state of their compliance with the decisions in order to prevent the recurrence of illegal activities. There were no cases in 1995 in which follow-up surveillance was completed.

Recommendations and Warnings Under the Subcontract Act

The Subcontract Act is intended to ensure fair conduct in the transactions of "parent firms" (which means here those firms that offer work on a subcontract basis) with their subcontractors by preventing delays in payment of subcontract proceeds, and other conduct. The Act aims to protect the interests of subcontractors, and by so doing, to contribute to the sound development of the national economy. Due to the nature of subcontracting transactions, it is unlikely that many subcontractors will lodge complaints. Therefore, the Act provides the FTC and the Small and Medium Enterprises Agency with the authority to conduct regular annual written surveys on parent firms and their transacting subcontractors to check for possible violations.

In 1995, the FTC conducted written surveys on 13 211 parent firms and the 74 377 subcontractors with whom they had transactions. Meanwhile, during the same period, the Small and Medium Enterprise Agency also conducted the same surveys on 38 939 offices of parent firms and 34 945 offices of subcontractors with whom they had transactions.

As a result of the surveys, 1 509 parent firms were found to have been violating the provisions of the Subcontract Act and were instructed by the FTC 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

By establishing specific provisions based on relevant stipulations in the Antimonopoly Act, the Premiums and Presentations Act aims to prevent the inducement of customers by means of unjustifiable premiums and misleading representations in connection with transactions regarding commodities or services, and thereby maintain fair competition as well as protect the interest of consumers in general.

The FTC investigated 1 034 cases in 1995 under the Premiums and Representations Act. Among these cases, cease-and-desist orders issued under Section 6 of the Premiums and Representations

Act numbered three cases, all for misleading representations. Warnings were also issued in 578 cases, although the FTC did not take legal action on them.

Major Cases in which Cease-and-Desist Orders were Given - The Case Against Miki Corp.

Miki Corp. listed, in newspaper fold-in advertisement fliers, "Non-Member Prices" over prices marked "Members Prices" for certain jewellery and precious metals, women's apparel and children's apparel. The ads were presented in such a way that it seemed that there was a notable mark-down in prices for "Members", even though the actual prices for regular customers wishing to buy their products were the same as the "Members" prices. Therefore, the "Non-Member price" could not be said to be the price at which these goods were normally sold, and by presenting these prices as the basis of comparison, the said company represented their prices as if they were notably cheaper than they were. This act is in violation of Section 4, Clause 2 of the Representations Act and the FTC gave a cease-and-desist order on 18 April 1995

Taking into consideration the conclusion of discussions by a study group of academic and other experts on the review and clarification of regulations regarding premium offers (submitted to the FTC at the end of March 1995), the draft of main points for revision of these regulations were published in June of the same year. The FTC invited opinions and requests in creating this draft. Furthermore, in December, a more specific draft notification was made public, and public hearings were held on the matter. Opinions were solicited from experienced academics, consumers, interested parties and others at the public hearings, and after careful consideration of the opinions presented, a decision was made to revise the notifications related to general regulations for premiums. These notifications were publicised in the government's official gazette in February 1996, and will be implemented as of 1 April 1996.

Lawsuits

Judgement against a petition seeking to overturn an FTC decision - Case of Toshiba Chemical Co., Ltd.

On 6 June 1989, the Commission gave 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 to domestic users of copper-plated phenolic paper laminate. Toshiba Chemical alone refused to accept the recommendation. (The other seven companies complied with the recommendation decision). Accordingly, the FTC initiated hearing procedures, and on 16 September 1992, handed down a cease-and-desist order against Toshiba Chemical. The dissatisfied respondent filed a suit with the Tokyo High Court on 16 October 1992, demanding that the decision be referred back to the Commission or be overturned.

The Tokyo High Court cited a procedural flaw in the FTC hearing procedure, overturned the FTC decision and referred the matter 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 again filed suit with the Tokyo High Court demanding that the second decision be referred back to the Commission or overturned. The Tokyo High Court rendered a decision on this matter on 25 September 1995 rejecting Toshiba Chemical's demands. The decision was affirmed on 10 October 1995.

Case of a new petition seeking to overturn an FTC decision

In 1995, there were no new cases petitioning for the overturning of an FTC decision under the Antimonopoly Act.

Pending damage suit under Section 25 of the Antimonopoly Act

In 1995, there was one pending damage suit under Section 25 of the Antimonopoly Act. No new suit was filed under this section.

Mergers and Economic Concentration

Statistics on Mergers

In Japan, prior notification of all mergers and transfers of business must be filed with the FTC under Sections 15 and 16 of the Antimonopoly Act. The FTC examines such notifications and if it deems that the proposed merger or acquisition may substantially restrict competition, it takes actions such as prohibiting the proposed merger or acquisition. In 1995, the FTC received 2 262 merger notifications under Section 15, and 1 426 acquisitions and other notifications under Section 16 of the Antimonopoly Act.

Table 1: Notifications filed with the FTC for Mergers and Acquisitions of Business

		1993	**1994**	**1995**
Fiscal year Submissions	Mergers	1 947	1 983	2 262
	Acquisitions, etc.	1 140	1 224	1 426
	Total	**3 087**	**3 207**	**3 688**

In 1995, there were no cases of mergers or acquisitions of business etc., in which the FTC initiated legal action.

In Japan, when a proposed merger may raise concerns under the Antimonopoly Act, it is normal practice for the parties concerned to consult with the FTC before filing the merger notification. The FTC closely examines the case to see whether there is a possibility of a violation of the Antimonopoly Act. If the FTC indicates any problems at the prior consultation stage, the parties to the intended merger either abandon their merger plan or modify it in order to avoid an infringement of the Antimonopoly Act.

Major Merger Cases

Major cases of mergers in 1995 were as follows:

Integration between Sumitomo Chemical Co., Ltd., Nippon Zeon Co., Ltd., and Sun Arrow Chemical Co., Ltd., in vinyl chloride resin operations

Sumitomo Chemical Co., Ltd., Nippon Zeon Co., Ltd., and Sun Arrow Chemical Co., Ltd. (three of the four companies which form the Daiichi Embi Hanbai K.K., joint marketing company of vinyl chloride resin) integrated their vinyl chloride resin operations. In the area of vinyl chloride sales, the shipping volume share of the three companies represents 16.1 per cent. However, from the perspective of sales of vinyl chloride paste, the merger presented problems in that the production ability and shipping volume shares (in the market) of the three companies (one of which does not produce paste) represented over 40 per cent and reduced the number of paste manufacturers in Japan from five to four.

The FTC decided that since the shipping volume share of the three companies makes up only 16.1 per cent of the market, the merging companies were not in a significantly stronger position compared to their competitors. Furthermore, even in regard to the paste market, because there were strong competitors and substitute goods as well as a projected increase in imports, the FTC did not see that the integration presented an immediate threat of substantially restricting competition in that particular field of trade.

Integration of Bayer Ltd. and Mitsubishi Chemical Industries-Hoechst Ltd., in fabric dye operations

DyStar Japan Co., Ltd., (a company financed completely by a joint venture firm established by Bayer AG and Hoechst AG in Germany) attempted to acquire fabric-dying operations from Bayer Co., Ltd., (a subsidiary that is financed 100 per cent by Bayer AG), Hoechst Japan, Ltd. (a subsidiary that is financed 100 per cent by Hoechst AG), Mitsubishi Chemical Industries-Hoechst Ltd., and others. Through this acquisition, DyStar Japan held a shipping volume share of 28 per cent in reactive dyes and 21 per cent in dispersed dyes, giving the company the largest share in both markets.

In this case, the FTC took into account the ease of entry into the market, the presence of strong competitors, import pressures, and the presence of substitute goods, and decided that the acquisition did not present an immediate threat of substantially restricting competition in the particular field of trade.

Other Major Cases of Corporate Alliances

Major cases of corporate alliances other than mergers were as follows:

Joint Venture by Nippon Telegraph and Telephone Corporation and NTT Mobile Communications Network Inc., etc.

Nippon Telegraph and Telephone Corporation (henceforth NTT) and NTT Mobile Communications Network Inc., as well as several other companies (henceforth collectively called DoCoMo), which are portable telephone service providers, divided Japan into nine separate blocks to establish a jointly-financed company to provide personal handy phone system (PHS) services in each of

those areas. In this case, the FTC determined that the portable phone and PHS service constituted a "particular field of trade", and

i) since DoCoMo holds a 50 to 70 per cent share in each of the markets (on an equipment contract basis), the alliance with the new company would reduce the competition unit by one. Furthermore,

ii) because NTT is the only enterprise with a national communications network, if an alliance were to develop between the new company and NTT and if the new company were to use this alliance with NTT, the new company would be in a stronger position against any new competitor in the market.

In this particular case, other strong competitors were planning to participate in the PHS service operations. Furthermore, NTT submitted that it will supply without discrimination all PHS operators with the required switching equipment, etc. Submissions were also made to the effect that,

i) NTT will hold down their stock holding ratio in the new company to a level at which NTT cannot affect the operation policy, etc., of the new company, and

ii) NTT will conduct their relations and dealings with PHS service operators under impartial and appropriate conditions to ensure the smooth development of their operations. Moreover

iii) the new company will not undertake joint equipment procurement (to ensure that the company does not use NTT's buying power), and will not conduct sales activities that unjustifiably use NTT's selling power.

The FTC, taking into consideration the proposed joint venture partners' actions and other factors decided that the joint venture plan would not necessarily restrain competition substantially in the particular field of trade.

Review of the Corporate Alliance Regulations

Following the "Deregulation Action Plan", it was decided that the threshold amounts for "large scale companies", which are subject to regulations regarding limitations of the total amount of share-holding of other companies under Section 9-2 of the Antimonopoly Act, would be raised. The threshold consists of two factors; the amount of capital and net assets. In order to increase the amount of these two factors, the Cabinet ordinance for the implementation of the AMA has been revised. Whereas the former thresholds for "large scale companies" (excluding financial companies) were either ten billion yen regarding capital or 30 billion yen regarding net assets, new thresholds are 35 billion yen regarding capital and 140 billion yen for net assets. The new ordinance was promulgated and took effect on 26 April 1995.

Under Chapter 4 of the Antimonopoly Act, regulations exist to:

i) prevent the excessive concentration of economic power by an enterprise through restrictions on stock ownership which prohibit the formation of holding companies, restrict the amount of stocks held by a large-scale company, and restrict the stock holding of a financial company and

ii) prevent stock holding, merger and acquisition of businesses in cases where "substantial restriction of competition in a particular field of trade" is expected. With regard to such restrictions, the FTC has been studying and, in accordance with the "Deregulation Action Plan", reviewing such issues as the above-mentioned threshold of a large-scale company and other issues. It also organised the "Study Group on the Issue of Revising Chapter 4 of the Antimonopoly Act" with a view to soliciting diversified comments and discussions from experts.

With regard to the provision in the AMA prohibiting holding companies, the study group concluded that it is appropriate to modify the provision to the extent that it does not run counter to the objectives of the AMA as stated in Section 1 of the AMA, particularly with regard to the prevention of the excessive concentration of economic power. The group also listed the types of holding companies that would not run counter to the purpose of the provision, and proposed measures to monitor those companies. The views of the group were compiled in a report, which was published in December 1995.

III. The Role of Competition Authorities in the Formulation and Implementation of Other Policies

Recent Moves to Review Government Regulations and the Exemption Systems of the Antimonopoly Act

In order to achieve specific objectives, the Government regulates, in accordance with laws and regulations, economic activities of firms in terms of market entry and/or pricing (government regulations). Furthermore, in specific fields and under specific conditions, certain actions by firms are exempted from the Antimonopoly Act (the exemption systems of the Antimonopoly Act). However, as a result of major changes in economic and other circumstances occurring since they were introduced, some of these objectives have lost their raison d'être, or government regulations and the exemption systems of the Antimonopoly Act sometimes obstruct economic vitality and efficiency.

One of the major policy objectives the Japanese Government is addressing is the promotion of deregulation, attaching the highest priority to consumer interests. This policy was embodied in the "Deregulation Action Programme" in March of 1995 with the fundamental objectives of making the Japanese national economy fully integrated into the global economy, and making it an economy based on market mechanisms and the principle of individual self-responsibility. The programme is to achieve the following:

i) improve the quality of life of the Japanese people through an expansion of the range of available choices, in response to diverse consumer needs, and a reduction in price differentials between Japan and the other countries;

ii) expand domestic demand, facilitate imports, increase business opportunities, and contribute by such means to the elimination of external economic frictions; and

iii) reduce the burden imposed on the Japanese people and simplify administrative work. 1 091 items were chosen for deregulation. Within this programme, the active implementation of competition policy is included along with the policy on deregulation.

The Japanese Government established the Administrative Reform Committee to monitor activities such as the progress of deregulation. The "Deregulation Action Programme" will be reviewed at

the end of each calendar year, and revision will be made by the end of each fiscal year on the basis of opinions and requests received from interested parties, both domestic and foreign, and the results of monitoring by the Administrative Reform Committee, etc.

In the aforementioned "Deregulation Action Programme", the Government announced that the systems of exemption from the Antimonopoly Act through individual laws would be reviewed, with a view to eliminating, in principle, these exemptions by the end of FY 1998, and that the specific conclusions would be reached on each individual law by the end of FY 1995. Furthermore, necessary studies will continue to be conducted on the exemption systems not covered by the above-mentioned review. The exemption systems regarding resale price maintenance would also be reviewed from the same standpoint, and such exemptions granted to certain items through designation by the JFTC will be abolished by the end of 1998. By the same time, the scope of "copyrighted items", the price maintenance of which is exempted from the AMA by the AMA itself, will be clarified and limited.

After this plan is formulated, efforts will be made to complete the necessary procedures for abolishing the exemptions for designated items by the end of March 1997, while taking into factors such as the Emergency Measures for Yen Appreciation and the Economy, designed to deal with concerns about the negative impact that a sharp rise in the value of the yen would have on the Japanese economy, and the Administrative Reform's Committee recommendations.

FTC Approaches

Review of Government Regulations

The FTC has reviewed government regulations based on competition policy from a medium- to long-term perspective. In accordance with the recommendations of the OECD Council in 1979, the FTC published its views on this question on the basis of factual surveys conducted in 1982, and has requested the ministries and agencies concerned to review their respective systems.

"The Study Group on Government Regulations, etc. and Competition Policy", consisting 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. In June 1995, the Study Group presented its findings on the current status of, and problems presented by, government regulations in the process of commodity distribution. (See Appendix).

"The Study Group on Competition Policy Relating to the Information and Communications Industries" conducted research and studies on competition policy issues in the telecommunications sector from a perspective centred on government policy, the establishment of competition conditions, and the operational conditions of NTT, and presented its findings in November 1995. (See Appendix) This Report contained proposals to relax government regulations in the telecommunications sector, and to take measures towards the creation of conditions necessary for competition, etc. such as elimination of the demand-and-supply requirement in considering applications for market entry and the alleviation of regulations on rates and services.

Review of the Systems of Exemptions from the Antimonopoly Act

The Antimonopoly Act prohibits cartels by firms and trade associations in principle. Yet certain cartels are exempted from the Act if they 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 regulatory authorities, or both.

Individual cartels currently exempted from the Antimonopoly Act are being carefully examined on a case-by-case basis by the FTC. This examination takes place at the procedural stage (e.g. at the application/acceptance stage) and judgement is rendered regarding the necessity of the cartel. The ministries and agencies concerned are also reviewing existing AMA-exempted cartels with a view to reducing the number of cartels. In 1995, there were 47 cartels whose authorisation procedure required intervention by the FTC.

Based on the "Deregulation Action Programme", the FTC, through available fora such as the liaison committee of the various ministries and agencies concerned in the review of the Exemption System of the Antimonopoly Act, organised by the Councillors' Office on International Affairs in the Cabinet Secretariat, is working on ministries and agencies concerned for the purpose of persuading them to review those exemption systems stipulated in individual laws with a view to abolishing them in principle. The FTC will continue to actively promote the review of exemption systems.

Review of the System of Exemption Pertaining to the Maintenance of Resale Prices

Since the Japanese system of exemption pertaining to the maintenance of resale prices covers goods designated by the FTC and copyrighted materials, the FTC intends to revoke the resale price maintenance for all designated items and to circumscribe and identify the scope of "copyrighted works".

Review of exemptions for resale price maintenance on designated goods

Regarding the system of exemption pertaining to the maintenance of resale prices over which the FTC has authority, the FTC publicised its review policy in March of 1992, and revoked the resale price maintenance of approximately half of the designated cosmetics and over-the-counter medicines which had qualified for such exemptions by December 1994. Based on the "Deregulation Action Programme", the FTC is conducting research on market conditions after reduction of a range of goods designated under the exemption policy (i.e. the remaining cosmetics and OTC medicines). Using the results of the study, the FTC will implement the procedures necessary to revoke the designation by the end of March, 1997.

Study on the Antimonopoly exemption for resale price maintenance on copyrighted works

Regarding the extent to which copyrighted works are authorised, under Section 24-2 of the Antimonopoly Act, to be eligible for exemption from the prohibition on the maintenance of resale prices, the FTC set up a subcommittee for a study on resale price maintenance issues, consisting of third-party experts, under the aegis of the Study Group on Government Regulations, etc., and Competition Policy. This subcommittee conducted theoretical, legal and economic studies and issued an interim report as well as the current state of distribution of copyrighted materials in July 1998. (See Appendix). The FTC is looking for a wide range of opinions from the people of Japan and seeking to deepen the debate on this issue. With these opinions, etc., as a stepping stone, the FTC is planning to define and clarify the range of copyrighted works that are exempted from the prohibition on resale price maintenance by the end of March, 1998.

IV. Surveys and Studies Related to Competition Policy

Surveys on the Actual State of Transactions Between Firms

In recent years, there has been great interest, both in Japan and abroad, in business practices among firms in Japan. This is especially true with regard to long-term business relationships between customers and suppliers. With an eye to examining transactions between firms in individual industries from the perspective of competition policy, the FTC, since 1990, has been conducting surveys of Japan's major industries on such aspects as the factors and backgrounds of long-term business relationships, the relations between stockholding and trade, and the presence or absence of exclusivity in the market.

As a part of this study, the FTC conducted surveys on the actual state of transactions in two industries; earthwork equipment and rolled aluminium products. These surveys were published in June of 1995. (See Appendix) The results were as follows:

Manufacturers cultivated and fostered a nation-wide network of agents which amalgamated sales and maintenance for earthwork equipment businesses. This trend is projected to continue because of reasons such as the existence of a historical relationship, the fact that there are many retailers which have a stockholding relationship with their manufacturers, and because of the tendency of the customer to place emphasis on such factors as the convenience of maintenance as well as the operator's mastery of the machinery (thereby choosing products from the same manufacturer). However, since there are many retailers that do not have a stockholding relationship with the manufacturer, the distribution routes are not closed to new participants.

The proportion of imports has been low because of such factors as the lack of overseas manufacturers producing the machinery that has the highest level of demand in Japan, and the necessity of frequent and delicate maintenance work.

The results of the survey showed that there were no violations of the Antimonopoly Act. However, it raised points of concern such as clauses in the basic transaction contract between the manufacturer and the retailer which required the retailer to hold prior consultations with the manufacturer if the retailer chose to sell products that were not a part of the contract. These points were addressed to the parties concerned, and they were urged to take voluntary action toward rectifying the situation.

Similar conditions (regarding quality, delivery date, technical service, habitual use, etc.) which persist with regard to earthwork equipment are generally seen in rolled aluminium product transactions as well. However, since new transactions, which are not negligible, exist and since many retailers and customers that have dealt with imported goods are present, the conclusion drawn was that there is nothing that presents a de facto restraint on dealing with foreign goods, and that there is expectation of further competition not only between domestic goods but with imported goods as well. Therefore, there were no items found that deviated from the Antimonopoly Act.

The FTC is currently undertaking a survey on actual conditions related to house construction and housing materials and equipment.

Survey on the Current State of Venture Capital

The FTC released "Interpretations of the Application of the Provisions of Section 9 of the Antimonopoly Act with Respect to Venture Capital Firms" in August, 1994. One year had passed since

the release of the Interpretations, and the FTC decided to undertake a survey on the current situation with the aim of evaluating these standards, the presence or absence of impediments with regard to operating venture capital, etc. The results were released in December of 1995. (See Appendix).

The survey showed that, currently, Article 9 of the Antimonopoly Act prohibiting the establishment, etc., of holding companies did not pose an impediment to the activities of venture capital.

However, as the Japanese market further matures, there is a need for venture capital to:

i) stimulate investment in venture businesses that deal with the establishment of new business, as well as research and development; and

ii) stimulate technical assistance and operational guidance toward venture businesses.

During this process, venture capital will acquire more stocks in venture businesses, with the stock holding company prohibition system possibly becoming an impediment to the development of venture capital and venture businesses. From this perspective, it is believed that there is a need to create an environment that is conducive to the development of venture capital.

Survey on the Current State of Independent Corporate Groups

The FTC has continuously conducted surveys on the actual state of corporate groups. It has also conducted a separate survey on pyramid-type corporate groups with the aim of gaining an understanding of the current state of affairs. The results of the survey were released in December of 1995. (See Appendix).

The findings of this survey are as follows:

With regard to transactions between corporations within the same corporate group, compared to the parent company's reliance on its sales volume to the related companies, the related companies' reliance on sales to the parent company is higher. In terms of the parent company's ratio of stocks held to the number of directors sent, the higher the rate of stocks held, the higher the number of directors sent. The parent company chose the companies with which to transact on a basis which emphasised the price and quality of the product, with few companies giving priority to companies with which they held stocks or had interlocking directorates.

Survey on the Actual State of Transactions between Large-scale Retailers and Their Suppliers

Based on the idea regarding the abuse of a dominant bargaining position by retailers stated in the Antimonopoly Act Guidelines Concerning Distribution Systems and Business Practices, the FTC conducted a survey on the actual situation regarding transactions between large-scale retailers and their suppliers. This survey was conducted with the aim of discovering matters such as the presence or absence of activities described as questionable in the Guidelines and changes that have taken place in supply transactions after the release of the Guidelines. The findings of the study were released in February 1995. (See Appendix).

Even though the survey found no incidences of Antimonopoly Act violations, the FTC gave guidance to the related business organisations so that they could make the contents of the Guidelines

better known among their members in order to improve business practices between large-scale retailers and their suppliers.

Survey on the Current State of the Credit Card Industry

The FTC conducted a study on the state of affiliation of the credit card companies and competition among such companies on service charges, and presented its findings in July 1995. (See Appendix). The FTC undertook this study because restructuring and affiliation among companies are in progress in the credit card industry through tie-ups between companies and the competition for franchises and agents.

This study found that there was discontent among agents and consumers regarding the agency service charge rate as well as the membership fee and interest rates. However, there were no circumstances in which credit card companies restricted the dealings of franchises or their affiliates by restricting their transactions with other companies, or by discriminatory practices in the use of information systems.

The FTC intends to carefully observe the industry as it further restructures and amalgamates with a view to preventing acts that would hinder fair competition.

V. Technical Co-operation with Other Countries and Areas

As a part of technical co-operation with other countries, the FTC accepted ten officials from competition authorities of Asian and Eastern European countries etc. for approximately four weeks in October/November 1995. The FTC also accepted 12 from the State Committee of the Russian Federation for Antimonopoly Policy and Promotion of New Economic Structures and related agencies for approximately three weeks in November/December. Each of these programmes included lectures on the Japanese Antimonopoly Act as well as discussions on cases reported on by the participants.

The "Osaka Action Agenda" adopted at the APEC Economic Leaders' Meeting in November 1995 includes the implementation of technical assistance, the promotion of dialogue and encouragement of co-operation. The FTC will actively engage in work such as technical co-operation in APEC, in line with the Action Agenda.

Appendix

List of Surveys, etc., related to Competition Policy

February 1995
Survey on the actual state of transactions between large-scale retailers and their suppliers

April
Survey on transactions between large-scale retailers and their subcontractors

June
Survey on low-price sales of domestic and imported products
(Report by the Study Group on Distribution Issues)

June
Trends in, and major cases of, mergers and transfers of businesses in 1994

June
Review of government regulations in the distribution sector
(Report by the Study Group on Government Regulations, etc., and Competition Policy)

June
On the current state of economic concentration in Japan

June
Survey on the current state of transactions in earthwork equipment

June
Survey on the current state of inter-corporate transactions regarding distribution of rolled aluminium products

July
Survey on the current state of the credit card industry

July
Survey on the current state of distribution of copyrighted works (books, magazines, newspapers, music CDs, etc.)

July "(Mid-term report) On the Handling of Copyrighted Works under the Resale Price Maintenance"
(Report by the Subcommittee on Resale-related Problems under the Study Group on Government Regulations, etc., and Competition Policy)

October
Antimonopoly Act Guidelines concerning the activities of trade associations

November
"Issues relating to Competition Policy in the telecommunications industry"
(Report by the Study Group on Competition Policy Relating to the Information and Communications Industries)

December
The current state of venture capital in Japan

December
The current state of independent corporate groups

December
The Interim Report of the Chapter IV Revision Study Committee of the "Act Relating to Prohibition of Private Monopoly and Maintenance of Fair Trade"

Index of FTC/Japan Views

No.19, January 1995

1. Second Seminar of European Union/Japan Competition Policy (Speech by FTC Chairman Masami Kogayu)
2. Administrative Procedure Standards for Examining Mergers, etc., 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

No.20, March 1995

1. The Antimonopoly Act Guidelines Concerning Administrative Guidance
2. The Outline of the Report on the Actual Conditions of the Six Major Corporate Groups
3. The 5th Meeting of the Conference on Competition Policies among Asian and Oceanic Countries
4. Recent Developments in Competition Policy in Japan (Country Report of Japan to the 5th Meeting of the Conference on Competition Policies among Asian and Oceanic Countries)

No.21, June 1995

1. Trends and Major Cases of Mergers, Acquisitions of Businesses, etc. in Fiscal Year 1993
2. Regarding the Active Implementation of Competition Policy along with the Formulation of the Deregulation Action Programme
3. Recent Developments in Competition Policy in Japan (January - December 1994)

No.22, October 1995

1. On the Fact-Finding Survey Regarding Transactions for Earthwork Equipment
2. Fact-finding Survey on Inter-Corporate Transactions Regarding Distribution of Rolled Aluminium Products
3. Research into Transactions of Agricultural Chemicals
4. Research on Actual Conditions of Inter-Corporate Transactions of Synthetic Rubber

No.23, November 1995

1. Recent Developments in Competition Policy in Japan
2. Review of Premium Regulations
3. Trends of Mergers, Acquisitions of Business, etc. in Fiscal Year 1994
4. Major Cases of Corporate Combination in Fiscal Year 1994

KOREA*

(1995-1996)

Executive Summary

The government of the Republic of Korea has greatly enhanced the status and role of the Korean Fair Trade Commission (hereinafter, the Commission). For one, the status of the Chairman of the Commission has been elevated to ministerial level, and he now participates in cabinet meetings and economic ministers' meetings. For another, the organisation has been enlarged and its functions strengthened. This signifies that competition policy now bears much more significance in the Korean economy and that equal weight is placed on competition policy as on macroeconomic policies such as financial, fiscal, and tax policies as well as trade and industrial policies.

As a follow-up measure to the revision of the Fair Trade Act in December 1994, the Commission enacted or revised the relevant Enforcement Decrees, Guidelines, and Notifications in 1995. This year, the Commission is pursuing a revision of the "Monopoly Regulation and Fair Trade Act" (hereinafter, the Fair Trade Act) in order to carry out its advocacy role more efficiently following the elevation of its status and role to a minister-level government agency. The current revision is also aimed at playing a role tantamount to its reinforced status and role and at actively participating in international talks of converging competition policies. The proposed bill is expected to be endorsed by the National Assembly in the regular session in autumn. The revised Fair Trade Act will be applied to a wider range of areas, and the provision on "prior consultation" (under Article 63 of the Fair Trade Act, government ministries are obligated to consult with the Commission prior to new enactments and revisions of their laws to remove any elements that may restrain competition) will be enforced more effectively. Furthermore, the Commission will not only correct the laws undergoing revision or being newly enacted, but also remove or revise anticompetitive elements in the existing laws, decrees, and administrative dispositions. That is, the Commission will make requests at the ministries to eliminate or correct anticompetitive elements in their laws. Needless to say, the revised Fair Trade Act will contain ways of improving rules and regulations to eradicate the detrimental effects of monopolistic and oligopolistic market structures.

As the government agency in charge of enforcing competition policies, the Commission performs its advocacy role in establishing economic policies by strictly enforcing Article 63 of the Fair Trade Act and by voicing its opinions at cabinet meetings and economic ministers' meetings. In 1995, the Commission examined a total of 205 acts and decrees and presented its views on 93 of them. Out of the 93, the Commission's opinions were reflected in 61 of them. Thus, the Commission is successfully eliminating anticompetitive elements in the enactments and revisions of laws and decrees throughout the economy.

In 1995 alone, the Commission made great progress in correcting monopolistic and oligopolistic market structures and undue collaborative acts through the effective enforcement of competition policy.

* The original language of this report is English

The strengthening of cooperation with the US, Japan, and France through annual competition policy consultations is especially noteworthy, as well as the "Competition Policy Training Program for Developing Nations" which the Commission held in September 1996 to play the role of a bridgehead between the advanced and developing nations.

I. Changes in Korean Competition Law and Policy

Strengthened Status and Role of the Korean Fair Trade Commission

In February 1996, the Korean government elevated the status of the Chairman of the Korean Fair Trade Commission (hereinafter, the Commission) to minister level and arranged for his participation in cabinet meetings and economic ministers' meetings. At the same time, the Commission was enlarged and its functions were strengthened. Following government measures in December 1994, in which the Commission was made a central administrative agency independent of the now-defunct Economic Planning Board, this is the second measure of the kind taken by the government to reinforce the Commission's status and role as the government agency in charge of enforcing competition policy in Korea.

The gist of the government measure is as follows: The status of the Chairman and Vice-chairman were elevated to minister and vice-minister levels respectively. Moreover, a Consumer Protection Bureau was established with a view to enhancing consumer protection. To keep abreast of the increasing significance of mergers, the Commission newly established a division (Merger Division) in charge of examining their anticompetitive effects in the market. Furthermore, the Subcontract Transactions Division was expanded to a bureau consisting of three divisions, and the Commission staff was increased from a total of 343 to 384.

Such strengthening of status and role bears testimony to the fact that the significance of competition policy in Korea has grown. The government has stressed the importance of placing as much weight on competition policy as on other economic policies such as macroeconomic policies including financial, fiscal, and tax policies as well as industrial and trade policies. In addition, the government has strengthened the role of the Commission so that competition policies can be enforced with consistency and in harmony with the economic policies of other government ministries.

The Commission is also responsible for enforcing three acts under the Competition Laws -- namely, the Monopoly Regulation and Fair Trade Act (hereinafter, the Fair Trade Act), the Fair Subcontract Transactions Act, and the Regulation of Standardized Contracts Act. According to Article 1 (Purpose) of each act, the role of the Commission is as follows:

- Under the Fair Trade Act, the Commission is to "encourage fair and free economic competition by prohibiting the abuse of market-dominating positions and the excessive concentration of economic power and by regulating undue collaborative acts and unfair business practices, thereby stimulating creative business activities, protecting consumers, and promoting the balanced development of the national economy."

- Under the Fair Subcontract Transactions Act, the Commission is to "promote the sound development of the national economy by establishing a fair order for subcontracting so that contractors and subcontractors may enjoy balanced development on an equal footing in a mutually complementary manner."

- Under the Regulation of Standardized Contracts Act, the Commission is to "protect consumers and promote the harmonious improvement of the nation's welfare by preventing enterprises from preparing and circulating standardized contracts containing unfair terms and conditions that constitute abuse of their negotiating position and by establishing a sound framework for business transactions through the regulation of standardized contracts containing unfair terms and conditions".

Enactment and Revision of the Enforcement Decrees, Guidelines, and Notification of the Competition Laws

In 1995, the Commission enacted and revised the enforcement decrees, guidelines, and notifications of the Competition Laws with a view to enforcing the act more efficiently and supporting the promotion of key policy goals. To be more specific, presidential decrees for the Fair Trade Act and the Fair Subcontract Transactions Act were revised, and the " Notification on the Types of and Criteria for Unfair Business Practices Relating to the Offering of Gifts", "Notification on the Types of and Criteria for Determining Unfair Business Practices in International Contracts" ,"Guidelines for Types of Unfair Business Practices Relating to Parallel Imports", "Guidelines for Fair Subcontract Transactions" were either newly enforced or revised.

Revision of Enforcement Decree of the Fair Trade Act

Following the revision of the Fair Trade Act in December 1994, the need to revise its enforcement decree as a follow-up measure surfaced. Provisions regarding alleviation of economic concentration were enhanced to buttress the revised laws, provisions regarding imposition of surcharges were readjusted, and provisions for the review of international contracts were improved. In an era of globalization and liberalisation, it was pointed out that the most effective way of making Korean firms more competitive would be to focus government policies on inducing dispersion of ownership rather than on cutting down the scale of Korean firms. Taking heed, in revising the Fair Trade Act in December 1994, the Commission included a provision designed to induce dispersion of ownership by stating that firms with sound financial structure and well dispersed ownership (hereinafter, "sound firms") would be exempt from application of the ceiling on total amount of capital investment. As a follow-up, the enforcement decree of the act needed to be revised to prescribe the specific criteria for selecting "sound firms" in a realistic and feasible manner that would effectively induce firms to disperse ownership and secure a sound financial structure. Furthermore, the enforcement decree needed to be revised following the strengthening of the system on surcharges so that the specific method of calculation and collection of surcharges would be prescribed. In addition, the enforcement decree pertaining to international contracts needed to be updated following the replacement of the "compulsory reporting system" with the "voluntary review system". The former system obligated the Korean party to an international contract to report the signing of the contract to the Commission. The latter system allows the Korean party to decide whether to report or not according to its own discretion. Thus, the enforcement decree was revised to prescribe the types of international contracts subject to application of the law as well as the procedures for requesting review.

Revision of Enforcement Decree of the Fair Subcontract Transactions Act

Following the revision of the Fair Subcontract Transactions Act in December 1994, the act now applies to a much wider range of subcontract transactions. Also, the new types of businesses within the manufacturing and construction industries - architectural design, engineering activities, software

businesses, and so on - have been included in the list of businesses subject to application of the act. By doing so, the Commission has strengthened protection of subcontractors and diversified corrective measures for habitual violators of the act not only by limiting their qualification for participating in bids, but also by requesting suspension of their businesses. In the revision of the enforcement decree, the range of contractors who are able to entrust a subcontractor with the commission to construct are specifically stated. In addition, a provision stipulating that a principal can directly make the subcontract payment to a subcontractor has been added. Thus, the revision was aimed at complementing the shortcomings of the act experienced during enforcement.

Gist of Enactment and Revision of Guidelines and Notifications

In 1995, the Commission enacted and revised nine guidelines and notifications pertaining to the "Fair Trade Act" and three pertaining to the "Fair Subcontract Transactions Act." Such enactments and revisions were Commission efforts not only to promote competition by enhancing efficiency in enforcement of the Competition Laws, but also to enhance the effectiveness and transparency of its enforcement activities.

Revision of Notification on the Types of and Criteria for Unfair Business Practices Relating to the Offering of Gifts.

Under the world-wide trend of globalization and the launch of the WTO regime, the Commission strives to strengthen competitiveness of Korean firms by allowing them to engage in various sales promotion activities. Also, the Commission has readjusted the limits on offering of gifts, bringing them to a more realistic level in line with calls for economic deregulation from the Korean Chamber of Commerce and Industry and the business sectors. The Commission even alleviated regulations regarding offering of gifts in the absence of business transaction. The revised notification raised the ceiling on the amount of gift offers, abolished the limit on consumer prize gift offering period, abolished the limit on frequency of offering public prize gifts, and so on.

Revision of Notification on the Types of and Criteria for Determining Unfair Business Practices in International Contracts

In the past, the notification only broadly stated what constituted unfair business practices in international contracts; however, in the revised notification, both fair and unfair business practices are specifically prescribed. Therefore, businessmen can check for themselves which category their contracts fall into. In addition, the revised notification declares a principle in which the effect of the contract on competition, the duration of the contract, and the status of the relevant markets are comprehensively taken into consideration in determining whether a contract constitutes unfair business practices or not.

Enactment of Guidelines for Types of Unfair Business Practices Relating to Parallel Imports

With the lifting of the ban on parallel imports of genuine products, which were once prohibited for the purpose of protecting trademarks, the Commission felt the need to enact guidelines on types of unfair business practices relating to parallel imports in order to specifically present the classic types of unfair business practices that constitute unfair interruption of parallel imports under the Fair Trade Act. Thus, a guideline was prepared and effective as of 1 January 1996.

Revision of Guidelines for Fair Subcontract Transactions

Subcontract transactions are becoming increasingly diverse and complex in nature. Thus, the Commission included specific criteria for subcontract transaction to which the law applies in the act and the enforcement decree, thereby making it a useful guideline to abide by for enterprises. Also, cases pertaining to the act were categorised upon judicial precedents of the Commission and reflected in the revision. Moreover, the Commission tried to eliminate the indirect cause of shoddy construction - insufficient construction funds - by setting specific criteria so that the subcontractor is not disadvantaged in receiving advance payment and subcontract payment (pegged to inflation rate) that the contractor has received from the principal.

Gist of the Proposed Revision Bill of the Fair Trade Act

The Commission prepared the revision bill of the Fair Trade Act and gave a prior notice of legislation on 7 August 1996. The Commission held a public hearing (8 August) to hear the opinions of people from all walks of life, and also heard the opinions of the relevant ministries and agencies during the period of prior notice (7-26 August). Based on the presented opinions, the Commission submitted an improved version of the revision bill to the economic ministers' meeting and cabinet meeting in September. Upon resolution at those meetings, the final bill is now pending at the regular session of the National Assembly for deliberation and decision thereof.

Extending Application of the Fair Trade Act to All Economic Sectors

In order to extend application of the Fair Trade Act to all economic sectors, the Commission has removed Article 61 of the Fair Trade Act which stated that financial and insurance businesses were to be excluded from application of certain articles. By subjecting those sectors to application of the act, the Commission aims to prevent business groups from increasing their subsidiaries through corporate mergers by capitalising on financial institutions belonging to their own groups. Moreover, when there are anticompetitive elements in acts, decrees, and administrative dispositions that government agencies enforce, the Commission is entitled to file a request to the head of the pertinent government agency to correct them. By doing so, the Commission aims to encourage the public sector to set an example in spreading competition in Korea.

As a means of strictly enforcing Article 63 of the Fair Trade Act, which stipulates that ministries are to hold consultations with the Commission prior to enacting or revising laws, the Commission introduced a system whereby it can request the head of a ministry to correct anticompetitive elements in its existing acts, decrees, and administrative dispositions. Also, the Commission has clarified anticompetitive laws and decrees which are subject to prior consultation with the Commission, and made it possible for the Commission to present its opinion or request that the necessary measures be taken to the head of a ministry with respect to their existing anticompetitive laws, decrees, and administrative dispositions.

In order to extend application of the law prohibiting anticompetitive corporate mergers, the Commission has decided to apply the prohibition to all anticompetitive corporate mergers, regardless of the scale of the firm (in the past, the prohibition only applied to firms of certain scale - capital exceeding five billion won and assets exceeding 20 billion won). Provided, however, that firms exceeding certain scale (assets or turnover exceeding 50 billion won) still remain obligated to report their mergers.

Enhancing Effectiveness of Policies Designed to Alleviate Economic Concentration and Rectification of Monopolistic and Oligopolistic Market Structures

Korean large business groups are the historical products of the government-led rapid economic growth since the 1960s. They are the major cause of excessive economic concentration in Korea. A handful of people own and control the subsidiaries and eventually dominate the market by expanding and diversifying their businesses through fleet-like expansion. Such large business groups have saved their failing affiliates from being selected out of the market and distorted balanced allocation of financial resources. Thus, efficient allocation of resources and balanced development of the small-medium firms have been impeded, and even caused the efficiency of the national economy to drop. In order to enhance the effectiveness of policies designed to ease such economic concentration, the Commission has decided to phase out limits on debt guarantees among affiliates of large business groups (apart from guarantees granted in the normal process of transaction) and completely remove the limit by 2001. Also, the Commission prohibits unfair in-house trading among affiliates of business groups in the field of finance.

The grace period for disposing of debt guarantees among affiliates of large business groups that exceed the ceiling set by the government (200 per cent of assets) has expired as of 31 March 1996. Thus, the share of debt guarantees in proportion to assets has dropped substantially; however, another phasing out of ceiling on debt guarantees is needed for the Commission to make failing affiliates be selected out of the market and to correct unbalanced distribution of credit. The timetable for phasing out ceiling on debt guarantees among affiliates of large business groups (excluding guarantees granted in the normal process of transaction) is down to 100 per cent of assets by 31 March 1998 and complete removal by 31 March 2001.

Unfair in-house trading among affiliates of large business groups hinders failing affiliates from being selected out of the market by giving each other support. This leads to reckless expansion of the groups, impeding on fair competition with small-medium firms and excessive economic concentration. Thus, to regulate such practices among affiliates of large business groups in the field of finance, the Commission has prohibited unfair transaction of shares, real estate, and loans among affiliates of large business groups.

The Commission has established a provision designed to rectify the ills of monopolistic and oligopolistic market structures which states that the Commission needs to adopt and enforce policies aimed at preventing the formation and entrenchment of market-dominating enterprises, and if necessary, that it may present its opinions relating to promoting competition and rectifying monopolistic and oligopolistic market structures to the pertinent administrative agency.

Overhauling Rules and Regulations Limiting Corporate Mergers

Often, conglomerate mergers constitute the very causes of monopolistic and oligopolistic market structures and economic concentration. Thus, the Commission has strengthened examination of mergers involving market-dominating enterprises as they are thought to restrain competition. However, the strain on competition resulting from such mergers are often difficult to prove. Thus, the Commission has facilitated the proving process by making it the responsibility of the large businesses to prove that their mergers are not anticompetitive.

Considering that control of management is possible with just ten per cent equity share in the case of "sound firms," the current system whereby only those owning more than 20 per cent of equity are to report may be too high, letting those who own enough shares to control management get away with not

reporting. In addition, in calculating the rate of equity ownership, firms that do not belong to large business groups are only to report its own equity shares excluding those of its affiliates and related persons. This can also be a loophole in regulating anticompetitive corporate mergers. Thus, the Commission introduced the "post-merger reporting system"; provided, however, that a firm exceeding certain scale that signs a contract to merge, to take-over business, or to establish a firm would continue to be subject to the "pre-merger reporting system." Also, small-scale mergers and those that do not greatly affect competition may be subject to a "Simple Reporting System," reducing the examination period (from 30-60 days to 15 days) and the papers to be submitted.

Strengthened Regulation of Undue Collaborative Acts and Unfair Business Practices.

The Commission has introduced a system whereby informants of undue collaborative acts are exempted from punishment or are subject to lighter penalties. Moreover, from regulating only anticompetitive acts performed by trade associations, the Commission has decided to also regulate trade associations that induce its members to engage in anticompetitive acts. Also, up to now, only interruption of business activities between transacting parties were subject to regulation; however, the Commission plans to also include such interruption between rival firms in the category of unfair business practices and subject them to regulation.

II. Advocacy Role of the Fair Trade Commission

Rectification of Anticompetitive Laws, Decrees, Rules, Regulations, and Practices

The Fair Trade Commission (hereinafter, the Commission) is equipped with the legal mechanism to request corrections in enactments and revisions of anticompetitive laws and decrees to the relevant ministry. Of particular importance is that the Chairman of the Commission has the right to present his opinions at cabinet meetings and economic ministers' meetings. The Commission efforts to improve laws and regulations to make them more competition-oriented are pursued in two ways: by finding out and correcting anticompetitive elements in the existing laws, decrees, and regulations as well as by making administrative agencies hold consultations with the Commission prior to enacting or revising laws or issuing orders, dispositions, or giving approval to businesses or trade associations under Article 63 of the Fair Trade Act.

Above all, making the Commission independent of the Economic Planning Board (EPB) and strengthening its status have served as the decisive factors in strengthening the enforcement of the provision on prior consultation under Article 63. Under the EPB, the Commission was not able to directly voice its opinions at the highest decision-making bodies of the government; however, with the elevation of its status to a central administrative agency, it is now able to do so without having its views filtered by other economic ministries. This provides a firm base upon which the Commission is able to efficiently improve rules and regulations from the viewpoint of competition policies.

Between 1988 and 1992, as the agency in charge of economic deregulation at the government level, the Commission set 171 deregulation tasks pertaining to regulations in 31 business sectors including the financial, transportation, and distribution sectors. To name a few, medical and pharmaceutical items subject to application of the "Standard Resale Price System" were drastically reduced, regulations relating to limits on distance between gas stations were alleviated, and regulations pertaining to the liquor business were either abolished or eased. However, in 1993, this task was handed over to another unit under the EPB in order to take into account various aspects relating to macroeconomic and industrial goals.

In late 1994, however, following the independence of the Commission and the elevation of its status to a central administrative agency, the Commission is now in charge of overhauling anticompetitive acts and decrees in line with government deregulation efforts. In 1995, the Commission reviewed some 296 economy-related laws and decrees enforced by government ministries for any anticompetitive elements such as blocking of market entry by means of granting permits and approvals. In the first phase, the Commission set 36 deregulation tasks with respect to regulations pertaining to 30 laws and decrees and began improving them. The resulting deregulation tasks were as follows: Twenty deregulation tasks for regulations restricting market entry, restricting area of trade, setting maximum prices, and allowing cartel activities in certain industries such as the construction, customs clearance, transportation, and insurance businesses, and so on. Sixteen deregulation tasks for regulations regarding establishment of trade associations and compulsory membership thereof.

In 1995, the Commission set 36 deregulation tasks for regulations pertaining to 30 laws and decrees that contained anticompetitive elements such as subcontract limits on construction companies, restrictions on area of trade in the tourism and customs clearance businesses, and locktime allocation of prime time television and radio advertising. At the same time, to ensure free business activities, the Commission improved some 369 anticompetitive rules and practices including regulations restricting entry and withdrawal of 218 trade associations, as well as regulations restricting business activities.

Case Study: abolition of Subcontract Limits on Construction, Electricity Repair, and Cable Repair Works

Under the Construction Business Act and other relevant acts, the maximum amount of subcontracting for each business is determined based on their performance in construction works in the previous year, which brings the ceiling down to a level where a single project may exceed the maximum. Thus, according to the limit, construction companies are deprived of the opportunity to land bigger projects than those in the previous year. The purpose of such ceiling on subcontracting is to prevent shoddy construction stemming from construction firms receiving orders in excess of their ability as well as to prevent excessive subcontracting. However, strengthening competitiveness and ensuring free competition is urgently called for with the opening of the construction market and with construction works becoming increasingly sophisticated and specialised. Fortunately, the principals and the subcontractors now have easier access to information, enabling subcontractors to build technological prowess, while enabling principals to select subcontractors based on information regarding their technical prowess and credit rating. Thus, many voice doubts about the significance of maintaining the ceilings.

On top of that, imposing the ceiling is artificially restricting access to markets based on past construction works. Under this system, large, established firms are able to land large-scale construction projects, while new firms are often deprived of the opportunity despite their new equipment, technical prowess, or growth potential. This also causes ineffective competition among various scales of construction projects.

Consultation prior to Enactment and Revision of Laws and Decrees for the Purpose of Eliminating Anticompetitive Elements

Pursuant to Article 12 (Co-ordination among Ministries in the Legislation Process of Laws and Decrees) of the Regulation for Operation of Legislation Affairs and Article 63 (Consultation on Enactment of Acts and Decrees which Restrain Competition) of the Fair Trade Act, each ministry is to hold a consultation with the Commission to eliminate anticompetitive elements prior to submitting drafts

to cabinet meetings, etc. In these prior consultations, the Commission focuses on three aspects: First, elimination of anticompetitive elements such as restriction of market entry, price fixing, territorial restriction, cartel activities, granting of exclusive importing rights, anticompetitive acts of trade associations and provisions forcing businesses to join the associations. Second, deregulation of administrative regulations such as the licensing system or regulation of replacing the licensing system with the reporting system only in name. Third, clarification of standards and criteria for works related to the Commission such as those relating to provisions for standardised contracts and subcontracting, as well as improvement of irrational rules and regulations. The Commission also looks into the implementation of improvements to be made to anticompetitive laws and decrees as resolved by the Economic Deregulation Committee.

In 1995, the Commission examined a total of 205 cases of acts, enforcement decrees, enforcement regulations, and etc. requested for prior consultation (by 16 ministries), of which the Commission took no issue with 112 of them but voiced its opinions with respect to 93, marking a 45.4 per cent rate of opinions voiced.

Table 1. Number of prior consultations and opinions reflected (Cases)

Classification		Acts	Decrees	Enforcement regulations	Total
opinions	reflected	29	21	11	61
	not reflected	10	11	11	32
presented	sub-total	39	32	22	93
Non-issues		33	41	38	112
Total		**72**	**73**	**60**	**205**

Of the 93 cases, the Commission's opinions were reflected in 61 of them. This yielded a reflection rate as high as 65.6 per cent. Its opinions were reflected in 29 acts, 21 enforcement decrees, and 11 enforcement regulations.

Active Participation in the Drafting of Economic Policies

The Chairman and Vice-chairman of the Commission are participating in cabinet meetings, vice-ministerial meetings, and economic ministers and vice-ministers' meetings and are presenting their opinions from the viewpoint of promoting competition in the drafting of various economic policies including industrial and trade policies. With respect to issues which have already undergone prior consultation, the Commission presents its opinions on whether its opinions were reflected or not and whether there remain problems in the modified provisions. With respect to issues that have not undergone prior consultation, the Commission states its opinions to eliminate anticompetitive elements and to pursue deregulation and rationalisation of rules and regulations.

In 1995, the Commission reviewed a total of 258 cases referred to the economic ministers and vice-ministers' meetings and presented its opinions with respect to 65 of them, which marks 25.2 per cent of opinions presented. Of the 65 cases, its opinions were reflected in 42 cases which is a reflection rate of 64.6 per cent. In terms of the types of views reflected, 24 were streamlining and deregulation measures,

twelve were improvement of unreasonable rules and regulations, three were rectification of anticompetitive provisions, and six were related to the Commission. For instance, the broad and vague registration requirements for oil refinery businesses and import and export businesses under the Oil Business Act and License requirements and facility standards of liquor sales business on Enforcement Decree of the Liquor Act were made more clear and concrete.

III. Enforcement of Competition Laws

Rectification of Monopolistic and Oligopolistic Market Structure

The policy for regulating monopoly and oligopoly in Korea is not limited to regulating the abuse of market dominating power or the formation of anticompetitive market dominance through corporate mergers, but also to regulating business groups, better known as Chebol, around whom the nation's economic power is concentrated.

Regulation of Abusive Acts by Market-Dominating Enterprises

The Commission designates market-dominating enterprises every year, based on their total amount of local supply and market share and strives to prevent them from abusing their market-dominating positions.

Total Amount of Local Supply	Market Share
- total amount of annual local supply of the relevant good and service exceeding 50 Billion won	- one person owning more than 50/100 - less than three persons owning more than 75/100 (however, excluding those who own less than 10/100)

In accordance with such standards, the Commission designated 326 firms and 140 items in 1996, which amounts to two additional items and ten additional firms compared to those of last year.

Table 2. Market-dominating items
(Number of items*)

Year	Monopolistic items	Oligopolistic Items of two companies	Oligopolistic items of three companies				
			Total	75%~80%	80~90%	90~100%	100%
1995	29 (21.0%)	47 (34.1%)	62 (44.9%)	6 (4.4%)	26 (18.8%)	26 (18.8%)	4 (2.9%)
1996	28 (20.0%)	45 (32.1%)	67 (47.9%)	14 (10%)	26 (18.6%)	23 (16.4%)	4 (2.9%)

(*): percentage out of total

The Commission distinguishes five types of abuse of market dominating position - namely, fixing prices, unreasonably controlling the sales of goods or the rendering of services, interrupting business activities of other businesses, restricting of market entry to new businesses, and other acts which

substantially restrain competition or damage consumer benefits. The Commission imposes heavier sanctions against such acts in comparison to general unfair business practices. The abuse of market-dominating position to fix prices and control sales of goods in particular, are classic means by which market-dominating firms abuse power in order to secure monopolistic interests. As the damages from such acts are substantial, the Commission not only conducts reactive corrections, but also steadily examines price or supply-demand situation and conducts investigations on its own authority. In addition, the Commission focuses on pro-active prevention of unduly raising prices or engaging in price fixing and price maintenance acts by offering programs to enhance understanding of the law with a view to preventing violation.

The table below shows corrections made with respect to violation of market-dominating firms.

Table 3. Corrective Measures against Violations by Market-Dominating Companies (cases)

Classification	1981-89	1990	1991	1992	1993	1994	1995	Total
- Abuse of Market-Dominating Position	9	2	-	6	2	1	3	23
- Unfair business Practices	216	23	19	46	58	39	72	473
Total	**225**	**25**	**19**	**52**	**60**	**40**	**75**	**496**

In the above table, three cases in which corrective measures were taken in 1995 with respect to abuse of market-dominating positions are shown: First, a corrective measure was issued against Korean Electric Promotion Corp. which established provisions based on Regulation on Electric Power Supply stipulating that five per cent arrears would be imposed on consumers with payment in arrears. Second, a measure was taken against the Korean Telecommunications Corp. for damaging consumer welfare by establishing provisions under the Standardised Contract on Telephone Services that states that the basic charges and added charges are to be returned only when the telephone line is busy for more than three days continuously. Third, Korean Xerox was issued corrective measures for interrupting business activities of another business.

Regulations on Corporate Mergers

Besides reactivity regulating the ills of monopolistic and oligopolistic markets, the Fair Trade Act provides for pro-active prevention of monopoly and oligopoly by prohibiting five types of corporate mergers including acquisition of shares that substantially restrain competition in a certain area of trade, interlocking directorate, merger, take-over of business, and new establishment of firms. Also, the Commission makes it an obligation to report corporate mergers for the purpose of examining and determining whether it will have the effect of restraining competition.

Table 4. Business Combinations (Cases)

Classification	1990	1991	1992	1993	1994	1995	Total
Total	157	154	149	123	195	325	2 949
Affiliates	57	58	69	74	74	52	1 285
Non-affiliates	100	96	80	49	121	273	1 664
(Large Business Groups)	(89)	(66)	(64)	(39)	(65)	(82)	1 305

Thus, in 1995, the Commission accepted and examined a total of 325 reports of mergers. It found that many violations were regarding failure to report within the reporting period due to lack of knowledge or simple carelessness. The Commission dealt with 23 such violation of procedures for filing reports by issuing light warnings. However, the heavy corrective measures taken against corporate merger cases in 1996 are good examples of the strengthened enforcement of laws relating to mergers.

Case Study: On 22 April 1996, the Commission decided to prohibit company A's acquisition of company B's shares as anticompetitive vertical merger. The reason was that Company B produces 33 per cent of caprolactam consumed in Korea while the rest is imported. Company A, the respondent, and three other firms are being supplied with caprolactam, and the market for nylon products which is made from caprolactam is also oligopolized by the four firms. In January 1995, the report filed to the Commission stated that the respondent had underwritten 20.38 per cent of company B shares, but it was learned that the respondent had actually acquired 30.14 per cent of the shares through acquisitions by related persons, affiliates, executives, and non-profit organisations. The Commission also confirmed that capitalising on its controlling shares, the respondent had exercised influence on the appointment and dismissal of executives in the stockholders' meetings. Thus, this act of acquiring enough shares to control the management of company B through executives of its affiliates by the respondent, which produces nylon using caprolactam as raw material, was considered an act of substantially restraining competition in the caprolactam and nylon markets. Accordingly, the Commission issued a corrective measure disapproving of anticompetitive corporate merger, and ordered the respondent to make a public announcement of the fact that it had received a corrective order from the Commission.

Policies Designed to Alleviate Economic Concentration

In general, "economic concentration" can be defined from many different perspectives: business concentration, which refers to the proportion of certain firms in the national economy as a whole; market concentration, which shows the share of certain firms in a certain commodity market; and ownership concentration, which refers to the level of wealth that a certain natural person or his family possess. However, the economic concentration unique to Korea is that certain Korean firms show all of the above-mentioned characteristics of concentration. In other words, a handful of people own and control numerous firms (a business group) based on blood relations, and each firm is managed within a group in a fleet-like manner, not independently. Through such means, the groups expand their affiliates and diversify their businesses, ultimately forming a monopolistic and oligopolistic market structure and controlling the entire market.

Such economic concentration in Korea is a historical product of the compressed, government-led economic growth strategy begun in the 1960s. These business groups can be characterised by the small number of people owning and controlling the affiliates of the groups and increasing and diversifying them through fleet-like expansion, ultimately dominating the market. Consequently, they keep failing companies in the market, disrupt balanced allocation of resources, harm balanced development of small-medium firms, and reduce economic efficiency.

It is true that large business groups have their merits, such as contribution to the rapid development of the Korean economy and benefits of economy of scale, but they are also the main culprits of economic concentration in Korea, raising the question of whether their wealth was accumulated in a just manner. Also, they are the target of harsh criticism due to the income disparity stemming from excessive concentration of wealth.

A number of indices support such worries of the ills of economic concentration in Korea. First, despite policies aimed at easing concentration which were pursued since 1987, the share of the top 30 large business groups in the national economy still exceeded one-third in 1993, which shows that the concentration is hardly being alleviated.

Table 5.

(%)	Shipments	Added Value	Tangible Assets	Employment
share of:				
top 30 business groups	38.1	33.6	44.6	16.6
(top 10 groups)	(30.8)	(26.5)	(35.6)	(12.7)

Source : Office of National Statistics

As a way of correcting the detrimental effects of economic concentration as well as promoting balanced economic growth and strengthening competitiveness, on 1 April 1987, the Commission introduced measures to suppress concentration in the Fair Trade Act - namely, prohibition on cross equity investment, limitations on total amount of equity investment, and prohibition on establishing or converting to holding companies. Also, since 1 April 1993, the Commission introduced a system of limiting debt guarantees in order to prevent chain bankruptcy arising from disproportionate credit toward large business groups and the impact of unsound management among a few affiliates spreading to the entire group. Thus, the total amount of debt guarantees to affiliates were limited to 200 per cent of its shareholder's equity; provided, however, that any amount exceeding the ceiling would be disposed of by 31 March 1996. Moreover, since July 1992, the Commission enacted " Standards for Examining Unfair Business Practices of Large Business Groups" which helps to strengthen surveillance of unfair in-house trading that aggravates economic concentration and gives rise to many other problems by discriminating terms of trade or prices and capitalising on superior positions in the market to support affiliates or to enhance competitiveness.

The government has been strengthening regulations against unfair in-house trading in large business groups in order to enhance specialisation of firms and secure independent management. In 1995, the government strengthened investigation of in-house trading and not only checked the implementation of measures by affiliates of top 30 business groups, but also extended investigation of such in-house

trading to the top 31-50 groups. In 1995, 24 affiliates of eight large business groups which were investigated for in-house trading in 1993 were chosen for checking whether the necessary measures had been implemented, and 32 affiliates of the top 31-50 business groups were newly chosen as targets for investigation.

Among the 56 affiliates of 28 business groups subject to investigation, 18 affiliates (no violations were found for 38 affiliates) were found to have engaged in unfair in-house trading. The types of such trade included 14 cases of discrimination in terms of trade, four cases of price discrimination, and three cases of sales to employees. Regarding measures against such acts, corrective orders were issued to eight firms, while both corrective orders and surcharges were imposed on eight other firms which were accused of more serious violations. On the other hand, the juridical person and representatives of three firms that had failed to implement corrective orders were reported to the prosecution.

Correction of Undue Collaborative Acts

With respect to undue collaborative acts, Article 22 of the Fair Trade Act states that "the Commission may impose upon the parties a surcharge not exceeding five per cent of the sales revenue posted between the date the violation occurred and the date the violation ceased." In addition, Article 19(3) states that "when two or more enterprises are committing any of the acts ... which substantially restrict competition in a relevant area of trade, the parties shall be presumed to have committed an unfair collaborative act despite the absence of an express agreement to engage in such act." Such clause is based on the realisation that it is often very difficult to secure evidence of undue collaborative acts; therefore, this article allows presumption of undue collaborative acts upon proof that certain acts prescribed in the law have been committed with the effect of restraining competition. In addition, Article 66 (Penal Provisions) states that undue collaborative acts is additionally punishable by imprisonment or criminal punishment.

However, even such collaborative acts are excluded from application of the law under the proviso in Article 19 (1) which states that the "prohibition shall not apply if such act has been authorised by the Commission in accordance with the provisions of the Presidential Decree for the purposes of rationalising the industry, promoting research and technology development, overcoming economic depression, promoting industrial restructuring, strengthening the competitiveness of small-and-medium-sized enterprises, or rationalising trade terms."

Ever since enforcement of the Fair Trade Act in 1981, the Commission has found 175 cases of undue collaborative acts. The types of such acts are as follows: price fixing topped the list with 89 cases, followed by 27 cases of unreasonable control of sales of goods and rendering of services, and 24 cases of territorial restriction and limitation of transaction partners. In 1993, in particular, undue collaborative acts relating to prices increased sharply as a result of liberalisation of prices earlier in the year.

Table 6. Corrective Measures for Different Types of Violations (cases)

Classification	1981~92	1993	1994	1995	Total
Fix, maintain, or alter prices	45	11	13	20	89
Restriction of business activities	-	3	1	3	7
Joint determination of terms of trade in goods, and etc.	8	1	2	4	15
Restriction of production and shipment of goods or services	16	1	5	5	27
Restriction of territory of trade or customers	14	2	4	4	24
Limitation on types and sizes of goods	8	-	-	1	9
Establishment of joint corporations	-	1	1	2	4
Total	**91**	**19**	**26**	**39**	**175**

Note: There can be more than two types of violations for one case.

As corrective measures, three cases were reported to the prosecution, surcharges were imposed on eleven cases, and corrective orders, recommendations, warnings, and etc. were imposed against the rest.

Table 7. Number of Corrective Measures by Types (Cases)

Classification	1981~92	1993	1994	1995	Total
Reports	1	-	2	-	3
Corrective Orders	24	4	5	13	46
(Surcharges)	(2)	(1)	(2)	(6)	(11)
Corrective Recommendations	27	-	1	-	28
Warnings	42	12	11	13	78
Sub-total	**94**	**16**	**19**	**26**	**155**
Dismissal and Others	61	4	12	14	91
Total	**155**	**20**	**31**	**40**	**246**

In 1994, for the first time, the prosecution and the police jointly launched an investigation of bid rigging in construction orders, which rang an alarm bell against such acts in construction projects. The major cases of correction are as follows:

Case Study: Bid rigging in Construction of Baek-chae Bridge

On 30 September 1994, 16 construction firms, including company C, participated in bidding for the construction of Baek-chae bridge offered by the Office of Supply of the Republic of Korea (OSROK) and collaborated to make company C land the bid by tendering their bids at the price determined by company C which wrote the bidding statements for them, or by bidding at a much higher price. The

Commission issued corrective orders (including obligation to make a public announcement of the violation in the newspaper) to all 16 firms that participated in the bidding and filed a report of the juridical person and representative of the 16 firms at the prosecution which subjected them to a summary trial and charged the juridical person with 30 million to 50 million won in fines, while charging the representative with five million to 50 million won. To the main culprit, company C, the Commission requested that the OSROK disqualify it in bidding for government-offered construction bids, following which company C was restricted from participating in bids for two months.

Rectification of Unfair Business Practices

In 1995, the Commission filed corrective measures against a total of 356 cases for unfair business practices. This is a 4.7 per cent increase from a total of 340 cases in the previous year, as shown in the chart below. The Commission affairs relating to regulation of unfair business practices in 1995 were particularly significant in that they helped to enhance effectiveness of the enforcement of the Fair Trade Act by strengthening sanctions against firms engaging in unfair business practices such as those in wedding hall businesses, advertisements, and so on.

Even public corporations are subject to application of the Fair Trade Act when they engage in businesses described in Article 2 of the Fair Trade Act. That is, even businesses in which the government has made investments or which are established or supported by the government are equally subject to application of the Fair Trade Act as are private businesses. Since the enactment of the Fair Trade Act in 1980, the Commission conducted a total of six investigations on its own authority against public corporations up to 1995. In 1993, the Commission announced a designation and notification of market-dominating firms, in which 18 were public corporations, and investigated whether their contracts contained any unfair elements. In 1995, a large-scale investigation on its own authority was conducted with respect to 21 public corporations with large orders including regional public corporations. In 1995 alone, a total of 75 corrective measures were issued by the Commission for unfair business practices.

In terms of types of measures taken in 1995, there were 23 cases of reports filed, 118 cases of corrective orders issued, 42 cases of surcharges imposed, 82 cases of corrective recommendations made, and 133 cases of warnings given.

Table 8. Different types of corrective measures against unfair business practices (cases)

Classification	1981~87	1988	1989	1990	1991	1992	1993	1994	1995
Reports	2	2	-	5	3	-	-	4	23
Corrective Orders	195	59	49	58	78	93	149	144	118
(Surcharges)	-	-	-	-	-	-	(23)	(63)	(42)
Corrective Recommendations	211	60	117	40	43	31	40	52	82
Warnings	503	154	154	74	211	168	126	140	133
Total	**911**	**275**	**320**	**177**	**335**	**292**	**315**	**340**	**356**

The types of unfair business practices against which corrective measures were taken (excluding warnings) are as shown in the following chart: 141 cases of abuse of market-dominating power, 115 cases of unreasonable representations and false or exaggerated advertisements, 45 cases of excessive gift-offering, 43 cases of forced trade or exclusion of rival businesses from trade, 30 cases of limiting sales areas and conditional transactions, 12 cases of resale price maintenance, 13 cases of undue special discount sales, and 25 cases of unreasonable refusal to deal. Corrective measures against abuse of market-dominating position amounted to 141, which is a four-fold increase from 49 in the previous year. This is due, in large part, to the examination of distribution agency contracts of the newly designated market-dominating firms in 1995, and the issuing of corrective measures against their unfair provisions such as those relating to unilateral rescission of contract for the future.

Table 9. Corrective Measures against Different Types of Unfair Business Practices (Cases)

Classification	1981~87	1988	1989	1990	1991	1992	1993	1994	1995
Unreasonable refusal to deal	9	7	2	1	3	1	18	34	25
Deceptive advertisements	114	24	37	29	52	25	106	145	115
Excessive gift-offering	45	11	38	43	36	28	68	23	45
Undue special discount sales	127	27	40	15	7	20	28	21	13
Resale price maintenance	31	2	11	8	14	16	17	7	12
Abuse of dominant positions	26	35	60	7	23	45	67	49	141
Conditional transaction	19	1	15	11	14	17	29	21	35
Undue discriminatory treatment									
Trade coercion and others	-	-	-	-	-	-	28	42	20
	36	36	16	4	2	5	23	40	43
Total	**407**	**121**	**219**	**118**	**151**	**157**	**384**	**382**	**449**

Examination of Unfair International Contracts

Under Article 32 (1) of the Fair Trade Act, enterprises and trade associations are prohibited from signing contracts that contain undue collaborative acts, unfair business practices, and resale price maintenance. Also, under Paragraph (2) of the same article, the Commission can determine the types of and criteria for such acts and issue notifications. Pursuant to such regulations, the Enforcement Decree of the Fair Trade Act includes contracts for intangible property rights, import distribution agencies, and joint venture in types of international contracts (article 47 of the enforcement decree) and prescribes the types of unfair business practices in international contracts in the "Types of and Criteria for Determining Unfair Business Practices in International Contracts." (Commission Notification Number 1995-10).

Since 1993, the number of cases subject to enforcement of the act has dropped, marking a low of 288 cases in 1995. The major reason for the drastic reduction in the number of cases filed for report is that as of April 1993, contracts for joint venture investment, for transfer of technical service, for loans, for long-term imports, and etc. have been excluded from the list of contracts subject to reporting. In addition, since 1995, the compulsory reporting system has been replaced with the voluntary review system. Thus, only contracts with problematic clauses have been subject to examination. Following the introduction of the voluntary review system, the correction rate (number of cases corrected/number of cases examined) of 1995 jumped to 14.93 per cent, an increase of more than two-fold from 7.16 per cent of the previous year.

However, it is worth noting that in the beginning stages of the compulsory reporting system, the correction rate was also quite high. That was probably because in the early stages of signing international contracts, there were many elements of unfair business practices because the parties were not well aware of what constituted unfair business practices and because the foreign counterparts often abused their superior positions.

Correction of Unfair Subcontract Transactions

In 1995, the number of unfair subcontract transaction cases against which the Commission issued corrective measures or those which underwent arbitration at the Dispute Mediation Council amounted to 383, a sharp increase from 220 in the previous year. On top of that, 154 cases were subjected to the investigation on the Commission's own authority, which is also a steep increase from 41 cases in the previous year.

The main reason behind the general increase in the number of corrective measures is that at the end of 1993, a broad investigation on its own authority was conducted of large scale construction works such as those of subways, tunnels, bridges, gas pipes, and the like with a view to stemming shoddy construction. Moreover, the investigation on its own authority was also conducted on the manufacturing businesses including the electronics and machinery businesses where there are many subcontract transactions. Furthermore, the investigation on its own authority was also conducted on the delivery of subcontract payments during the new year holiday season of 1995. However, the number of cases filed in 1995, excluding those resulting from the investigation on its own authority, still marked 27 per cent more than that of the previous year. This is because the application of the Fair Subcontract Transactions Act was extended as of 1 April 1995 following its revision. Also, another reason could be attributed to the fact that there were many disputes among parties to contracts due to the general recession in the construction industry since 1994.

In terms of types of measures taken against unfair business practices, there were ten cases filed for report, 36 cases of corrective orders, and 224 cases of warnings. A majority of the cases filed for report were against enterprises that failed to implement corrective orders issued in 1995.

Table 10. Different Types of Corrective Measures (Cases)

Classification	1983~89	1990	1991	1992	1993	1994	1995
Reports	8	-	2	7	6	7	10(8)
Corrective Orders	249	7	75(60)	26(6)	43(8)	23	36(8)
Recommendations	65	-	-	-	-	1	-
Warnings	307	58	70(32)	66(14)	87(20)	105(41)	224(138)
Mediation	183	32	52	50	90	84	113
Total	**812**	**97**	**199(92)**	**149(20)**	**226(28)**	**220(41)**	**383(154)**

Note: bracketed are the number of cases investigated upon the direct authority of the Commission.

In terms of the types of unfair business practices that were subjected to corrective measures in 1995, there were 182 cases of failure to make subcontract payments, 83 cases of delayed subcontract payments, 462 cases of failure to pay note discount charges, 219 cases of failure to submit written documents, and etc. In terms of violations in the construction and manufacturing industries respectively,

out of a total of 1 359, those in the manufacturing industry amounted to 182, which is much lower than 1 177 of the construction industry. The main reason behind the wide gap is that in the manufacturing industry there is a high rate of dependence on constant transaction, making subcontractors more reluctant to file a report of unfair subcontract transactions by the contractor, in fear of termination of transaction with the parent firm; therefore, the investigations on the Commission's own authority need to be conducted regularly in the manufacturing industry. The rapid increase in the number of cases relating to failure to make subcontract payments, note discount charges, and advance payments in the construction industry, compared to that of the previous year, is thought to be because the investigation on its own authority has been strengthened and disputes among parties to contracts grew in the process of subcontracting due to a general downturn in the construction industry.

Examination of Unfair Standardised Contracts

Standardised contracts, where one party to a contract (enterprise) prepares the terms of contract in advance for the purpose of massive transaction with numerous counterparts, need to be examined more thoroughly to ensure fairness than individual contracts prepared upon agreement by both parties to a contract. "Regulation of Standardised Contracts Act" (hereinafter, Standardised Contracts Act) is based on the premise that enterprises that rely on standardised contracts have the social responsibility of preparing fair terms and conditions, taking into account not only its own interests but also those of its customers. Examination of the fairness of standardised contracts are made in accordance with the Standardised Contracts Act and deliberated on and determined by the Commission. Through abstract examinations (the Commission only determines whether the stipulations of the contracts are effective or not, regardless of specific disputes among parties to the contracts) of the standardised contracts, the Commission prohibits the use of unfair stipulations by issuing corrective measures against enterprises utilising such contracts. However, as the Standardised Contracts Act does not intervene in legal disputes among parties to the contracts (also known as "specific disputes"), such disputes need to be resolved in court through civil suit procedures.

Measures taken against standardised contracts are as follows: In 1995, a total of 51 corrective measures were taken against unfair stipulations in various fields of trade such as the financial, insurance, real estate, etc. In particular, a standard contract was prepared for apartment sales and rentals, and hospital services.

Table 11. Corrective measures against unfair standardised contracts (Cases)

Type	1987	1988	1989	1990	1991	1992	1993	1994	1995	Total
Corrective Orders	-	-	-	-	-	-	10	14	14	38
Recommendations	2	6	3	9	6	8	16	53	34	137
Request of correction	-	2	4	1	2	-	4	4	3	20
Dismissal and others	1	2	-	-	2	-	151	169	225	549
Total	**3**	**10**	**7**	**10**	**10**	**8**	**181**	**240**	**275**	**744**

In 1995, the regulation of unfair standardised contracts through issuance of corrective measures was taken a step further and standard contracts for each field of transaction began to be made by trade

associations. This was upon realisation that the establishment of a standard contract was urgently called for in order to prevent damages to consumers stemming from unfair stipulations.

This is not to say that enterprises are forced or obliged to utilise the standard contracts; however, the standard contracts do represent the minimum standards considered necessary for the balanced protection of enterprises and consumers. Therefore, if an enterprise prepares stipulations that provide less protection to consumers than that given in the standard contract, there is a high probability that the enterprise will be violating the Standardised Contracts Act.

In 1995, standard contracts were prepared for two areas - namely, apartment sales and rentals and hospital services.

Strengthening Co-operation among Competition Authorities

The Commission regularly holds bilateral consultations with the competition authorities of the US, Japan, France, and the like and exchanges opinions and discussions with respect to issues of mutual concern. When the Chairman of the Commission visited Europe in May 1995, he held discussions with the competition authorities of the EU and Germany for bilateral co-operation.

Through the Dialogue for Economic Co-operation (DEC) and the working-level competition policy talks begun in July 1993, Korea and the US have discussed issues of mutual concern and reflected the outcome in their respective polices. Following the first and second working-level competition policy meetings in February and April 1994 respectively, the third meeting was held at the US Department of Justice on 9 March 1995 with the participation of the relevant government officials. The third DEC marked the last meeting of its kind, and on 26 January 1996, the first Korea-US Consultation on Competition Policy was held at the Commission. The Korean delegation consisted of eight including Chairman Sei-Jin Pyo, and the US delegation consisted of three from the Federal Trade Commission including Chairman Robert Pitofsky and another three from the Department of Justice. In this meeting, there were presentations and discussions on the following topics: Recent Developments in Competition Policy and Enforcement, Enforcement Activities and Policies Regarding Anticompetitive Activities of Trade Associations, Developments in International Competition in the Competition Policy Area, Role of Competition Authorities in Enforcement of Consumer Protection Policy, and Criminal Enforcement of Competition Laws. Moreover, the US gave a presentation on the theme of Enforcement Activities and Policies Concerning Mergers and Acquisitions. This meeting was the first of its kind aimed at strengthening bilateral co-operation of the competition authorities, and mutual understanding was enhanced through presentations and discussions on the rules and regulations and key policy goals of both nations. Lastly, the two sides agreed to hold such meetings on a regular basis.

On 20 March 1995, the Korea-France Annual Competition Authority Consultation was held at the Commission with the participation of Vice Chairmen Yoon-Chol Chun and Frederic Yves Jenny as well as the relevant officials from both authorities. In this meeting, the two sides shared their experience and held discussions on the current developments in competition policies and those in the international community. Moreover, there was a question and answer session to touch on other issues of concern. Furthermore, the two authorities shared the view that multilateral co-operation would be more effective than individual measures. In conclusion, the two sides came to understand each other better and established a firm foundation for forging stronger ties and co-operation.

Since 1990, Korea and Japan have held annual competition policy meetings to enhance understanding of the competition laws in each nation and to strengthen mutual co-operation. The 6th

meeting in 1995 was held at the Commission between 22 and 23 June. In this meeting, the Korean delegation consisted of eight including Chairman Sei-Jin Pyo, and the Japanese delegation consisted of six including Chairman Kogayu. In the plenary session in which both chairmen presided, there were presentations and discussions of the current developments in competition policy and regulations for economic concentration. In the working-level talks, current international developments in competition policy and issues of mutual concern relating to the competition policies of the two countries were discussed.

On 28 May 1996, the 7th meeting was held at the Fair Trade Commission of Japan. For Korea, it was the first meeting following the elevation of the status and role of the Commission to a minister-level agency. The Korean delegation, consisting of seven delegates, was led by Chairman In-Ho Kim, while the Japanese delegation was led by Chairman Kogayu. In this meeting, there were four items on the agenda, including strengthening of the functions of the competition authorities and deregulation as well as corporate merger. As the two nations are geographically close and have many common aspects such as similarities in competition laws and regulations, there is much room for mutual co-operation. At a time when international discussions of competition policies are rapidly progressing around the OECD, the competition authorities of Korea and Japan agreed that through the free exchange of opinions in the annual meetings, they formed an important foundation for mutual co-operation in international talks.

Following the International Cartel Conference Berlin 1995, Chairman Pyo paid a visit to President Dieter Wolf of the FCO, during which they talked promoting bilateral exchange and mutual co-operation. Also, Korea and EU broached the possibility of regular bilateral consultations as well as current developments in international economic policies. As such, the Commission is striving to establish the foundation for co-operation with Germany and the EU in international talks of competition policy.

Following the conclusion of the UR multilateral negotiations, competition policy is emerging as the new key issue in international talks of trade. Moreover, talks of converging the various competition policies around the world are progressing rapidly at the OECD. At this juncture, Korea seeks to play the role of a bridgehead between the advanced nations and developing nations. Thus, between 10-13 September 1996, the Commission provided a "Competition Policy Training Program for Developing Nations" in Seoul. In this program, jointly organised by the Commission and the Korea Development Institute, 24 public servants in charge of competition policy from 12 developing nations (mostly APEC members) gathered in Seoul. The lecturers consisted of competition policy experts from home and abroad as well as experts from the Commission, and they talked on themes of "The Need to Introduce Competition Policies in Developing Nations," "Relation between Competition Law and Economic Development," and "Korean Experience in Enforcing Competition Policy."

NEW ZEALAND*

(1995)

I. Changes to Competition Laws and Policies, Proposed or Adopted

The amendments to the Commerce Act contained in the Commerce Amendment Act 1996 came into effect on 2 September 1996. The relevant sections set out in the Commerce Amendment Act 1996 are as follows:

Section 2 extends New Zealand jurisdiction in relation to certain business acquisitions consummated overseas. Specifically, it will provide jurisdiction over acquisitions between overseas firms that are not resident or carrying on business in New Zealand to the extent that the acquisitions affect a market in New Zealand. This will give the courts power to require divestiture in relation to assets and shares held in New Zealand.

Section 4 confirms that the Commerce Commission has the jurisdiction to consider applications for authorisation of practices that lessens competition without having to enquire into whether the practice substantially lessens competition.

Section 7 limits the amount the Commission is liable to pay to $40 million pursuant to an undertaking to pay damages in connection with the granting of an interim injunction. The Commission has an indemnity from the Government for up to $40 million per case.

Section 10 allows the Commission to state a case for the opinion of the High Court on any question of law arising in any matter before it.

II. Enforcement of Competition Laws and Policies

Action taken against anti-competitive practices

Summary of activities of the Competition Authority - Pro-active enforcement

The Commerce Commission continued one industry-practice study on Wholesale Gas Supply Contracts and initiated another to analyse data required to be supplied by firms in the electricity industry under the Electricity (Information Disclosure) Regulation the purpose of maintaining a watching brief on developing industry practices.

* The original language of this report is English

Complaints

During the year ended 30 June 1996, the Commission received 1 255 complaints, a considerable increase over previous years. Of these, 150 were found to involve *prima facie* breaches of the Commerce Act. These were further assessed and 61 matters were classed for full investigation.

Surveillance

As New Zealand has a voluntary notification regime for mergers and acquisitions, the Commission maintains a surveillance programme which detects and monitors business acquisitions which are proposed, or which have been given effect to, and which have not been the subject of clearance or authorisation notices. Most of the acquisitions identified do not require further action, but for those which raise concerns, further investigation is undertaken. During the year ended 30 June 1996, 320 acquisitions were identified by the programme, and of these 99 were followed up. This was consistent both with previous years.

Promotion of Public Awareness

The Commission issued 107 media releases, 13 of which focused on Commerce Act enforcement. Thirteen articles for trade or professional magazines, two of them related to Commerce Act enforcement, were produced or published. Commissioners and Commission staff gave 63 speeches, 11 on Commerce Act enforcement topics and another five on Commission-wide topics. Five pamphlets were reprinted and updated on Commerce Act enforcement and two general guides were issued. In addition to this the Commission released an exposure draft of guidelines on mergers and acquisitions, for public comment and feedback. The merger guidelines are due to be published in their final form in October 1996. The merger guidelines describe the basis on which the Commission will consider challenging an acquisition under section 47 of the Commerce Act on the grounds that the acquisition would result, or would be likely to result, in the acquisition or strengthening of a dominant position in the market.

Investigation

From 1 July 1995 there were 76 investigations completed, including those on hand at the start of the year, leaving 31 on hand at 30 June 1996.

Administrative Resolution

The Commission continued its practice of using informal warnings and administrative settlements to promote awareness of, and compliance with, the Commerce Act. During the year ended 30 June 1996, 29 informal warnings were given, advising persons that, in the Commission’s view, their behaviour was at risk in terms of the Act. Twenty-one of those warnings were followed up to determine whether the issues in question had been resolved and no further action in respect of them was required. Seven administrative settlements were achieved during the year.

Litigation

During the year ended 30 June 1996, the Commission approved the commencement of penalty action in the High Court against two matters, both related to the North Island meat processing industry. Four cases were decided by the courts including a $15 000 penalty for a price fixing and exclusionary behaviour, a $1 000 penalty for obstructing Commission officers in the execution of a search warrant, a permanent injunction restraining three hostels from price fixing, and the Port Nelson case concerning abuse of a dominant position.

Authorisations of Restrictive Trade Practices

Applications to authorise restrictive trade practices

On hand 1 July 1995	2	Authorised	2
Registered during year	3	Declined	2
		Withdrawn by applicant	0
		On hand 30 June 1996	1
Total	**5**	**Total**	**5**

Two applications concerned the interim wholesale electricity market. The Commission authorised the proposed pricing arrangements for the market for the period up to 30 September 1996. In respect of the second application, which related to an interim supply arrangement between ECNZ and Contact Energy, the Commission decided that the arrangement did not lessen competition and therefore the application could not be authorised.

The Commission has also authorised by-laws of the Sydney Futures Exchange Clearing House Pty Ltd ("SFECH"), that set criteria for admission to clearing membership of SFECH. The criteria required trades of dealers on the NZ futures and Options Exchange Ltd who were not clearing members of the SFECH to be cleared through and guaranteed by a SFECH member, and provided for disciplinary action against SFECH members.

The Commission declined to authorise a contract to guarantee access to services in a new mental health facility to be built by Health Waikato Ltd and a contract under which the applicants would agree to negotiate a contract for delivered mental health services to be provided at the facility. Four Regional Health act as monopsony health purchasers of health services on behalf of the Crown. Following the decision, the Midland Regional Health Authority and Health Waikato proposed a new services contract, which no longer required Health Waikato to be given favoured status after an initial three-year term.

Court Activity

In addition to the cases the courts have heard from action taken by the Commerce Commission or appeals against Commission decisions, the courts have also heard cases between private litigants.

Description of significant cases, including those with international implications

Port Nelson Ltd v Commerce Commission

Port Nelson Limited (PNL) owns the wharves, berths, slipways and harbour land at the Port of Nelson and has a monopoly over port access, berthage utilities and wharfage services but faces competition in the provision of stevedoring, tugs and pilotage services.

From 1988 to late 1990 pilotage services were contracted out to Tasman Bay Marine Pilots Ltd (TBMPL) while PNL retained control of the pilot launch and tugs. In 1990 negotiations to renew the pilotage contract broke down and the contract was cancelled. PNL reverted to using employed pilots whilst TBMPL decided to provide pilotage services directly to shipping companies.

PNL refused to make PNL tugs available to vessels piloted by TBMPL pilots, known as the 'tug tie'. PNL refused to supply tugs on the basis that PNL as owner would still carry the liability for damage caused by those using the tugs, and because PNL was reviewing its charges. TBMPL was reduced to providing pilotage services for small vessels that did not require the use of tugs until it obtained a small tug of its own in February 1991.

PNL introduced a new charging scale with a $100 minimum for operations up to 2 500 GRT (vessel weight), and a maximum of $800 for vessels for 36 500 GRT and over. This did not align with the charges proposed by PNL's own accountants, Deloittes. PNL also introduced a five per cent discount if all services required by the customer were supplied by PNL.

The Commerce Commission investigated the matter and initiated proceedings against PNL in the High Court for breaches of sections 27 and 36 of the Commerce Act 1986. Section 27 prohibits agreements that substantially lessen competition and section 36 prohibits the use of a dominant position for exclusionary purposes.

The High Court Decision (mid 1995)

The tug services and pilotage services were defined as two separate markets. The High Court found PNL had breached section 27 in regards to the pilotage market on two counts:

i) as at 1991, PNL's conduct in offering and allowing the five per cent discount in terms conditional upon use of all PNL services amounted to inducing and being party to contracts containing provisions that had the 'purpose' and 'likely' effect of substantially lessening competition in the pilotage market.

ii) PNL's offering and contracting at the $100 minimum pilotage charge had the purpose and likely effect of substantially lessening competition in the pilotage market.

The High Court also found PNL had breached section 36. PNL used its dominant position for the purpose of restricting the entry of PNL's competitors into the tug boat market by refusing to allow non-PNL pilots to use PNL tugs. However, PNL had not breached section 36 in respect of the five per cent discount or the $100 minimum charge.

The Court issued injunctions constraining PNL from refusing to hire its vessels to customers using non-PNL pilots, and constraining PNL from implementing a five per cent discount in the form proposed. The Court also imposed pecuniary penalties of $500 000 against PNL.

The Court of Appeal Decision (delivered 3 July 1996)

It endorsed the High Court's finding that PNL had under-allocated the costs of its pilots, and allocated most of its common costs to uncontestable services. The $100 minimum charge was significantly below what was justified. An approach to costing more closely relative to actual cost per vessel would have been appropriate.

The Court of Appeal found that while there were matters indicating that PNL was not totally unconstrained, that is not a necessary requirement for dominant influence. In assessing the likely entry of potential competitors into the tugs market, it was entirely open to the High Court to take into account the evidence of PNL's control over the facilities, PNL's local authority shareholders and PNL having priced its tug services below the level appropriate to recover costs. The Court of Appeal was satisfied that the High Court's finding that PNL was in a dominant position was correct.

Mergers and acquisitions

Statistics

New Zealand has a voluntary pre-merger notification system. Mergers notified to the Commerce Commission in the period from 1 July 1995 to 30 June 1996 were as follows:

Merger applications registered under section 66 (clearance)

On hand 1 July 1995	0	Cleared within 10 working days	21
Registered during year	37	Cleared after extension of time	14
		On hand 1 July 1996	1
		Withdrawn by applicant	1
Total	**37**	**Total**	**37**

Merger applications registered under section 67 (authorisation)

On hand 1 July 1995	0	Withdrawn	0
Registered during year	2	Authorised	0
		Declined	2
Total	**2**	**Total**	**2**

The Commission monitors business mergers and can initiate investigations into mergers not notified to it by the parties involved.

Mergers investigations initiated by the Commission

On hand 1 July 1995	37	No dominance concerns	60
Investigations started during year	99	Transaction not proceeding	23
		Clearance sought/obtained	17
		Authorisation sought/obtained	-
		Warnings issued	1
		Other	4
		On hand 30 June 1995	29
Total	**136**	**Total**	**136**

Significant Merger Cases

Litigation in relation to mergers and acquisitions involved four appeals against decisions made by the Commerce Commission. Significant features of cases involving the Commerce Commission's decisions on business applications are set out below.

Power New Zealand Ltd v Mercury Energy Ltd and Commerce Commission

Mercury Energy Ltd (Mercury) and Power New Zealand Ltd (PNZ) were the two largest electric power companies in New Zealand. They supplied line services and delivered energy to power consumers. Between them, they covered almost the whole greater Auckland region, the largest and fastest growing urban population in New Zealand. Mercury held 20 per cent of the shares in PNZ and wished to acquire the remaining 80 per cent. Mercury applied to acquire the balance of PNZ shares under New Zealand's voluntarily system for clearance of acquisitions. Based on a staff report the Commission decided in favour of giving Mercury clearance. PNZ appealed the decision to the High Court.

The Court said it could find no fault with the way in which the Commission approached its "difficult task", within a short time frame. The Court confirmed the Commission's decision in granting the clearance, and dismissed the appeal.

The Court the expanded market area was defined by market realities, not simply by firm activity. The enlarged firms's market power would be unchanged (i.e. the natural monopoly possessed by the ownership of local distribution lines and their dependence upon the nearest transformer) but the geographic scope of its exercise would expand.

The High Court rejected PNZ's claim that the merger would create a new regional market. The existing markets were separate because they must embody sunk costs that are embedded in the local distribution areas. It also accepted that the operation of new networks constrained existing line services. The operation of new networks in the Auckland region is not confined to Mercury and PNZ and as a result the acquisition would have little effect.

The Court concluded that the potential for the cross-border competition was taken too seriously by the Commission. The common border between the areas in which the two companies had embedded distribution assets was predominantly water (a harbour, river and a stream).

The Court was not convinced by PNZ's submission that the loss of consumer and yardstick comparisons between the two companies would cause a market power problem. It concluded that the loss of PNZ would have very little effect upon the availability of comparative material both within New Zealand and internationally.

In assessing the dominance of Mercury in the national market for electricity following the merger, the Court noted that figures of market share provided by the parties indicated that there was no dominance in sight. The development of the wholesale market would facilitate entry by independent traders and give a fillip to competition in the retail market. The evidence is that access to distribution has not been an impediment to the wheeling function (retailers buying power direct from the wholesaler, and then contracting for use of line services to retail to consumers wherever those consumers might be).

Air New Zealand/Ansett Holdings

On 3 April 1996, the Commission declined to give a clearance or grant an authorisation to the proposed acquisition of up to 50 per cent of Australian based Ansett Holdings Ltd, from TNT, by Air New Zealand. Air New Zealand is New Zealand's national airline on New Zealand's domestic and international routes. Air New Zealand's objective was to forge an alliance with Ansett in order to obtain access into Australia's domestic market and improve its competitiveness in the Asia-Pacific region's international markets.

Ansett Holdings Ltd owns the Australian airline Ansett Australia and Air New Zealand's main domestic competitor Ansett New Zealand. Qantas is Ansett Australia's main competitor in the Australian domestic market, and one of a number of international competitors on the regions international routes. Qantas was not interested in buying Ansett New Zealand or entering the New Zealand domestic market. The Commission concluded that the proposal would result in Air New Zealand and Ansett NZ becoming associated persons in terms of the Act.

As associated persons, their combined share of domestic passenger air services markets would be almost 100 per cent. In addition, the Commission considered that the threat of potential entry to the markets was unlikely to constrain them. It concluded that, as associated persons, Air New Zealand and Ansett NZ would be dominant in these markets.

In balancing public benefits against detriments to competition, the Chairman and Commissioner Stapleton were of the view that detriments outweighed benefits. Commissioners Allport and Auton took the opposite view. The Chairman used his deliberative vote and the application was declined.

News Ltd/ Ansett NZ and Air NZ/ Ansett Holdings

Air New Zealand and News Ltd, the owner of the other 50 per cent in Ansett Holdings Ltd, restructured the proposed acquisition of Ansett Holdings Ltd, and submitted two acquisition proposals to the Commission for clearance. On 4 June 1996, the Commission cleared New Ltd to acquire up to 100 per cent of Ansett New Zealand and also cleared Air New Zealand to acquire 50 per cent of Ansett Holdings from TNT, subject to News and Air New Zealand undertaking to dispose of all of the assets and shares owned and held by Ansett Holdings Ltd in Ansett New Zealand.

In clearing the separate but interrelated acquisitions, the Commission accepted undertakings from News and Air New Zealand as to the future shareholding of Ansett Holdings and the disposal of all

the assets and shares of Ansett New Zealand within one working day of Air New Zealand acquiring 50 per cent of Ansett Holdings.

With the implementation of the undertakings, Air New Zealand would have no ability to exert any influence over Ansett New Zealand and therefore would not acquire or strengthen a dominant position in the New Zealand air transport markets.

Ravensdown/SouthFert

On 21 June 1996, the Commission declined to clear or authorise Ravensdown Corporation Ltd's proposal to acquire up to 100 per cent of the shares of SouthFert Co-operative Ltd.

The Commission concluded that the combined company would acquire a dominant position in each of the South Island markets for the manufacture and wholesale supply of superphosphate, the importation and wholesale supply of high analysis fertiliser, and the wholesale supply of urea.

The Commission noted that the proposal would bring together the only companies currently active in each of these markets in circumstances where there was unlikely to be sufficient entry to act as a competitive constraint on the combined company. The Commission examined a range of public benefits which were claimed to result from the acquisition, but concluded that the likely level of detriment exceeded the likely benefits from the proposal. Ravensdown has lodged an appeal against the Commission's decision.

Telecom/ HKP Partnership

The Commission gave clearance to Telecom Corporation of New Zealand Ltd to acquire control of companies which were to hold the interests of its major shareholders in Sky Network Telecom Ltd. Clear Communications filed both judicial review proceedings and an appeal against the Commission's decision authorising Telecom to purchase 25 per cent of the HKP Partnership shareholding. BellSouth also appealed against the Commission's decision, but did not commence judicial review proceedings. At the same time Clear commenced a private enforcement action under Part II of the Commerce Act against Telecom. Subsequently, Telecom has abandoned its purchase of the HKP shareholding and, in result, there are no live issues remaining in the proceedings. Despite this, further interlocutory applications are to be heard where the Commerce Commission supports the stay of both Clear Communications and Bell South's appeals, and where the Commission is seeking that the judicial review proceedings be struck out. Clear, on the other hand, has indicated its intention to continue the Part II enforcement proceedings in conjunction with both its appeal and its judicial review applications despite there being no live issues remaining. The Commission is opposed to the continuation of these proceedings.

III. The Regulation of Essential Facilities

New Zealand has placed reliance on the Commerce Act 1986 to regulate access to the facilities of vertically integrated natural monopolies VINMs. This approach is supported by information disclosure regulations together with the threat of further regulation if monopoly power is abused.

In June 1996, the Government decided to continue, for the time being, with the present regulatory regime based upon the Commerce Act. Alternatives to the present regime had not been

developed to the point where they offered clear improvements to what had already been achieved in New Zealand. Officials are continuing to closely monitor developments, and to evaluate any potential means of improving on the present regime.

Regulation of Airport Authorities

The Airport Authorities Amendment Act 1996 was enacted in mid 1996. The objective of this Act is to guard against the potential for monopoly abuse by continuing the requirement that airport companies must consult over charges. This has been enhanced by the requirement that consultation take place at least every five years by all airport companies. In addition, the Act brings in a system of rigorous information disclosure and a requirement to consult on capital expenditure information, for airports with over $10 million of revenue. This environment is designed to ensure that the release of information will discourage airports from monopoly pricing and ensure that their charges are contested on at least a five yearly basis. In addition, there would continue to be a threat of further regulation if airport companies abuse their monopoly positions. These amendments were designed to maintain consistency with the principles of the Commerce Act 1986 and regulation of access to essential facilities in other sectors of the economy.

The Gas Industry

Gas sector reform has taken place in the context of broad structural reform, and in parallel with reform of many sectors in which the Government was commercially active. The Commerce Act is an important part of the framework for limiting monopoly power and promoting competition in the gas industry. The Government's business activities in the gas industry have been corporatised and privatised over the past ten years.

The Government announced in 1990 that firms engaged in gas transmission or distribution, or who are dominant in wholesaling or retailing, would be subject to information disclosure requirements to be included in the energy sector reform legislation package. Price control was removed in 1993 to coincide with the coming into force of the Gas Act 1992. The Gas Act provided for the introduction of information disclosure and the removal of exclusive distribution franchises. The information disclosure regulations have yet to be introduced, but are in the final stages of drafting.

The Electricity Industry

The New Zealand electricity industry's regulatory regime is unique in that there is no price control or industry-specific regulator. Instead New Zealand has adopted a 'light handed' regulatory regime to control the abuse of market power. The regime comprises:

i) full application of competition law (the Commerce Act 1986) to deal with anticompetitive behaviour; supported by

ii) extensive information disclosure requirements under the Electricity (Information Disclosure) Regulations 1994; and

iii) the threat of further regulation as a last resort if market dominance is abused.

This regime focuses particularly on the natural monopoly sectors of the electricity industry (ie transmission and line or distribution businesses) where concerns relating to market dominance are greatest. Requirements on sectors where competition is possible (ie retailing and generation) are much less stringent.

Reforms in Generation

The Electricity Corporation of New Zealand (ECNZ) was set up a as State-owned Enterprise, incorporating the generation and transmission assets of the New Zealand Electricity Division of the Ministry of Energy. In November 1995, a new State-owned generating enterprise, Contact Energy Ltd, was established for the express purpose of competing with ECNZ. Various rights and assets of ECNZ (amounting to around 28 per cent of New Zealand's generation capacity) were vested in Contact on 1 February 1996. This was an integral part of the wholesale market reforms.

Reforms in Transmission

The grid network interconnects all generation stations and substations which supply electricity to major consumers and local electricity companies. In 1988 ECNZ's transmission business, which had been incorporated within ECNZ, became a subsidiary company, Trans Power (NZ) Ltd. In April 1994 Trans Power was separated from ECNZ, thus facilitating access to the grid on fair and reasonable terms. Regional transmission pricing began to be phased in, with the price more closely reflecting the cost of supplying grid users.

Reforms of Distribution & Retailing

The Energy Companies Act 1992 required corporatisation of the then 48 Electricity Supply Authorities. Twenty two of the electricity companies have the majority of their shares owned by a trust. Twelve are majority owned by consumers, councils or private investors. One company is owned by the Crown. The remaining companies are owned by a mix of councils, trusts and private investors.

Electricity companies, as part of the process of adapting to more a commercial and competitive environment, are moving to rebalance electricity prices to eliminate cross-subsidies between classes of consumer. The balance between fixed and variable charges is also being adjusted to more accurately reflect the fixed component of costs.

The Wholesale Electricity Market

The Government announced its decision concerning the wholesale electricity market on 8 June 1995. The key component of the reforms was the splitting of ECNZ into two competing State enterprises, ECNZ and Contact Energy.

The Government recognised that, initially, ECNZ will retain a dominant position in the wholesale electricity market, with a (capacity) market share of about 68 per cent. Accordingly a set of special restraints apply to ECNZ until its market share falls below 45 per cent:

- a cap preventing ECNZ from building more than 50 per cent of new capacity; this will guarantee a share of the market to independent generators and ensure vigorous competition;

- ECNZ is required to 'ring-fence' additional capacity which it builds within this cap; this will constrain any cross-subsidisation of new ECNZ capacity from existing generation; and

- ECNZ is required to offer electricity form most of its capacity on longer-term contracts; this will reduce its ability and incentive to manipulate spot market prices.

The Government expects that the establishment of a competitive wholesale electricity market will provide incentives to investors (including overseas investors) to bring new generation capacity on stream when it is required , and will discourage overbuilding of new generation.

The Electricity Market Company Ltd

The Electricity Market Company Ltd (EMCO) was established in 1993 by ECNZ and the Electricity Supply Association of New Zealand (ESANZ) for the purpose of developing and providing the various services required by the proposed wholesale electricity market.

In September 1995, the ownership of EMCO was rearranged. Trans Power, ESANZ and ECNZ are now equal shareholders in EMCO. EMCO administers the rules which govern the New Zealand Electricity Market (NZEM). The rules provide for the buying and selling of electricity at the wholesale level through a pool arrangement in which competing generators offer electricity into the market for dispatch and transmission by the national grid company, Trans Power.

The market rules have been determined by market participants, within the constraints of the Commerce Act 1986. Market participants include generators, purchasers and traders. Admittance is by application to the independent Market Surveillance Committee. Alterations or additions to the rules of NZEM can only be made with the agreement of the participants.

From 1 February 1996 to 30 September 1996 the NZEM operated under interim rules, to smooth the transition to a fully competitive market. Rules for the fully competitive market, came into effect on 1 October 1996. The rules provide for a day ahead (*ex ante*) financial commitment market, providing the opportunity for purchasers and generators to establish a price and quantity a day ahead.

In addition, there is to be a real time physical market with the following characteristics:

- scheduling and dispatch based on simple price/quantity bids and offers;

- generation scheduled for each half hourly trading period to meet expected demand at the lowest cost;

- effects of frequency control reserves, transmission losses and transmission constraints priced in the market;

- marginal location factors determined daily for each half hour; and

- price allowed to clear the market (no cap or floor on spot price).

Agricultural Marketing Arrangements and the Commerce Act

The Ministry of Commerce contributes to policy advice to the Government on the regulation of agricultural marketing arrangements, specifically the competition policy implications of producer boards. In the past year, the Ministry of Commerce has been involved in reviewing the functions and powers of the Meat, Wool and Pork Producer Boards (the "Boards"). The review resulted in the Government deciding to:

- extend to the directors of the Boards the duties imposed on directors of companies under companies legislation;
- provide for the levy monies collected by the Boards to be held in separate trust accounts; and
- remove from the Meat Producers Board and the Wool Board unnecessary and unused powers.

Quality of Regulation

The Ministry of Commerce contributes to the formulation of policies which impact on competition and the business environment. In doing so, it applies quality of regulation principles, in particular:

i) the specific issue or problem should be clearly defined;

ii) all the options available to address the problem/issue which has been identified should be identified (including the status quo);

iii) the options being considered should target the problem/issue and be proportionate to the magnitude of the problem/issue;

iv) the option which has the greatest net benefits should be determined through a comparative analysis of the options.

In identifying policy options on a given issue, policy developers must consider whether existing generic law (including the Commerce Act) is a sufficient framework to address the identified problem or issues. Secondly, in comparing the net benefits of the options, policy developers must consider the impacts each option will have on competition and economic efficiency in the relevant markets. Accordingly, the Ministry of Commerce has a role in contributing to policy formulation and implementation on a wide range of issues. The most significant issues in the twelve months to 31 August 1996 has been work involving infrastructural issues such as transport, roading, electricity and telecommunications.

IV. Publications Relating to the Commerce Act

Publications of the Commerce Commission (Revised and Reprinted)

Anti-competitive Behaviour - What the Commerce Act Prohibits

Comply with the Commerce Act - A Guide to Setting up a Compliance Programme for Your Business

Reducing Competition - A Guide to Section 27 of the Commerce Act

Business Acquisitions and the Commerce Act 1986

Refusal to Deal and the Commerce Act

The Commerce Commission - A General Guide for the Business Community

Dictating Prices and the Commerce Act

Publications Relating to the Fair Trading Act and Consumers Guarantees Act

Refunds Returns Guarantees and Warranties - The Links Between the Consumer Guarantees Act and the Fair Trading Act

Place of Origin and the Fair Trading Act

Investigative Powers of the Commerce Commission

Debt Collecting and the Fair Trading Act

Safety Standards for Bicycles

NORWAY*

(1995)

Introduction

On 1 May 1995 Einar Hope succeeded Egil Bakke as the head of the Norwegian Competition Authority.

A new strategic plan for the Authority for the first three years has been introduced. The Authority has a vision of being the central national authority of competition policy in all markets as well as being the main centre of competence regarding every question within this field. The plan takes into account the process of integration and internationalisation of markets and the need for updated information about development and changing conditions in various markets. The plan especially takes into consideration the new challenges which have to be met as new markets gradually are being opened up to competition. The competence of the Norwegian Competition Authority and the authority of other industry specific authorities must be clearly defined and a close co-operation with these authorities should be established.

Several cases which have been investigated and reported to the police by the Competition Authority have been appealed and decided by the Supreme Court. In one case the Supreme Court has quintupled the fines imposed by the lower court.

An infringement of the prohibition against price fixing agreements in the gold and silver market was reported to the police in 1995. Several interventions against restrictive agreements have been carried out and the Authority has intervened in one merger case.

The trade agreement in the book market has been granted a renewed exemption from the prohibition against price fixing agreements on certain conditions, the main one being that sale of schoolbooks should be excluded from the agreement. The case was appealed to the Ministry of Government Administration, which accepted the exemption without conditions.

The Competition Authority has delivered several statements to the Ministry of Government Administration concerning competition and regulatory policy issues.

I. Competition Laws and Policies

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

* The original language of this report is English

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 fix or seek to influence prices, discounts or mark-ups for the recipients sale of goods or services. Nevertheless, an individual supplier may stipulate recommended prices for the recipients sale of goods or services on the condition that the prices are explicitly defined as recommended. Market sharing in the form of area division, customer division, quota distribution, specialisation or limitation of quantity is prohibited. An individual supplier may, however, enter into an agreement on market sharing with or determine market sharing for his recipents, 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 supply of goods or services is permitted for individual projects.

- Price collaboration and market sharing are permitted between owner and company where the owner has more than 50 per cent of stocks, shares or corresponding equity stakes giving voting rights.

- The prohibitions shall not apply to restraints that are determined between licensor og licensee in an agreement stipulating the licensee's right to utilisation of a registered patent or design.

- 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.

Exception from the prohibition against market sharing

The prohibition against market sharing encompasses both area division, customer division, quota distribution, specialisation or limitations of quantity. Market sharing agreements entered into in connection with the acquisition of enterprises are excepted from the prohibition. 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. If the former owner is an important potential competitor such agreements may 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.

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 are invalid between the parties of the agreement.

Merger Control

The Competition Authority may intervene against mergers or acquisitions of enterprises. Normally any intervention must take place within six months after a final agreement on a merger or an acquisition has been concluded. An agreement on a merger or purchase of shares may, on a voluntary basis, be reported to the Competition Authority in order to ascertain whether the Authority will intervene. The Authority must, 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 retail goods to consumers shall, pursuant to the Act, provide information on prices so that they can be easily observed by the customers. The same applies to sale of services to consumers.

New legislation in 1995

Exception from the prohibition against market sharing in connection with sale and renting of real estate

In connection with sale and renting of real estate, clauses regarding market sharing are often agreed upon. The clause may imply that a certain business activity should not be carried out by the new owner. In that way the seller or buyer can avoid competition. The Competition Authority hold that this may be necessary to make a seller willing to transfer a property to a new owner. It may also be necessary to protect a buyer or renter from competing business carried out at a nearby estate. The new provisions limit such market sharing agreements to a period not longer than ten years.

New provisions concerning redundant information

The Competition Authority has issued specific provisions concerning superfluous information. The Authority may carry out inspections to secure evidence when there are reasonable grounds for assuming that the Competition Act has been infringed. In connection with such inspections the Authority may find and confiscate documents for closer investigation. Some documents may turn out to be irrelevant to the competition case under investigation. The new provisions regulate how such information shall be treated. Documents which do not concern the competition case under investigation should be returned or shredded. If the documents contain information about serious criminal actions by the enterprise in question, a public reaction would be necessary. Documents containing information about criminal actions should therefor be transferred to the prosecution authority.

The Price Policy Act

Parallel with the Competition Act, the Act of 11 June 1993 relating to Price Policy took effect (the Price Policy Act). The Price Policy Act entered into force on 1 January 1994 and provides authorisation for price regulation. Moreover, it carries on the prohibition on unreasonable prices.

II. Enforcement of Competition Laws and Policies

Infringements of the prohibitions

The Competition Authority is continually supervising markets in order to determine whether the provisions of the Competition Act are complied with. Such activities have uncovered various unlawful practices during the previous year. These have been referred for prosecution and in some cases substantial fines have been imposed by the courts. The infringements have mostly concerned the prohibition against price fixing agreements.

The producers of corrugated cardboard

In 1994 the four largest Norwegian producers of corrugated cardboard were fined a total of NOK 2 650 000. In addition they had to relinquish a gain of NOK 7 932 000 and pay costs of NOK one million. Each of three managing directors were fined NOK 75 000. The ruling was appealed to the Supreme Court which decided the case in December 1995. The appeal was rejected on all counts. The Court found that the illegal co-operation had resulted in increased prices for the customers, leading to a loss of economic efficiency and also to considerable profit increases to the enterprises involved. The Supreme Court also took into account that the collusion had been both well concealed and organised. The Supreme Court concluded by increasing the fines (by 400 per cent) to NOK 14 900 000. The relinquishment of gain and the payment of cost were maintained, as these aspects were not appealed by the companies.

Driving schools

In 1994 a local court fined three driving schools and seven persons involved for illegal price co-operation. One of the schools and its owners appealed the decision to the Supreme Court. The school had a considerable lower turnover than the other two and had in spite of this been fined almost the same

amount. The Supreme Court came to the conclusion that turnover gives an indication of the extent of the infringement. The court found that the degree of the fine should be set in proportion to sale/turnover. The Supreme Court consequently reduced the fine (from NOK 40 000 to NOK 25 000). The fines levied on the owners were maintained.

Infringements in the gold and silver ware market

The Competition Authority has reported a local craft guild in Stavanger and eight retailers in the gold and silver ware market to the police in 1995 for illegal price co-operation. The infringement took place from 1992 to 1995. The craft guild had issued recommendations concerning the calculation of prices. It had also advised its members that recommended prices set by producers should be treated as fixed retail prices. The co-operation also comprised repairs and engraving. In Kristiansand the retailers had agreed upon common prices for silver cutlery. They had also decided that recommended prices on specified jewellery should be adhered to. The case is now referred to the police for prosecution.

Merger control

Four hundred and forty-seven mergers or merger plans have been registered by the Competition Authority in 1995. Twenty-four mergers have been subject to a closer examination. Four cases were still under consideration by the end of the year. In one case the Authority decided to intervene.

The acquisition of Norgro AS by FKØ

Felleskjøpet Østlandet (FKØ) is a dominant enterprise, owned by various associations of Norwegian farmers. FKØ functions both as wholesaler and retailer and has a high market share especially in the market for fertilisers, farm machinery and seed products. In 1995 it acquired Norgro AS, one of its largest competitors. The Competition Authority was of the opinion that the acquisition would substantially reduce competition in the market especially for concentrated cattle food and fertilisers. The Authority would only accept the acquisition under a number of specified conditions. After negotiations with the Authority the FKØ has accepted three conditions relating to the acquisition. It will sell Norgros division in Kristiansand in the course of 1995. Furthermore, any mill having co-operation agreements with FKØ or Norgros AS should be offered to have existing agreements reviewed within three months. Finally a packing station for fertiliser, the control of which passed to the new company, would have to be sold in 1995.

Ringnes/Fortos

In 1995 a merger case was dealt with by the European Commission in accordance with the EEA Agreement. The Commission accepted a merger in the market for beer and mineral water between Ringnes, a brewery owned by Orkla AS, an enterprise dominant within various sectors in the consumer market, and the Swedish enterprise Fortos, who also owns a brewery, Hansa Bryggeri. The merger led to a strong concentration in the Norwegian market for beer. Accordingly, the merger was only accepted on condition that Hansa Bryggeri should be sold within a certain date. The Norwegain Competition Authority co-operated with the Commission in the procedure.

Nordic Satellite Distribution

In 1995 the European Commission dealt with a case concerning the development of a distribution system for satellite-TV in the Nordic countries where the Norwegian enterprise, Telenor AS, was involved. The Commission assessed the case in accordance with the European Unions merger regulation and decided to forbid the agreement as incompatible with the common market. The case was decided on the ground that the Nordic Satellite Distribution (NSD) created a dominant position as a supplier of satellite distribution capacity in the Nordic market. Further, the Commission found that NSD by it's vertical integrated ownership would control all the levels in the distribution chain. The Norwegian Competition Authority participated in hearings and in the EU Advisory Committee.

Intervention against restraints on competition

The Competition Authority may intervene against terms of business, agreements and actions if the Authority finds that they have the purpose or effect of restricting, competition contrary to the aim of the Competition Act. During the last year the Competition Authority has inquired into several such cases. In the following a short summary of two of the cases will be given.

Refusal to deal in the gold- and silverware market

A retail chain in the gold and silverware market, Gull-Funn, intended to start dealing in clocks and watches in connection with a change of management. Consequently orders for clocks and watches were placed with three dominant wholesalers. The wholesalers all refused to supply the goods ordered. Gull-Funn complained to the Competition Authority, arguing that the wholesalers had co-operated on the refusal to deal. Gull-Funn also held that the refusal was caused by pressure from established retailers. The Authority decided to intervene as the chain would not have a sufficient number of alternative suppliers if the three dominating wholesalers refused to deal.

A private register for health products

In 1995 the Competition Authority intervened against a private register for health products. The register had been established in co-operation between the association of suppliers of health food and the association of retailers. The purpose of the register was to supervise and guarantee the quality of health products. In order to avoid restriction of competition the Authority demanded forbade the retailers' association to organise joint refusals to purchase non-registered health products. Furthermore, the condition that either all or none of the products should be registered was disallowed. The fee for registration should be the same for members and non members of the association.

Exemptions from the prohibitions

The Norwegian Competition Authority may grant exemption from the prohibitions. Exemption may for example be granted when the restrictive practices in question may lead to increased competition, promote efficiency or have little competitive significance. A substantial part of the cases dealt with during 1995 concerned collaboration on prices within small chains of retailers.

Trade agreement in the book trade

The Norwegian Association of Booksellers and The Norwegian Publisher applied in 1995 to the Norwegian Competition Authority for an exemption for their revised trade agreement.

The agreement regulates business conditions between publishers and booksellers. The agreement conflicts with the prohibition against price co-operation and market sharing in the Competition Act. In order to be valid the agreement must be given an exemption from the prohibition.

Considering an exemption from the prohibitions in the Competition Act, the Competition Authority has focused on the regulations related to school books and book clubs. The agreement was granted exemption from the prohibitions in the law on the following conditions:

- school books regulations should no longer be part of the agreement
- the price restrictions connected to book clubs had to be removed
- the publishers were not allowed to label the price on books before distribution.

The decision of the Competition Authority was appealed to the Ministry of Government Administration, which accepted the exemption without the conditions mentioned above.

SAS/Lufthansa

In May 1995 the two airline companies SAS and Lufthansa applied for an exemption from the prohibitions, under the Treaty of Rome and the EEA-agreement, against collusion restricting competition. The European Commission found that the agreement between the two parties would create a monopoly in the market of air transport between Scandinavia and Germany. The agreement was exempted under conditions that enabled new entrants to enter the market. The Norwegian Competition Authority was involved in the procedure. The Commission reached its final conclusion in January 1996.

Subjects related to prices

Price surveillance, price regulation

For certain commodities and services for which competition is negligible or non-existent the Competition Authority has stipulated maximum prices. This applies for instance to cement, milk and taxi services. Certain firms have been instructed to notify the Competition Authority when increasing their prices.

The price regulation for artificial fertilisers

The price regulation for artificial fertilisers was abandoned in 1995. Prices for artificial fertilisers, produced by the Norwegian enterprise Norsk Hydro, have for many years been regulated by maximum prices due to the dominant position enjoyed by Norsk Hydro in the Norwegian market. In 1995 the Competition Authority decided to abandon price regulation. Import of fertiliser has introduced an element of competition in the Norwegian market. This is confirmed by the fact that one of the most dominant wholesalers in this market always considers alternative foreign suppliers before buying. In the

opinion of the Competition Authority increased international competition has been the main reason why Norsk Hydro has for some time not charged maximum prices. The company is, however, obliged to submit information of any price increase. This will enable the Competition Authority to monitor the market and prevent Norsk Hydro from abusing its dominant market position.

Norgesgruppen

During the last few years there has been a growing trend of concentration both in the wholesale and retail trade in the consumer goods sector. This has led to an increased vertical integration of wholesalers and retailers. In the opinion of the Competition Authority this trend may well have adverse effect on competition. The Competition Authority has therefore instructed a major wholesaler and four wholesale/retail chains to report to the Authority of any further acquisition or agreement on vertical as well as horizontal co-operation. The establishment in 1995 of a new group of retailers, Norgesgruppen, has lead to a closer co-operation between retailers which had been organised in the group Norgesdetalj. The new group has a market share of 37 per cent of the sale of consumer goods in Norway. The establishment of Norgesgruppen has furthermore resulted in a closer connection between the co-operating wholesalers and retailers. This may also lead to weakening co-operation between wholesalers which do not co-operate with the new group. The Authority has therefore decided to impose an obligation to submit information about acquisitions, agreements with new groups, new associated members and any new agreements between the group and other dominant chains, groups and wholesalers in the market.

Price information and price awareness

The general obligation to provide information on prices so that they can be easily observed by consumers applies also to sales of services. In 1995 a new provision was introduced for dentists.

The Norwegian Competition Authority makes an effort to promote price consciousness among consumers as well as trade and industry by way of publishing surveys of price differentials in various markets. The Authority also carries out price researches for information to the public.

III. The Role of Competition Authorities in the Formulation and Implementation of Other Policies

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 two cases illustrates this work:

Deregulation of the state monopoly for wine and spirits

Until 1996 all retailing, wholesale, import and export of wine and spirits were run by a public monopoly, AS Vinmonopolet. After 1 January 1996 AS Vinmonopolet has been divided into two separate companies. AS Vinmonopolet is still the sole retailer of wine and spirits, while Arcus AS is a state-owned wholesaler. The wholesale market has however been opened for competition from private wholesalers/

importers in order to comply with the obligations following from the EEA agreement. In connection with the deregulation the Competition Authority has made several statements to the government.

The Competition Authority is of the opinion that competition in the market for wholesalers is welcomed. This should produce incentives to increased efficiency in the market. The number of competing wholesalers will depend on the licence granting policy and the control systems. These conditions must not be set in such a way that they function as barriers for entry of potential new wholesalers.

A new agency is given the authority to grant licences for the wholesale and production of spirits. A fee will have to be paid for submitting an application. An additional fee will be levied on wholesale and production. This fee should be set proportional to the amount of alcohol sold and should vary with the various types of alcoholic beverages. The Competition Authority held that if the public system for control and licence granting should be financed by the actors, the fee should reflect the real costs and corresponding with the need for control systems and not be excessive.

Wholesalers will have to provide a guarantee for minimum NOK 400 000 to cover excise duties. The Authority maintained that small enterprises may have problems to get a bank guarantee for such a considerable sum of money. This may eventually contribute to reduce the number of competitors.

In one statement the Authority stresses that the activities of AS Vinmonopolet and Arcus AS must be kept separated. Cross-subsidisation of the activity exposed to competition from the activity sheltered from competition must not take place. Such subsidisation will make it unprofitable for newcomers to enter the market.

AS Vinmonopolet should not favour Arcus AS when buying wine and spirits. The public monopoly for retail sale of wine and spirits will be the most important customer for any new wholesaler. The turnover of the wholesaler will consequently depend on whether or not their products are on sale in the shops of the monopoly. The Authority maintained that new wholesalers must get the opportunity to sell wines through the monopoly retailer and that information about the wines is given by the shop manager.

The provisions also demands that a wholesaler must have a distribution system that covers the whole country. The Authority demanded that this provision should be removed to make it possible for small wholesalers to enter the market.

The market for telecommunication

The Competition Authority has dealt with several cases in the market for telecommunication. Parts of the sector has recently been deregulated and further deregulation is expected to take place. The Authority has submitted several statements to the Ministry of Administration on the subject.

In Norway there exists two parallel mobile telephony systems. Telenor Mobil has a licence to provide a Nordic mobile telephony system named NMT and Telenor Mobil and NetCom each have one GSM-licence.

Telenor Mobil's NMT (monopoly) and GSM (competition) business are organised within the same business unit. Telenor Mobil is required to establish an accounting system which shows profit and loss account and cash flows for each system. The Competition Authority is of the opinion that separate

accounts hardly will be sufficient in preventing cross-subsidization or other competition restraining effects of the organisation.

It is the Competition Authority's view that separation of Telenor Mobils NMT and GSM business is essential to efficient competition in the mobile telephone market in Norway. It is important to prevent Telenor Mobil from establishing a business connection between the NMT and GSM businesses, with the result that competition in the GSM market may not take place on equal terms.

Telenor has signed a contract with the Norwegian State Railways which grants Telenor an exclusive right for 15 years to make use of spare capacity in the cable system owned by the railway. The cable system is a potential substitute in nation-wide telecom transmission, and consequently a system that could have been a major challenger to Telenors own cable net. In a letter to the Ministry of Administration the competition Authority has pointed out the potential harmful effects on competition emerging from this agreement. The Competition Authority has requested that the issue should be discussed with the Ministry of Transportation and Communications.

Telenor is obliged to supply leased communication lines on equal terms within the delivery area for the specific type of lines. Prices shall be calculated on objective terms, based on costs. Equal terms also implies that the price for communication lines shall be the same within the delivery area. Consequently, prices on leased lines can be above costs in densely populated areas and below costs in rural ones. It is the Competition Authority's opinion that this could imply inefficient utilisation of society's resources. From the Competition Authorities point of view competition in leased lines should be open. By use of tenders it should be possible to ensure that every part of the country gains access to leased lines and that control of prices is maintained in rural areas. Tenders should also ensure cost efficient solutions.

Private dairies

The first private dairy in Norway was started in 1995. The dairy sells milk for consumption. All other dairies in Norway are part of an agricultural co-operative, owned by the farmers associations. Sale of milk to consumers is the most profitable part of dairy activities, while production of butter and cheese is far less profitable. In order to create equal competition conditions between dairies the Ministry of Agriculture has decided that the new private dairy shall participate in the cross subsidising of the various products by paying a fee. The fee proposed for the private dairy was higher than the fee set for the other dairies. The reason given is that the co-operative dairies are assumed to have higher transport costs than private ones because of tasks set for regional policy purposes. The Authority held in a statement that the fee for private dairies and co-operative dairies must be identical in order to secure equal possibilities for competition and prevent private dairies from being closed down.

IV. New Reports and Studies on Competition Policy Issues

The Competition Authority may intervene against terms of business, agreements and actions which may restrict competition or work against an efficient utilisation of resources. In order to safeguard an objective and consistent analysis of the various cases, the Authority has published guidelines on its policy of enforcement. The guidelines also inform about how the Competition Act is practised.

During the last few years the Authority has published guidelines concerning:

- Individual exemptions from the prohibitions laid down in the Act
- Intervention against loyalty discounts
- Intervention against refusals to deal
- Intervention against mergers and acquisitions

V. Strategic Plan for the Period 1996-1998

During the last part of 1995 a new strategic plan for the Authority was introduced which took into consideration the new challenges which have to be met in the years to come. The Authority has formulated a vision of being the central national authority of competition policy in all markets as well as being the main centre of competence regarding every question within this field. The plan takes into account the integration and internationalisation of markets, the need for updated information about changing conditions in the markets and the new challenges as newly deregulated markets gradually are opened up to competition. The Authority will have the following strategic goals in the coming three years:

- The Competition Authority shall be the main and primary authority with regard to all aspects of competition in every part of economy.
- The Authority will initiate and further the introduction of competition in those parts of economy which so far have been regulated. In those markets which are deregulated the Authority will act according to the Competition Act. Consumers, trade and industry in such sectors shall act price consciously. The Authority will press for the right to exert influence when regulation of monopoly sectors are carried out.
- The Authority shall try to influence other public agencies to take the competitive aspects into account when public trading concerns are established and when public enterprises carry out their activity.
- The Authority shall co-operate with competition authorities in other countries to ensure that competition will play a key role in effecting efficient use of resources.
- Information on competition in various trades and markets shall be made easily accessible, enabling the Authority to achieve the goals laid down in the Competition Act.

VI. Organisation of the Competition Authorities

The authorities

The superior authority in the sphere of competition policy rests with Stortinget, the Norwegian Parliament. In the Ministry of Government Administration, which is the governing agency for the Norwegian Competition Authority, a specific section is 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 which may have a significant restraining effect on competition. The Ministry also takes part in international activities in the field of competition.

Organisation of the Norwegian Competition Authority

The Norwegian Competition Authority is responsible for Norwegian competition policy and the 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:

- 8 Regional Sections and a Central co-ordinating Unit

Competition Department:

- Division for Consumer Goods
- Division for Crafts and Industry
- Division for communication and Liberal Professions
- 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

According to the legislation, the Competition Authority appears to have overlapping competence with industry specific public authorities which make regulations and grant concessions in various sectors, for instance energy, finance, post, telecommunication, railways, air transport, health services, agriculture and fishery. The Norwegian Competition Authority will, as far as competition policy is concerned, contribute towards obtaining a clear distinction between the tasks and competence of the Competition Authority and the authority of industry specific bodies. The Competition Authority has also the ambition of acting as adviser for the public regulatory bodies to secure that equal principles are followed in all technical regulations and in regulation of monopolies.

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 down statements from employees in the enterprise 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 fining 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 recipient 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

The Market Council functions as the court dealing with cases brought there with reference to the Act by the Consumer Ombudsman or a party involved or affected.

The Stortings 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.

EFTA Surveillance Authority, EU Commission and the competition authorities in other countries

The EFTA Surveillance Authority (ESA) and the EU Commission are responsible for the enforcement of the competition rules according to the Treaty of Rome and the EEA agreement. In cases concerning Norwegian markets, the Norwegian Competition Authority has a close co-operation with these authorities. The Competition Authority is sending trainees both to ESA and the EU Commission. There has been a close and long-lasting relationship between the competition authorities in the Nordic countries.

When Finland and Sweden joined the European Union this relationships became even more important to the Norwegian Competition Authority.

The Competition Authority has also co-operated with competition authorities in other countries. Two officers from the Romanian Ministry of Finance were for instance in 1995 on a three week traineeship in the Norwegian Competition Authority.

PORTUGAL*

(1995-1996)

I. Changes to competition law and policy, proposed or adopted

Summary of new legal provisions of competition law or related legislation

During this period of time no new act or amendments to the Competition Act were adopted. The main reason for this lays on the fact that Decree-Law No. 371/93 (DL 371/93) only came into force on 1 January 1994.

Other relevant measures, including new guidelines

The Directorate-General for Competition and Prices (DGCP) issued a form relating to the merger notification procedure under DL 371/93, which specifies the information that should be provided by the undertakings to the DGCP. A notice establishing some guidelines in the area of merger control is being prepared.

Government proposals for new legislation

A proposal assigning the DGCP the task of investigating some unfair trade practices, such as price discrimination and tied selling, refusal to sell or to deal and predatory pricing, which are not considered as anti-competitive practices by the Portuguese law, is currently under study.

II. Enforcement of competition law and policy

Action against anti-competitive practices, including agreements and abuse of dominant position

Activity of the Directorate-General for Competition and Prices

* The original language of this report is English

	1995 Aug-Dec	1996 Jan-Aug	Observations
Cases under investigation	35 (a)	47 (a)	a) from the 82 cases investigated, 58 were raised by complaints.
Investigations concluded	12	32	
Opening of formal infringement procedures	2 (b)	12 (c)	b) referred to the CC for final decision. c) 6 cases are still pending. The other 6 cases - all concluded - concern non notified mergers (3) and failure to send information requested by DGCP (3).
Prior evaluation of restrictive practices	2	--	The CC adopted an interim decision, while the notification was under examination by the DGCP

Comments

Preliminary proceedings

For the last 13 months - August 1995 to September 1996 - 82 cases were investigated by the DGCP, the majority of which (58) originated in complaints.

Between August and December of 1995, twelve preliminary investigations were concluded, two of which gave origin to formal procedures for infringement of competition law. The other cases were filed due to several reasons, such as informal settlements, compliance with the competition rules, or withdrawal of the complaint.

Until the end of August 1996, 32 preliminary proceedings were completed, and although twelve formal infringement procedures were opened, six of them relate to violations of procedural rules - lack of notification of mergers, failure to comply with decisions requesting information.

Formal procedures

During this period of time - August 1995 to September 1996 - seven cases referred to the Competition Council for final decision, under Article 26 (1) of DL 371/93. The most important cases concerned:

- exclusive TV exhibition rights of football matches' highlights, licensed by the Football clubs' association to the Portuguese public TV company through an advertising company;

- selective distribution in the market for optical material;

- collusive tendering and tacit price collusion in the market of medicinal gas;
- abusive behaviours through price discrimination and foreclosure to distribution in the tobacco market;
- collusive tendering in the construction market;
- abusive behaviour in the market of credit cards; and
- horizontal customer allocation in the market for transportation of cash and other means of payment;
- exclusive/selective distribution of maize seeds.

In two of these procedures (construction market and transportation of cash and other means of payment), the DGCP conducted "on the spot" investigations on the premises of several undertakings - five in one of the cases and two on the other one, during which business records were examined and seized, after having obtained the necessary judicial authorisation, equivalent to a "search warrant", as established by the Portuguese competition law.

Notifications received

Under Decree 1097/93, undertakings may apply to the Competition Council to evaluate an agreement or a concerted practice according to the criteria laid down in Article 5 of DL 371/93, the Directorate-General being committed the task of organising the procedures and gathering the information necessary for the assessment of the impact on competition of the practices concerned, before submitting its final report to the CC.

From August 1995 through September 1996, the DGCP analysed two notifications concerning two distribution agreements, one in the ice cream market and the other in the biscuit and cookies' market. Both cases were already referred to the Competition Council.

Decisions of the Competition Council

Between August 1995 and September 1996, the Competition Council adopted nine decisions, of which two concerned notifications received for prior evaluation and one an interim measures request put forward by the Directorate-General.

Most relevant cases

i) ANF

ANF (National Association of Pharmacies) issued a decision that recommended its associates the boycott of a non-pharmaceutical product for personal hygiene - ASEPTAL - as the distribution of this product was no longer exclusively made through pharmacies, being also sold by hyper and supermarkets. The CC considered the recommendation as restrictive of competition, taking into account that it clearly intended to limit the distribution of the product, imposed ANF a fine and ordered the Association to inform all associates that the recommendation was no longer in effect.

This was the third decision in which the Competition Council examined a boycott recommendation adopted by this association. Since ANF did not comply with the CC's order, a new formal procedure was opened against the association.

ii) RTC- Rádio Televisão Comercial

RTC - Rádio Televisão Comercial, a company held by RTP - Rádio Televisão Portuguesa SA, the public TV company that runs the two public TV channels, has the exclusive of TV advertising on the public channels. A complaint against RTC was lodged by SIC - Sociedade Independente de Comunicação SA, one of the two Portuguese private TV channels, because RTC refused to advertise on the public TV channels a programme exhibited on prime-time by SIC, arguing that the fact of advertising such a programme could cause considerable damage to RTP, its parent company.

Notwithstanding the analysis of the DGCP, focused on the existence of an abuse of the dominant position of RTC on the market for advertising on TV (refusal to deal), the CC considered that only an individual practice of refusal to deal - prohibited by the former Competition Act but left out of the law applicable after 1 January 1994 - could be at stake. As this behaviour is no longer qualified as an anti-competitive practice, the CC decided that it was no longer competent to assess it and filed the procedure without any further order.

iii) Portline and others

Portline and three other maritime cargo transport companies guarantee and control the maritime cargo transportation between the continental territory of Portugal and the islands of Madeira and Açores, which is of extreme importance in the case of Madeira, since 90 per cent of its supplies arrive by sea.

Between 1992 and 1994, the four companies offered similar prices and other transactions' conditions, reducing simultaneously the rebates they used to grant for the transport of cargo. DGCP accused them of infringing the Competition Act not only through an anti-competitive concerted practice but also through the abuse of the collective dominant position held by these companies in the relevant market, which provoked an excessive level of pricing.

The CC filed the case, given the nature of the market, extremely regulated even in the EC context, and usually subject to a special regime as far as competition provisions are concerned, which could justify the restriction of competition.

iv) Auto-Sueco Lda

Auto-Sueco Lda. has the exclusive representation in Portugal of motor vehicles and spare parts of Volvo. Through its subsidiary Volvaler, Auto-Sueco refused to sell "chassis-cabine" of this trademark to Basrio/Metalomecânica e Equipamentos Rodoviários SA, as well as to pay technical assistance to Volvo "chassis-cabine" imported by this undertaking (an assembler of garbage trucks).

After considering Auto-Sueco and Volvaler as a single undertaking, and concluding they held a dominant position in the two relevant markets concerned - the market of "chassis-cabine" and the market of garbage trucks - the CC decided that the behaviour of Auto-Sueco, acting together with Volvaler, amounted to an abuse of dominant position as it aimed to prevent or, at least, limit the access of Basrio to

the market of garbage trucks. Accordingly, a fine was imposed, and the CC ordered the offenders to immediately cease that practice and to refrain from similar conducts in the future.

v) ANEPSA/Associação Nacional de Estabelecimentos Privados de Saúde

ANEPSA, an association of private health-care centres, issued regularly price fixing lists that were later sent to its associates and closely followed by them, even if the association inform its members that the pricing lists were not compulsory, the centres being free to fix their own prices.

Although DGCP had accused the association of restricting the competition through a price recommendation decision, the CC surprisingly considered that a decision of this nature did no more than provide the health-care centres a general guideline in the area of pricing, which could benefit the customers and could not, in any case, restrict the competition in such a competitive market. Concluding that the recommendation did not have the object or the effect of restricting the competition, the CC filed the case.

vi) UNICRE

Unicre/Cartão Internacional de Crédito SA is an undertaking which issues credit cards and manages Visa credit cards in an exclusive basis. UNICRE decided to charge gas retailers an extra fixed rate for each purchase made by clients with a credit card, a “client fee”, threatening gas retailers to break the agreements relating to the acceptance of credit cards. The DGCP requested the CC the adoption of interim measures, arguing that UNICRE was discriminating clients for similar transactions, since other retailers only pay UNICRE a fee proportional to the purchase made and to their turnover, and that this fixed fee would lead to a horizontal price collusion, of a particular anti-competitive impact in a market extremely regulated by the maximum price regime established.

The CC did not support the DGCP's reasoning, though UNICRE's dominant position was not questioned, considering that no discrimination could be found between retailers of different sectors, which only had in common the fact that they accepted credit cards as a means of payment, and also that in such a regulated market a price collusion could not necessarily result from the fixed fee.

Yet, the CC considered the interdiction to transfer the fixed fee to clients, imposed by UNICRE on the gas retailers, as anti-competitive, since it amounted to a limitation of the retailers' freedom of trade and could be qualified as the imposition of a transaction condition, prohibited by the Competition Act. The main procedure is still pending.

Mergers and acquisitions

Statistics on number, size and type of mergers notified

Year	2nd Semester 1995	January-August 1996
Mergers notified	11 (a)	14 (a)
Mergers procedures examined	7 (c)	9
Procedures pending	1	2

Comments

The Competition Act establishes that concentrations which lead to the creation or the strengthening of a share higher than 30 per cent of the national market, or in a substantial part of it, or where the participating undertakings' turnover in Portugal in the preceding financial year was more than 30 billion escudos, after deduction of tax directly related to the turnover, are subject to prior notification to DGCP.

Since June 1995, the DGCP examined *25* merger operations, three of which are still pending.

During the second half of 1995, two of the notified operations were considered not to be subject to compulsory notification, as they did not fulfil any of the requirements set out by the law. In one case the parties withdrew the notification. One of the examined mergers, related to the privatisation procedure of a chemical company, was later annulled for public interest reasons.

In 1996, only one operation of the 14 notified until 1 July. was not caught by DL 371/93, two notifications having been also withdrawn by the parties. The remaining operations were given favourable opinions, and were approved by the Minister of Economy or, on the basis of a delegation of powers, by the Secretary of State for Trade (after the legislative elections of October 1995, the Minister of Economy took over the former Ministries for Trade and Tourism and for Industry and Energy), even though two cases involved the attachment of formal conditions.

The activity of the undertakings involved on the notified mergers and caught by the merger control provisions during the period mentioned above were as follows:

- *Manufacturing or distribution:*
  ⇒ Food and beverage 3
  ⇒ Chemical products 1
  ⇒ Pharmaceuticals 2
  ⇒ Metal products 1
  ⇒ Medical instruments..... 1
  ⇒ Electrical machinery and apparatus 1

- *Construction:*
  ⇒ Construction..... 1
- *Wholesale and retail trade:*
  ⇒ Wholesale..... 1
  ⇒ Retail services 5
- *other business activities:*
  ⇒ Security services 1
  ⇒ Catering..... 1
- *Recreation, cultural and sporting activities*
  ⇒ Distribution of films and videos 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:

Year	2nd Semester 1995	Jan-August 1996
Form of merger		
Take-overs	2	-
Acquisition of assets	-	4
Acquisition of shares	5	7
Joint ventures	1	-
Restructuration within the same group of undertakings	-	-
Co-operative joint ventures	-	-
Type of merger		
vertical	-	1
Horizontal non conglomerate	5	10
Horizontal conglomerate	3	-
"Nationality" of the undertakings involved		
Purely domestic	3	6
Indirect foreign participation	2	2
Direct foreign participation	2	2
Purely foreign	1	1

Summary of significant cases

i) SAPEC AGRO/BANCO MELLO/SOIMPER

This merger operation, notified on 25 August 1995, was related to the privatisation procedure of QUIMIGAL ADUBOS, S.A., a company part of a chemical conglomerate, which was expected to be carried out through a public competitive tendering approved by the Government in May 1995. SAPEC, a company that produces, imports, exports and sells fertilisers and seeds, applied to buy 100 per cent of the

share capital of Quimigal, on the basis of an agreement with BANCO MELLO, a banking institution and SOIMPER, a holding company, who would buy SAPEC 50 per cent of Quimigal's capital. This horizontal merger would imply, therefore, a joint acquisition of control.

Since the national fertiliser market is an open market, the DGCP rendered a favourable opinion to the operation, provided that the new undertaking would regularly inform the DGCP of its pricing policy and its sales' conditions: the merger was later authorised by the Secretary of State for Trade.

In February 1996, after the jury of the competitive tendering started to review the proposals of the two candidates, placed *ex aequo*, the Government decided to annul this procedure for public interest reasons.

ii) LACTOGAL (Agros, Lacticoop and Proleite/Mimosa)

This operation, notified on 24 August 1995, concerned the merger of all the industrial and commercial activities of the three Portuguese companies - two of them grouping co-operatives - that transform milk and produce dairy products, through the creation of two joint ventures, the first one in charge of the distribution and sale of dairy products, and the second one, expected to take place at a latter stage, concentrating all industrial activities of milk transformation and of dairy products.

Notwithstanding the extremely important market share of the companies involved - of approximately 64 per cent in the UHT milk, of 45 per cent in the butter market and of 60 per cent in the cream market - the DGCP did not raise objections to this operation, since there were not any obstacles to the access of similar products to the national market and competing companies were active in this market. Yet, the authorisation of this merger was subject to conditions, imposing the parties the obligation to inform DGCP of any agreement between the parent companies and the joint venture for the distribution of their products, and also to send periodically information on the purchase conditions negotiated with the milk suppliers, as well as of the pricing policy of the new joint venture.

The Secretary of State for Trade requested the opinion of the Competition Council, who considered that some minor restrictive effects of this operation should not prevent its approval, underlining that if the companies did not proceed with the two phases of the operation envisaged, the conclusions presently drawn would be meaningless, and it would be necessary for the dairy companies to comply with the cartel interdiction provisions of the Competition Act.

The merger was later authorised by the Secretary of State for Trade, under the commitment of the parties to comply with the charges suggested by the DGCP.

iii) SOGRAPE/FORRESTER

This merger, notified on 27 September 1995, consisted of the acquisition of 100 per cent of the share capital of FORRESTER - a Portuguese company held by Martini & Rossi, Lda. - by SOGRAPE - a company that deals mainly with the production, sale and distribution of wine - through the increase of the its share capital, subscribed by the group BACARDI MARTINI.

The goal of the companies involved was to combine the know-how of SOGRAPE in the sector of wine production with the international distribution network of the group Bacardi Martini, widening SOGRAPE's portfolio of Port wine brands.

The merger allowed SOGRAPE to strengthen its market share outside Portugal, reaching a market share higher than ten per cent, the only market of importance as far as the demand of Port wine is concerned, since it stands for 90 per cent of the global consumption.

Considering that there is not any attachment to a particular brand of Port wine from the Portuguese consumers, that the distribution of the different brands owned by the companies involved in this operation will be kept separately and that there are other important international groups operating in this market, the DGCP rendered a favourable opinion, on the basis of which the Secretary of State for Trade authorised the merger.

iv) RAR/SUCRAL

This merger, notified on 20 October 1995, consisted of the acquisition by RAR, S.A., a Portuguese undertaking that produces and sells sugar, either extracted from sugar beet or from sugar cane, of 41.56 per cent of the share capital of SUCRAL, an associated company of RAR, that also transforms sugar beet, out of labour at that time, which is partly (less than ten per cent) owned by the British group Tate & Lyle.

After the acquisition of IPE CAPITAL, a public holding company, RAR held approximately 68 per cent of SUCRAL. Since SUCRAL was not active in that market when the acquisition took place, it was difficult to determine its market share, which led the DGCP to conclude that the merger was not expected to affect the competition on the national relevant market. The merger was authorised by the Secretary of State on the grounds that the operation did not affect adversely the national sugar market, that the acquisition of SUCRAL's control would not affect the separation and the legal autonomy of both companies, and because even the principal competitor of RAR, ALCANTARA, S.A. did not foresee any major consequences of the merger in the sugar market.

v) SECURITAS/SONASA

This merger was notified on 25 November 1995 and consisted of the acquisition of 100 per cent of the capital share of Sonasa, a small company working in the area of safety services, surveillance services, and transportation of cash and other means of payment**,** as well as producing and selling safety equipment, by SECURITAS, a Portuguese company indirectly controlled by a Swedish company, that provides prevention and safety services and connected activities, as well as produces the necessary equipment for that line of business.

According to the DGCP, the relevant market included three different segments, relating to the human surveillance, the electronic surveillance and the transportation of cash and other means of payment. Only in the sub-markets of human surveillance and of transportation of means of payment was the market share of SECURITAS reinforced after the acquisition, particularly in the last one, where the supply is concentrated on two companies only, one of which being SECURITAS.

The fact that its customers are companies of a considerable size and that they are able to use their own self-protection services, may prevent any potential exploitation of SECURITAS' market share.

vi) JOHNSON & JOHNSON/CORDIS CORPORATION

This operation was notified on 20 December 1995 and consisted of the merger of CORDIS, an American company, and JOHNSON & JOHNSON, also an American company, through incorporation. While the case was under analysis in Portugal, the merger was approved by the Federal Trade Commission (FTC), though the approval was subject to the sale of some of the CORDIS' assets in the area of neuro-surgery.

According to the DGCP's opinion the approval should depend on the same terms and conditions set by the FTC, since the merger was expected to have similar effects in both markets. The merger was authorised, because the legal delay ran out without a formal decision being taken by the Secretary of State.

vii) UNICHEM/ALLIANCE SANTÉ

This merger, notified on 5 January 1996, consisted of the acquisition by UNICHEM, a Portuguese company held by the British group UNICHEM, of three companies controlled by ALLIANCE SANTÉ, a French company, through their associate companies ERPI and IFP (both French).

The relevant market concerned the wholesale trade of pharmaceuticals, in which UNICHEM had a market share of approximately eight per cent, which would be reinforced through this merger operation, reaching nearly 17 per cent of the relevant market.

The Secretary of State approved the operation on the basis of the favourable opinion of the DGCP, that underlined the need to do a close follow-up of this particular market.

viii) LEGRAND/TEHALIT

This merger, notified on 10 January 1996, consisted of the acquisition by LEGRAND, a French company, of an equity share of 94.3 per cent of TEHALIT, a German company, both producing and selling electrical equipment and accessories necessary to assembly electrical wires. LEGRAND already had a high market share in the relevant market - approximately 60 per cent - and would only strengthen it by nearly three per cent, the market share of TEHALIT, which exports the major part of its production.

The merger was approved by the Secretary of State, according to the favourable opinion of the DGCP, with the recommendation that the Directorate-General keep up with any further developments of this operation, bearing in mind its effect on the Portuguese market.

ix) AERO-CHEF/TAP AIR ATLANTIS

This merger was notified on 16 January 1996 and consisted of the acquisition by AERO-CHEF AS, a Danish company, of the remaining share capital (51 per cent) of AIR ATLANTIS Catering S.A., a Portuguese company jointly owned by the national airline company TAP-Air Portugal S.A. and by AERO-CHEF.

The relevant market relates to catering services between airline companies and catering companies, that are rendered on the airport terminals, following the previous orders of the clients, the airline companies. Since the merger did not create or reinforce a dominant position in this market, whose clients have a strong bargaining power that stimulates competition, and since the companies working in

Portugal also face the competition of foreign companies through the “return catering”, the catering services prepared in foreign airports, the DGCP rendered a favourable opinion, on the basis of which the merger was approved by the Secretary of State.

x) ARTSANA/PRENATAL

This merger was notified on 14 February 1996 and consisted of the acquisition by ARTSANA, an Italian company, of PRENATAL, also Italian and held by the French company PINAULT PRINTEMPS - REDOUTE, in the market of baby and children clothing, footwear, toys and cosmetics.

Since PRENATAL had an negligible market share - approximately two per cent - the acquisition of 100 per cent of its share capital did not produced major changes in the structure of the relevant market, clearly dominated by ARTSANA (approximately 60 per cent). The DGCP also considered that the relevant market was rather open to new entrants, and therefore potentially very competitive. On the basis of this favourable opinion, the merger was authorised by the Secretary of State for Trade.

xi) LUSOMUNDO/FILMAYER

The DGCP was informed of this merger through an application for a fiscal exemption made by the parties to the Directorate-General for Taxes, that later requested the DGCP' s opinion.

A Portuguese act of 1990 grants the companies that go under a process of reorganisation or merger the exemption of taxes collected when the acquisition of some assets takes place, as long as they formally applied and depending on the non-opposition opinion of the DGCP.

Although the merger was not notified by the parties, the DGCP had the opportunity to examine it, having in the meanwhile opened a procedure against LUSOMUNDO for an infringement of the obligation to notify any merger operation that comes within the scope of the Portuguese Competition Act, which happened to be the case.

LUSOMUNDO is a Portuguese company whose main activities include the import, the distribution and the exhibition of films, as well as the edition and distribution of video tapes through different channels. FILMAYER Lda., the company acquired by LUSOMUNDO, who previously owned a equity share of FILMAYER, directly and indirectly through an associated company of the same group, also sold different audio-visual equipment, like cassettes, video tapes and others.

After the acquisition of 53 per cent of the share capital of Filmayer, LUSOMUNDO reinforced its market share in the sector of videotapes for direct sale, separated from the sector of videotapes for rent, due to the different nature of demand on the two sectors, reaching 43 per cent.

The DGCP gave, nevertheless, a favourable opinion, taking into consideration the fact that, in reality, LUSOMUNDO’s market share was not much affected by the acquisition, since the company was previously acting as an distributor of videotapes edited by FILMAYER, and because LUSOMUNDO holds the exclusive distribution rights in Portugal of the major videotape catalogues edited by the most important American film companies.

After the adoption of the DGCP’s decision imposing a fine on LUSOMUNDO for failure to notify the merger, this was authorised by the Secretary of State.

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

Privatisation

Latest developments

After the general elections of 1 October 1995, the new Portuguese Government approved in March 1996 a privatisation programme for 1996/1997, clarifying the goals pursued and the criteria chosen - assuming a clear preference for public offerings in the Stock Market, as it was already the case before - as well as setting the priorities for each sector.

In the financial sector the Government intends to limit the public participation to two banking institutions - CAIXA GERAL DE DEPÓSITOS and BANCO NACIONAL ULTRAMARINO, an associated bank part of the largest banking group of Portugal.

In the industrial sector, the privatisation of the remaining public participation on the pulp and paper production group PORTUCEL will only take place in 1997, the year when the privatisation procedure of the chemical conglomerate QUIMIGAL is expected to be finished (the public competitive tendering organised in 1995 was later annulled), and possibly the time when the sale of the last company (Siderurgia Nacional- Empresa de Serviços, SA) created from the former only company active in the iron and steel industry in Portugal - SIDERURGIA NACIONAL - will take place.

After the privatisation of Estaleiros Navais de Viana de Castelo, SA, scheduled for the end of 1996 or 1997, there will not be any further public share in the shipping sector (construction and repairs).

In the transportation and telecommunications sector, the privatisation of the most important company, PORTUGAL TELECOM, started in 1995 - the first phase - and will go on until 1997. Eventually the Government expects to find a global strategic partner and to develop several specific strategic alliances, reducing its share to less than 50 per cent, although maintaining an equity share in the company.

1997 will also be the year of the privatisation of the majority of companies that form the group EDP - Electricidade de Portugal, SA, (electricity production and distribution) expected to start in 1996, as well as the year of the last phase of privatisation of PETROGAL (oil refining industry), both from the energy sector.

Although the applicants on a public competitive tendering may be subject to compulsory notification of a merger proposal to the DGCP, within the framework of merger control provisions set by the Competition Act, the conclusion of the competitive tendering depending on the opinion of DGCP, there have not been any cases of this kind as previously, partly due to the preference for public offerings shown in the last privatisations.

Privatisations that occurred in the second semester of 1995 and until late August 96

Among the companies sold during the period referred to, some cases should be underlined, such as:

i) Cement

The second phase of the privatisation of CIMPOR - Cimentos de Portugal SA, in which an equity of 45 per cent was sold through a public offering, in order to spread the shares in foreign markets ("bookbuilding").

ii) Bank

The complete privatisation (second and third phases) of BFE - Banco do Fomento Exterior SA, consisting of the sale of the remaining 65 per cent of the share capital through a public competitive tendering.

The first phase of privatisation of Banco Comercial dos Açores SA, in which an equity share of 66 per cent was sold through a public competitive tendering.

iii) Insurance companies

The privatisation of the public equity share held by IPE - Investimentos e Participações Empresariais, SA, a public holding company, in Companhia de Seguros GARANTIA, SA, through its merger with two other insurance companies, Aliança Seguradora and UAP Portugal.

iv) Telecommunications

The second phase of the privatisation of PORTUGAL TELECOM S.A. (21.74 per cent), through a public offering and a direct sale to a group of financial institutions, in order to spread the shares in foreign markets ("bookbuilding").

v) Tobacco manufacturing

The direct sale of 80 per cent of the share capital of FÁBRICA DE TABACOS MICAELENSE S.A., one of the only two Portuguese companies that manufacture tobacco, based in the Açores, through a group of five companies, among which TABAQUEIRA, the other tobacco manufacturer of Portugal, that holds an extremely large market share.

The approval of a new privatisation procedure of TABAQUEIRA, that includes three phases, the first concerning the sale of an equity share of 65 per cent through a public competitive tendering, the second one through a public offering to take place not before two years after the conclusion of the competitive tendering, and the last one, to sell not more than 20 per cent of the share capital to specific categories of acquirers - workers and small investors, who usually are granted better conditions to subscribe shares.

The DGCP is expected to analyse the merger proposals presented within the public competitive tendering of the tobacco manufacturer TABAQUEIRA and Empresa Industrial de Tabacos S.A., since they are subject to compulsory notification under the merger control regime.

vi) Chemical industry:

The direct sale of the petrochemist company CNP - Companhia Portuguesa de Petroquímica SA, to the company that was previously exploring the chemical plant - Borealis A/S.

SPAIN*

(1995)

Executive summary

During 1995 the Tribunal for the Protection of Competition has delivered judgement on more than 80 antitrust cases, being the most outstanding among them, the horizontal agreements in the sectors of bakeries, obstetricians, sales of second hand vehicles, game machines and distribution of home appliances.

The Spanish Competition Authorities have detected, however, few cases of vertical agreements. This might be due to the broad system of block exemptions established by Royal Decree 157/1992 and to the simplicity and speediness of the procedures for obtaining single exemptions.

Nevertheless, there have been inquiries concerning the distribution of oil products and the sector of game machines. The Tribunal for the Protection of Competition has examined but a limited number of cases of abuse of dominant position, finding violation only in the case of public telephones in airports (DAFFE/CLP/WD(96)7).

More than 40 single exemptions have been granted mostly, as it has become customary, related to the establishment of registers of information on late-paying clients by associations of companies within the different economic sectors.

In the area of Merger Control we should highlight the remarkable increase in the number of voluntary notifications, especially of those of acquisitions and control taking operations. The chemical sector was the most active in this area.

The Competition Authorities have issued reports on regulatory policy matters, concerning different sectors. Especially noteworthy were those related to the procedures for awarding contracts in the sectors of water, energy, transport, telecommunications and cable television.

Finally, in the course of 1995 the Tribunal for the Protection of Competition made public its third report on competition under the title: "Competition in Spain: Situation and New Proposals". In the report the Tribunal examines the developments in the introduction of competition since the publication of its last report and puts forward proposals for legislative changes in five newly studied sectors: retail banking, ports, distribution of oil products, film industry and pharmacies.

Introduction

This report aims to explain the activities of the Spanish Competition Authorities during the year 1995. It covers the Spanish Legislation on competition, the enforcement of the competition policy, both by the Tribunal for the Protection of Competition (TDC) and by the Service for the Protection of Competition

* The original language of this report is English

(SDC) and, finally, the report also describes the advisory work on legislation and regulatory matters carried out by the Authorities during 1995.

Legislation

Current legislation

The Act for the Protection of Competition 16/1989, of 17 July, establishes competition as the guiding principle of market economies, linked directly with Article 38 of the Spanish Constitution.

Chapter I regulates a system of flexible control for agreements and restrictive or abusive practices and prohibits the abusive exercise of economic power, capable of distorting competition.

Chapter II establishes a scheme of control for the economic concentrations and, finally, Chapter III introduces a system to analyse public aids from the competition viewpoint.

In implementation of the Competition Law 16/1989, the following regulations have been developed :

- Royal Decree 157/1992 of 21 February, which implements Act 16/1989 regarding block exemptions, single exemptions and the Register of the Protection of Competition ;

- Royal Decree 1080/1992 of 11 September which establishes the procedures for economic concentrations and the form and content of the voluntary notifications ;

- Furthermore, Royal Decree 1882/1986 implements the enforcement of Articles 85 and 86 of the Treaty of the European Economic Community.

Changes to legislation

In 1995 there has not been any changes in the Spanish legislation on protection of competition.

However, in 1996, Royal Decree 765/1996 of 7 May, has modified the fundamental structure of the Ministry of Economy and Finance. By this decree, the Service for the Protection of Competition is now part of the General Directorate of Economic Policy and Protection of Competition.

The enforcement of the competition policy

The authorities entrusted with the protection of competition in Spain are: Service for the Protection of Competition, within the General Directorate for Economic Policy and Protection of Competition, and the Tribunal for the Protection of Competition.

The Service for the Protection of Competition has administrative attachment to the Ministry of Economy and Finance. The SDC carries out the proceedings concerning conducts included in the Act 16/1989, controls the execution of and compliance with the decisions adopted, and keeps the Register for the Protection of Competition.

The Service undertakes also research on the economic sectors, and may advise and make recommendations to the government on competition issues. The SDC is also entrusted with the co-operation with foreign organisations and international institutions.

The SDC is made up of a staff of 74 people of which :

- 40 are technical staff;
- 12 are administrative staff; and
- 22 carry out secretarial work.

The Tribunal for the Protection of Competition is attached for administrative purposes to the Ministry of Economy and Finance, although it performs its duties with full independence.

The TDC consists of a President and eight members appointed by the government among lawyers, economists and other professionals of prestige with more than fifteen years of professional experience. The President and the members are appointed for a period of six years renewable. Decisions are adopted by absolute majority. The TDC decides on matters of its jurisdiction under Act 16/1989, may require the SDC to initiate proceedings and it authorises agreements, decisions, recommendations and practices. The Tribunal is also entrusted with advisory functions.

Control of conducts

The Procedure relating to agreements of possible anti-competitive practices is initiated by the SDC on its own initiative or at the request of any member of the public. The SDC carries out a preliminary examination and decides whether to open proceedings or to file the records of the case (the filing out of a complaint can be appealed before the TDC). When the inquiry is concluded, the SDC decides whether to dismiss action or to send the proceedings to the TDC with a full report, describing the conducts observed, its foregoing circumstances, its effects and its assessment of the facts. The TDC may complete the investigations with the reports it deems necessary and will pronounce a resolution. This resolution can be appealed before the chamber of Administrative Litigation of the National High Court.

Certain agreements containing anti-competitive practices, prohibited by Law 16/1989, might be authorised, provided that they fulfil the conditions established by regulation 157/1992 on block exemptions or that they are entitled to be granted a single exemption.

The application for a single exemption is lodged before the SDC and then sent to the TDC with a favourable or unfavourable report. The Tribunal for the Protection of Competition takes the final decision on the authorisation of the agreement and decides the duration and conditions for the single exemption.

Prohibited conducts

Law 16/1989 prohibits all agreements, decisions or recommendations which prevent, restrict or distort competition in all or part of the domestic market. Article 1 mentions, in particular, those conducts aimed to: *i)* fix prices or other trading or service conditions; *ii)* limit or control production, distribution, technical development or investment; *iii)* share the market or the sources of supply; *iv)* apply dissimilar

conditions to equivalent transactions; and *v)* impose for the conclusion of contracts supplementary obligations which bear no connection with the object of such contracts.

Relevant cases

Horizontal agreements

All the cases of horizontal agreements lodged before the TDC during 1995 were concluded with a condemnation resolution. The Tribunal ordered the parts involved to desist from carrying out the prohibited practices and in all, but one of the cases, fines were imposed.

The Bakeries cases:

Two Provincial associations of bakers, the Provincial Association of Bread Producers and Distributors of Salamanca and the Association of Bread Producers and Distributors of Zaragoza, recommended to their members and non members modifications in the prices and size of bread. In both cases violation was found and the TDC imposed fines to the associations amounting to 10 million and 25 million pesetas respectively.

The case of the Association of Spanish Obstetricians

The Association of Spanish Obstetricians made an agreement for collective bargaining of the professional fees to be charged to the private medical Insurance Companies. The Association tried to compel the Insurance Companies to accept the new fees by means of charging the patients with the difference between the old and the new alleged fees.

The TDC in its Resolution stated that two violations of the Act 16/1989 had taken place. The agreement by the members of the Association on the professional fees to be charged to the medical insurance companies.

The Obstetricians Association's agreement to press the insurance companies by charging extra fees to the patients.

The TDC resolved to order the Association to refrain from undertaking similar agreements in the future and to impose upon the Obstetrician Association a fine amounting to 25 million pesetas for the first violation and to 15 million pesetas for the second.

The case of the Catalan Federation of Motor vehicle retailers (FECAVEM)

This enquiry focused on the question whether the drawing up of a bulletin with a list of the selling prices of second hand vehicles was to be considered a competition restrictive practice. The TDC resolution established that the publication of the bulletin was against the Competition Law, due to the fact that the prices in the list were fixed at random, or by a system agreed in a unilateral way by Fecavem.

Furthermore, the Tribunal declared the issuing of all price bulletins to be illicit. There is no need, however, to apply for authorisation when a price list contains prices which are only statistics results, and not eventual recommended prices.

Game Machines

There had been put forward two different complaints in this case. On the one hand, the Restaurateurs Association of Gijón had filed a complaint against the Association of Game Machines Operators of Asturias for the restrictive conditions they imposed for the contracting of game machines.

On the other hand, a game machine company had complained against the aforementioned Restaurateurs Association for having subscribed an exclusive contracting agreement.

The Restaurateurs Association of Gijón, on behalf of its members, had implemented a framework agreement in order to facilitate negotiations with suppliers and to take advantage of their much stronger joint demand (acting in fact as a purchasing centre). The TDC did not find this conduct to be a restrictive practice, as the Association did not hold a dominant position in the market. Actually, the TDC considered that the behaviour of the Association had contributed to the breaking up of the cartel of the game machine operators.

However, there were two clauses in the framework agreement that were declared null and void by the TDC. First of all, it was the obligation for all the members to have their contracts countersigned by the Association and secondly, the execution of discriminatory preferences.

Furthermore, the TDC resolved that the Association of Game machines operators had shared out the market. The Association did not allowed operators to install their machines in places where there had been already another operator, unless they were granted express consent by the first operator.

The Tribunal imposed a fine amounting to 21 million pesetas to the Association of Game machine operators for the sharing of the market.

Home appliances: Alicante

A retailer in Alicante filed a complaint against different shops of the chain “Tien 21" for offering a televideo set at a price below the acquisition cost. The Service for the Protection of Competition dismissed action for considering that there had not been established anti-competitive practices. The plaintiff appealed the decision before the TDC. The Tribunal decided that there were pieces of evidence which indicated an eventual agreement among the companies involved, as well as the existence of unfair competition conducts. The Service for the Protection of Competition dismissed again the allegations of unfair competition practices but accused the shops of having made an agreement to offer televideo sets at a very low price to prevent the complainant from selling his stock of these products in the market at the prices previously announced through an advertising campaign.

The TDC deemed that the offering of a product at a very low price, in order to compete with another entrepreneur working at very low prices, should be considered restrictive of the competition regulations, when the aim is to expel the competitor from that market. The Tribunal took into account the fact that the chain “Tien 21" was unable to fulfil the low price offer, as they did not have at their disposal enough quantities of these products; in other words, it was an “empty offer”. Therefore, the TDC declared

the practice to be restrictive of competition and imposed the chain “Tien 21" a fine amounting to one million pesetas.

The Resolution of the TDC tackles the problem of the “voluntary chains” of retail shops and the joint advertising of a product at the same price for all the members of the chain. The Tribunal takes the opinion that these practices should be allowed as long as the companies involved do not have a dominantposition in the market. Although this sort of practices restricts competition between the members of the chain, there is, as well, an increase in the level of competition with respect to big department stores and hypermarkets.

Vertical agreements

As mentioned in the executive summary, during 1995 there have been examined only few cases of vertical agreements. The decrease in the number of dossiers of this kind could be due to the ample system of block exemptions established by Royal Decree 157/1992 and to the simplicity and speediness of the procedures for granting a single exemption. One of the most significant cases of vertical agreements was the one initiated by the SDC against Shell España S.A.

The case of Shell España S.A.

As mentioned above, the SDC started proceedings against Shell España S.A. for alleged prohibited conducts, as established in Article 1 of Law 16/1989.

The SDC had information on a type of distribution contract for oil products that Shell had carried out with certain retailers in the Canary Islands. These contracts, according to the SDC, might contain competition restrictive clauses not covered by EEC Regulation 1984/1983 (exclusive supply agreements) nor by EEC Regulation 4087/1988 (Franchising). The most significant characteristics of these contracts are the following:

- Shell is the proprietor of the service stations that sell products and services related with motorvehicles and other type of products. The stations are installed in states owned by Shell;
- the service stations are leased by independent retailers, who run the business under their own responsibility;
- there can not be exhibited in the stations products and advertising of other oil companies, but in cases expressly authorised;
- the leaseholder, everything equal, should work mainly with the supplier suggested by Shell;
- the contract lasts 4 years;
- the leaseholder should pay Shell monthly an income, which is the added result of three components: the sale of fuel and lubricants, the mini- market business and the bar-cafeteria business.

Considering that this type of contract did not fall under the block exemption regulations, the Tribunal for the Protection of Competition had to decide whether the agreement included restrictive practices and whether a single exemption could be granted in this case.

The TDC considered the contract in question to be a business lease contract by which Shell, owner of the businesses, handed over the running of the service stations to other entrepreneurs. The TDC did not find any competition restrictive clauses in the contracts and, therefore, they were authorised for a period of five years.

Abuse of dominant position

During 1995 the TDC has examined only three cases of abuse of dominant position and in only one of the cases, the dossier of public telephones in airports, the TDC found violation of Law 16/1989. We do not include this case in our report, as it was already discussed in a working paper presented to the CLP (DAFFE/CLP/WD(96)7).

The international Fair of Valencia

The origin of this case is a complaint of the National Association of Motorcycles Importers against the "Two Wheels Exhibition Show" of the Valencia International Fair. The complainants claimed that it was unfair competition to prohibit the participation in the show of the non-official importers. The companies Cagiva, Yamaha, Honda, Montesa and Vespa had stipulated the absence of parallel importers in the show and therefore, the Organising Committee cancelled the enrolment of the firm "Alfa Motos".

The Service for the Protection of Competition accused the Valencia Fair of abuse of dominant position because it considered the exhibition show to be the relevant market. The Tribunal for the Protection of Competition, however, decided to take into account the existence of possible substitutes for this motorcycle exhibition, e.g., other motor car and motorcycle fairs and exhibitions that take place in the country at different times of the year. Consequently, the TDC questioned the market position of the Valencia Fair, being, therefore, unable to attribute abuse of dominant position to the organisation.

The TDC took the view that it might have been possible to make an accusation for practices of exclusion distorting competition, as established in Articles 1 and 7 of Law 16/1989. Nevertheless, this conduct had not been included in the statement of objections and it was, therefore, impossible to reassess the case.

Roca Radiadores, S.A.

The Company Metalibérica filed a complaint against Roca Radiadores for unfair competition and abuse of dominant position.

The SDC dismissed the complaint for unfair competition, dismissal confirmed by the TDC.

However, the SDC considered the conduct of Roca Radiadores S.A. (and its subsidiaries Cerámica Bellavista and Vitrometal) to be abusive of its position in the market. This accusation was based on the special conditions established by Roca with its distributors. The conditions were the following:

- a purchase compromise linked to a programming prize;

- the granting of a special prize called "Mercurio" to the distributors who had an exhibition room in exclusive for Roca products and dedicated special attention to these products; and

- a discount or fidelity bonus.

The SDC considered that all these elements implied a control over the distribution channels and, at the same time, limited the access of other distributors to the market.

The Tribunal for the Protection of Competition narrowed down the relevant market to that of sanitary equipments for bathrooms and considered the market for taps and accessories as being a related neighbouring market but not the same one. It was established that Roca had a dominant position in the market of sanitary equipments.

However, the TDC concluded that the establishment of purchase programmes and special prizes and bonuses for the distributors helped to increase the efficiency of the manufacturers, to reduce costs and to improve competition among distributors. It was not proved that the system had worked as a market barrier. In conclusion, due to the lack of evidences and applying the principle "*in dubio pro reo*", the TDC declared that it had not been established the existence of anti-competitive practices.

Single exemptions

According to Article 4 of Law 16/1989, the TDC may authorise certain prohibited conducts when a number of requisites are met. As it has become customary during the last few years, most of the applications for single exemptions are related to the forming of registers of information on late paying clients by associations of companies of different economic activities, in an attempt to confront the growing number of bad debts.

Due to the increasing number of this type of applications, the TDC tried to find a way to avoid having to authorise the exemptions case by case, while, at the same time, granting legal security to the companies involved.

However, this has not been possible for two main reasons:

- these agreements do not fall under the block exemptions regulations contemplated in Article 5 of Law 16/1989;

- there has been opposition by some consumers associations, who question the legality and constitutionality of these registers.

With respect to this last objection, it is important to point out that the TDC makes clear in all its resolutions that the authorisations are granted after considering the effects of these registers in the markets involved, or related markets. The TDC does not study the consequences of the registers in other areas outside its responsibility.

Some of the established registers can not be considered the result of a prohibited conduct, under Article 1 of Law 16/1989, as they are not agreements between competitors, but the individual initiative of

one company. These single companies, by forming a register on late paying clients, want to address other companies which might have common clients, irrespective of their activities.

Nevertheless, most of the applications for single exemptions for this type of registers fall under Article 4 of the Law 16/1989, and they are characterised by the fact that they are filed by a business sector association.

The TDC authorised the forming of a register of information on late paying clients addressed exclusively to the hotel trade business. A service company wanted to offer information on late paying clients to this sector. The TDC considered that it did not make any difference whether the register was established by a business association or by a company offering these services, as the response by the market forces to the register would be identical.

Another group of single exemptions is that of the authorisations for franchising agreements. An interesting case was the application for a single exemption of the *Franchising Company Pascal* for a type of contract of distribution of publishing products and the running of courses on study methods.

However as we will explain, this case was finally authorised under the block exemption categories established by Royal Decree 157/1922.

There were only two participating companies in the contract and the agreement had an effect only on the Spanish market. But, the requisites established by the EEC Council Regulation 4087/88 were not met.

Therefore, the TDC resolved that in order to grant the exemptions, it was necessary to introduce the following changes in the contracts:

- to modify the length of time and scope of the agreement on non- competition, once the franchising contract was over;

- to allow the franchisee to use the franchisor know-how, once this is not considered secret anymore;

- to allow the franchisee to use other suppliers from the net. Besides, the franchisee must be able to inform the public about his independence from the franchisor;

- the franchisor might recommend the selling prices but can not impose prices upon the franchisee.

The applicants introduced the above mentioned modifications and the TDC, therefore, authorised the franchising contracts under the block exemption categories established by Article 1.1 of Royal Decree 157/1992 and in accordance with EEC Council Regulation 4087/88.

Other types of single exemptions resolved by the TDC are related to exclusive distribution contracts, the establishing of common time limits for payments and the forming of tables of maximum professional fees.

The import company *GAFA* applied for a single exemption for exclusive distribution contracts of American shoes Sebago. These contracts could not benefit from the block exemption under EEC

Regulation 1983/83, because there were no alternative sources of supply, no parallel imports and they restricted the freedom to fix prices.

The contracts did not comply either with the conditions necessary for the grating of a single exemption. The compensations for the restrictions in competition did not outweigh the disadvantages introduced by the distribution contracts.

GAFA decided then to modify the contracts, following the recommendations of the TDC, and the agreement was finally authorised.

The Spanish Confederation of Associations of Manufactures of Building Materials(CEPCO) and the National Association of Manufacturers of Capital Equipment (SERCOBE) requested a single exemption, under Article 4 of Law 16/1989, to establish a frame agreement on the time limits for payments to the associated companies (more than 14.000).

The agreement aimed to reduce gradually the payments time limits in the sale of industrial products and services.

The associations intended to confront the situation originated by the belated payments of their clients which caused enormous financial burden and high costs for the companies.

The TDC did not authorise the agreement, due to the important distortion that it might produce in the market. The associations represent 70 percent of the capacity of the national production in the sectors of building products and capital equipment.

Furthermore, the TDC expressed its concern about the influence of the fixation of the payment time limits on the final price, and insisted on its non acceptance of horizontal agreements to fix prices.

The Professional Association of Expert Appraisers and Damage Surveyors applied for a single exemption to be able to establish a table of maximum professional fees to be charged to the arbitrational committees of consumers.

The associations, taking into consideration the strong objections presented by the Service for the Protection of Competition and after a preliminary hearing, decided to withdraw their application.

The TDC stated in its resolution once more, its strong opposition to the horizontal fixation of prices.

Interim measures

According to article 45 of Law 16/1989, once proceedings have been initiated, the SDC may, on its own initiative or at the request of the interested parties, propose the TDC the adoption of interim measures to ensure the effectiveness of the resolution to be pronounced and, especially, to avoid the damage which the conduct referred to in the file might cause.

The only case requiring interim measures during 1995 was that of the *Cotton Gins industry*. Twenty one companies made an agreement to adapt their capacity to the cotton production in Spain. The

signatories of the agreement admitted that, due to the unbalanced situation existing between the industrial capacity and the cotton production, they tried to organise competition to avoid a price war.

The agreement consisted in the establishing of a quota of a certain number of Kg of cotton to be bought by each company. There were, besides, extra bonuses if the amount of cotton processed was below the quota and there were penalizations for the companies which had processed more cotton than the established in their quota.

The TDC, at the request of the Service for the Protection of Competition, resolved to order the parties involved to desist from applying the agreement during six months. The TDC's reasons were the following:

- the agreement established corrective measures to the market mechanism, for which no single exemption had been requested;

- the TDC took the opinion that the Cotton Gin industry did not seem to undergo a structural crisis, as at peak periods it was unable to supply the total demand. The temporary crisis could have been caused by the bad crops resulting from the long lasting drought;

- because of the short duration of the cotton season, and the distortion that the agreement could produce in the prices and market conditions, it was advisable to take interim measures to prevent the ineffectiveness of the TDC's final resolution.

Case statistics

Table 1A. Antitrust cases

Total	Complaint	SDC Initiative	Exemptions
158	86	13	59

Table1B. Closed antitrust cases

		SDC		TDC	
Total	Filed out	Accumulated	Dismissed	Violations	Exemptions
145	55	5	16	23	46

Table 2. TDC Final decisions

Category	Found	Not found
Violation cases	**7**	**16**
Vertical agreements	0	4
Horizontal agreements	6	1
Abuse dominance	1	2
Unfair competition	0	9

Table 3. Fines

Total antitrust decisions	**69**
Violation founds (Number of cases)	7
Fines imposed (Number of cases)	7
Amount fined (Pesetas)	224 300 000
Firms fined	13

Table 4. Single exemption decisions

Total	**46**
Exemption granted	40
Exemption denied	1
Exemption revoked	1
No exemption required	3
Accept withdrawal of application	1

Mergers control

All projects or operations of concentration of enterprises, or taking-control operations may be submitted by the Ministry of Economy and Finance to the TDC for its opinion when:

- a share equal or greater than 25 percent of the domestic market or a substantial part of it, is acquired or increased for a particular product or service;

- when the aggregate turnover in Spain of all participants exceeds, in the last accounting period, the amount of twenty thousand million pesetas.

The notification of the operation is voluntary and can be presented to the Service for the Protection of Competition, prior to the operation or within three months of its taking place. After the report of the SDC, the Minister of Economy and Finance might decide to send the files to the TDC for its judgement.

The Tribunal for the Protection of Competition will send its report to the Minister of Economy and Finance for submission to the Government, which within three months may decide:

a) not to oppose the operation;

b) make its approval depend on the fulfilment of certain conditions; or

c) reject the operation.

It is understood that the Administration does not oppose the operation if, a month after having voluntary notified to the SDC, the Tribunal has not had submission of it or if it has not delivered the judgement mentioned above within the indicated period.

Besides, the SDC can start proceedings when it has had knowledge of operations of concentrations which might prevent the maintenance of a sufficient level of competition in the market and the operation has not been voluntary notified. In this last case, these operations will not benefit from the tacit authorisations.

Voluntary notifications

There were 20 voluntary notifications during the year 1995; this amount represents a notable increase (54 percent) with respect to 1994, changing the decreasing tendency registered the previous years.

The concentration operations that took place in 1995 were mostly acquisitions, being the chemical sector the one that underwent the biggest number of mergers.

The Minister of Economy and Finance, in the light of the SDC reports, decided to submit to the TDC the files of the following operations:

EPA/COFRALIM. Ice creams

The notified operation consisted in the purchase of all the shares of the companies CONELSA and COFRALIM of the food products company of the group BBV by the Nestlé firm AEPA. This operation meant that AEPA took control of the manufacturing and distribution of the ice cream brands Miko and Avidesa.

The TDC considered that the relevant markets involved were those of frozen foods and ice creams. With respect to the former, there were not observed changes in the competition conditions. The ice cream market was broken down into impulse, take home and catering ice cream, following the EEC Commission decisions Nestlé/Italgel and Unilever France/Ortiz Miko, and considering the geographic reference market as still predominantly national. Only in the submarket of impulse ice creams, there were evidences of a significant increase in the concentration of the offer and, therefore, risks to competition.

The TDC decided, however, not to oppose the concentration, provided that the exclusive distribution contracts carried out by Nestlé in the future do not exceed a time limit of one year. There were several reasons for this decision:

- the concentration index of this market in Spain is lower than in other EEC countries and it does exist strong rivalry among competitors;

- the Commission of the EEC had not oppose similar concentration operations, even with higher concentration indexes;

- the net of cold storage is very developed in Spain, allowing the entrance of new competitors in the market.

The government approved the operation without conditions.

Exide/Ceac

Through this operation, the company Exide Corporation acquired 99,7 percent of the shares of the firm Compagnie européenne d'acumulateurs (CEAC) of the Fiat group. Exide is also proprietor of the Sociedad Española del Acumulador Tudor, S.A.

This operation is especially interesting because it was notified to the Competition Authorities of ten European countries, due to the fact that it did not fall within the scope of application of Council Regulation 4064/89, for not having Community dimension. On the other hand, the contract of sale of the shares of the French Company CEAC took place in Paris and it fell, consequently, within the scope of French laws for having its most decisive effects in France, although the effects in Spain were also considerable.

The relevant markets established were those of original equipment car batteries, after-sales car batteries, industrial batteries for fixed installations and industrial batteries for haulage. It was considered that the only market in which there was a national dimension was the market of the after-sales car batteries, following the criteria of the European Commission in the cases VARTA/BOSCH and Magnetti Morelli/CEAC. It was observed, however, that the market dimension is becoming more and more European, as the process of economic integration is progressing within the European Union.

The TDC established that the operation could cause adverse effects on the Spanish clients and consumers. However, after assessing other important factors, such as the possibility of parallel imports and the increasing globalization of this market, the TDC decided not to oppose the operation.

Nestlé/Laboratorios Cusi, S.A.

The notified operation consisted in the acquisition by Nestlé of 100 percent of the capital of the company Laboratorios Cusí, S.A. The relevant market it was considered to be the market for ophthalmic pharmaceutical products.

The TDC decided not to oppose the notified operation, although the merger produced a considerable increase in the concentration degree of the offer of some ophthalmic pharmaceuticals. Nevertheless, the Tribunal took into account the limited dimension of the Spanish market, the

impossibility of exercising any market power and the fact that it is a market strongly regulated. Besides, the market of ophthalmic pharmaceuticals does not show any access barrier for other pharmaceutical laboratories and it will be exposed to the increasing competition of imports from the European Union in the near future.

Cookson Matthey/MICROMED

The notified operation was the acquisition by Cookson Ceramics Spain S.A. of the company Micronizados del Mediterráneo, S.A. (MICROMED).

The reference market to be considered was that of the zirconium silicate in micronized particles, raw material for the manufacturing of tiles and other ceramic products. The geographic relevant market was the European. The Tribunal for the Protection of Competition verified an increase in the concentration of the Spanish offer and, although it did not oppose the operation, recommended the Service for the Protection of Competition to watch the development and tendencies of the prices of particles of zirconium in Spain and other Member States of the European Union.

Sensormatic/Knogo

The Spanish company Esselte S.A., subsidiary of the Swedish company of the same name, requested the intervention of the Service for the Protection of Competition in relation to the acquisition in the USA of the assets and businesses outside the United States of Knogo Corporation by its competitor Sensormatic Electronics Corporation.

The SDC asks the Spanish subsidiary of Sensormatic to provide information on the effects of this operation upon the Spanish market. The reference market was that of the distribution of labelling systems for the electronic surveillance of particles.

The TDC decided not to oppose the operation, as the concentration increased competition among the different brands, due to the new strategies of the companies. The operation produced a decrease in the degree of concentration of the market and had, therefore, a positive effect on the Spanish distribution market of these products.

Notified operations in 1994; pending judgement at the end of 1995:

Two more cases, the operations C 20/95 *Plasgom/Atochem* and C 21/95 *Cablevision* were still under procedure at the TDC at the end of 1995.

Ex officio initiated dossiers

The Service for the Protection of Competition is entrusted with the tasks of control and study of the market structures. During 1995 the SDC opened 8 dossiers related to merger operations. In two of the cases, the Companies decided to notify voluntarily and in the rest of them there were not found evidences of obstacles in the maintenance of effective competition in the markets in question.

Case statistics

Table 5. Merger cases

Notifications	20
SDC Initiatives	8
Sent to TDC	6
TDC Reports produced	5

Advisory work of the Spanish competition authorities

Advisory activities of the service for the protection of competition

Article 31.d) and e) of Law 16/1989 entrusts the SDC with a number of advisory functions: to study and carry out research on economic sectors, analysing the situation and degree of competition of each one, as well as the possible existence of restrictive practices on competition. As a consequence of these studies, the SDC may propose measures leading to the removal of obstacles on which the restriction is based.

To provide information, advise and recommendations in the area of agreements and restrictive practices, concentration and association of enterprises, degree of competition in the internal and external market in relation to the domestic one, and on other matters relating to the protection of competition.

In that competence, the SDC is charged by the Minister of Economy and Finance of informing and assessing the changes on laws and regulations having effect upon competition before they are discussed by the Government.

During 1995 the SDC has reported its opinion on four draft laws: company taxation, procedures on the awarding of contracts in the sectors of water, energy, transport and telecommunications, special taxes, and on Cable Television. The SDC was also heard regarding the Royal Decree on the enforcement of the Co-operation Treaty on Patents. Besides, the SDC submitted reports on one autonomous regional law (institutional advertising) and on EEC Commission Directive 95/51 on the interconnecting nets of Cable Television.

Advisory activities of the tribunal for the protection of competition

Article 26.1, 2 and 3 of Law 16/1989 establishes a number of advisory functions to be carried out by the TDC.

The Tribunal has jurisdiction to *i)* advise on the draft bills which may affect competition; *ii)* issue reports to any state authority or body, and iii) to study and submit to the government the appropriate proposals for the amendment of the Act, according to the dictates of experience in the enforcement of national and Community laws.

Furthermore, the TDC may be consulted by the Parliamentary Committees on proposed draft bills and on any other question related to free competition.

The Tribunal also promotes and makes studies and research in the field of competition.

But especially important it is the role assigned by Article 2.2 of Law 16/1989 to the TDC. This article establishes that the Tribunal may propose the government, through the Ministry of Economy and Finance, to eliminate or modify situations which restrict competition established under legal rules.

In this capacity, in June 1995 the TDC submitted to the government the report: **"***Competition in Spain: Situation and New Proposals. 1995".* This document attracted an enormous interest in the media. It is the third formal proposal sent to the government.

The report contains three different sections:

i) Social dimension of competition

This part of the report studies the positive effects of the increase of free competition on social progress. The TDC supports its opinion with six main arguments:

- competition does not imply deregulation;
- competition fights against injustified privileges;
- competition tends to raise real wages;
- competition makes good and services access easier for all;
- competition improves job creation;
- competition contributes to the maintenance of social public expenditures.

ii) Evaluation of the liberalisation process in Spain

The TDC recapitulates over what it has been done in Spain during the last years to promote competition, and analyses to which extent the proposals made in previous reports have been followed by the Spanish economic authorities. This part includes, as well, an assessment of five legislative changes: the end of the legal monopoly of INEM in labour market mediation, the law of urban land use, modification of mortgage loans, fees of mercantile notaries, and retail trade.

iii) New recommendations

The TDC makes new proposals to the government in the following sectors: retail banking, ports, petroleum distribution, film industry, and pharmacies.

In the annex to the Annual Report 1993-1994, submitted by Spain to the CLP in October 1995, there is a more complete summary of the contents of the TDC's report.

Reports to the Parliament

On the political party's "Grupo Federal Izquierda Unida" (IU) initiative, the Congress sent to the government a request for a study on competition in the financial and banking sector. The TDC made the report and sent it to the government for submission to the Congress in February 1995.

The President of the TDC appeared before the Parliament on different occasions to inform verbally on different matters: telecommunications, cable television and pharmacies.

Reports requested by the judiciary branch

The Lower Courts nº. 1 and 14 of Sevilla and nº. 2 of Osasuna requested from the TDC reports on cases to be decided and related to the distribution of fuel in service stations.

The Superior Court of Justice of Aragón consulted the TDC about the consistency with the principles of free competition of some articles of the regulation of the general planning for commercial equipment in Aragón.

Other reports

The TDC carried out several reports on projects for different regulations, at the request of the ministerial departments, or on its own initiative.

Among them, we should highlight:

- Draft Royal Decree on the regulation for the retail distribution of fuel and oil products;
- Draft Royal Decree on joint generation of energy;
- Draft Royal Decree on the statutes of the retail and bulk distribution of fuel for fixed installations;
- Draft Royal Decree on the regulation of non-lucrative employment agencies; and
- Draft Royal Decree on financial measures for professional activities, related to housing and urban land: 1996-1999.

SWEDEN*

(1995)

I. Changes to competition laws and policies adopted or envisaged

Introduction

On 1 January 1995 Sweden became a member of the European Union.

The EC competition rules are directly applicable in Sweden. However, the Swedish Competition Authority, unlike some other national competition authorities in the member states, cannot apply Articles 85 and 86 of the Treaty of Rome.

Since 1 September 1995 the Swedish Competition Authority (Konkurrensverket) has a new organisation, which is no longer based on economic sectors but on the functions carried out by the Authority. There are now two departments for handling applications for negative clearance and exemptions, a merger control department, a cartel department responsible for investigating infringements of the Competition Act and a department for investigating different sectors of the economy and providing information. A competition council has been set up within the Authority with the task of improving the decision making process and safeguarding quality in this area. There is also an administrative department and two secretariats for legal and international matters. The number of employees (around 120) was not affected by the re-organisation.

The Competition Research Council, affiliated to the Authority, actively encouraged research in the field of competition by granting financial support.

1. Competition legislation

No amendments were made to the Swedish Competition Act during 1995. However, several reviews of existing legislation and competitive conditions in Sweden were initiated.

Reviews of competition legislation

The Swedish Government decided to appoint a governmental commission on the application and functioning of the Swedish Competition Act. A review was envisaged when the Act was adopted in December 1992. According to the Commission Directive the investigation should summarise the experience gained in applying the Act, and, if necessary, propose changes to the regulatory framework.

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* The original language of this report is English.

The investigation should cover all aspects of the Competition Act. In particular it should examine to what extent the Competition Act and its application have led to important changes for undertakings and consumers. Special attention should be paid to how the so-called *de minimis* rule has been applied so far and to make clear to what extent there is a conflict between the Competition Act and other legislation, and whether this has led to particular problems from a competition point of view. The commission should also examine to what extent restrictive practices fall outside the Competition Act and the experiences that have been gained so far in court from the application of the Competition Act.

In the field of merger control the investigation should, in particular, consider whether the current turnover threshold of four billion SEK is set at an appropriate level and functioning satisfactorily. It should also consider the application of the merger rules on concentrative and co-operative joint ventures since the Competition Act at present makes no distinction in this respect. Finally, according to its directives the commission should also consider the feasibility of ordering dominant companies to divest in cases where this would be the only appropriate way of achieving effective competition in a market. The commission will present its results no later than 31 December 1996.

In response to a request for information about the experiences gained so far, the Competition Authority has drawn the investigating commission's attention to the application of some of the provisions in the Act which might require special study and consideration. For example, the Authority considers that a simplified decision-making procedure could be introduced in cases of minor importance. The Authority has made decisions in a large number of merger cases since the entry into force of the Competition Act in 1993, and has presented its observations on the application of the merger provisions to the commission, e.g. on the definition of mergers, joint ventures, ancillary restraints and a *de minimis* rule on mandatory notifications regarding the possible introduction of an additional turnover threshold for the activities on the Swedish market of the acquired company. The Competition Authority is also considering the introduction of a short-form notification procedure, the aim of which would be to reduce the reporting burden on companies and to increase transparency in the practice of waivers from the obligation to supply certain information. The short-form notification would apply in cases, which fall under the rules of mandatory notification but where competition problems normally do not arise.

Nine national block exemptions were introduced at the same time as the Competition Act. Eight of these correspond to the EC block exemptions and there is also a block exemption for co-operation within retailing chains. The time limits of the block exemptions will expire during 1996, and reviews have been initiated to investigate amendments, e.g. arising as a result of the recent amendments made to the corresponding EC block exemptions.

The Government has also decided to set up two commissions on the food sector to examine competition conditions in the food industry as well as in the retail trade, and the high consumer price level compared to many other European countries.

2. Other legislation affecting competition

Price competition in the public sector

A governmental commission has studied the problem of predatory pricing in the public sector. The Competition Authority has observed that private undertakings do not compete on equivalent terms with public undertakings. The Authority has received a large number of complaints in this area. However, the rules of the Competition Act on abuse of dominance could not be applied as it has not been possible to

establish predatory pricing, since the public undertakings have not been dominant nor has it been shown that they have had the intention of eliminating competition.

The commission has recently published its report (Competition in Balance) proposing several measures to establish a level playing field for competition: a prohibition on public bodies against applying a pricing policy distorting competition, requirements for separate accounting, a specification of conditions under which local government bodies involved must act in competitive markets and proposals for making it easier to appeal. The report also recommends that public bodies should be prohibited from interrupting an ongoing public procurement process except on commercially justifiable grounds.
A governmental bill is envisaged during 1996.

II. Enforcement of competition law

The following table shows the number of new cases under the Competition Act - mergers, agreements and complaints - registered during 1995 and the number of decisions taken during the same period.

	Registered cases	Decisions
Mergers	252	252
Notifications for negative clearance or exemptions	136	214
Complaints	292	279
Other cases (inquiries, etc.)	149	143
Total	829	888

A total of 23 Competition Authority decisions were appealed to the Stockholm City Court (court of first instance) and so far the Court has made a judgement in 18 cases.

The Market Court has during the same period taken decisions in 5 cases.

Its consultative role on existing and proposed public regulations is an important task assigned to the Competition Authority. A total of 117 formal opinions were submitted to Governmental and public authorities.

1. Anti-competitive co-operation

Procedural matters

The Market Court (MD), the final court of appeal in cases under the Competition Act, referred in March 1995 a case back to the Competition Authority concerning the Swedish high voltage grid and made some important statements on the procedural requirements in cases handled by the Authority.

Firstly, the Court stated that if the Competition Authority decides not to grant a negative clearance for an agreement, in its decision it must specify all the conditions in the agreement considered to impede granting a negative clearance. Only if the agreement as a whole is considered an obstacle it would

not be necessary to assess the conditions individually. The original decision from the Competition Authority stated that the agreement contained at least two conditions contrary to the Competition Act, and that this in itself was sufficient for not granting a negative clearance.

Secondly, the Court stated that the Competition Authority, according to the Swedish Administrative Procedure Act, must on its own initiative communicate to the applicant all documentation which has been added to the file and submitted by a party other than the applicant. The Competition Authority had not communicated a document it considered irrelevant to the decision.

Thirdly, the Court stated that since the Competition Authority was not involved as a party in the case, it could not be obliged to compensate the complainant for the legal costs incurred.

Consortia in the construction sector

An important change brought about by the new Competition Act concerns a more rigorous view of co-operation between companies in the form of consortia. Among the consortium cases handled by the Competition Authority so far, the construction sector features more frequently than others. In a notice from the Competition Authority (KKVFS 1993:7) concerning co-operation between companies, it is stated that competing companies may co-operate in consortia and this is not a restriction of competition on the market, providing none of the participating companies would be able to carry out a specific project on its own. The notice also says that agreements between competitors in consortia for a certain tendering process do not restrict competition provided that none of the companies individually would have a chance to win the contract.

On the Swedish construction market there are only four companies that are able to operate nation-wide - Skanska, NCC, Siab and Peab - and with enough resources to carry out all kinds of projects. If these companies are co-operating with each other in a tendering process, it would normally result in a substantial weakening of competition pressure. Thus, the view of the Competition Authority is that a consortium co-operation between the biggest Swedish construction companies could be granted an exemption only when very special circumstances exist.

One of the consortium cases of the Competition Authority involved both Swedish and Danish producers:

Cementa AB and Aalborg Portland A/S applied for negative clearance and exemption for a consortium to produce and deliver cement to the bridge and tunnel across the straits between Sweden and Denmark. Cementa and Aalborg Portland claimed that neither of them had enough capacity to individually take part in the tendering process. The applicants also pointed out that there is a substantial difference between the conditions on the normal cement markets in Sweden and Denmark and the conditions for such large projects like the Öresund link. The latter result in large volumes of cement of a certain quality to a single purchaser during a limited period of time.

Cementa and Aalborg Portland are the sole cement producers in Sweden and Denmark. Cementa is a subsidiary of Euroc which is the biggest producer of building materials in Sweden. Euroc also owns the sole cement producer in Finland and has close co-operation with Aker which is the sole cement producer in Norway. Furthermore, together Euroc and Aker own the second biggest cement producer in England, the first one being Blue Circle, which is the parent company of Aalborg Portland.

The Competition Authority found that Euroc and Aalborg Portland have enough capacity to individually take part in the tendering process within their own combined group of companies. Cementa's and Aalborg Portland's ownership relations and co-operation agreements with the majority of cement producers in England, Denmark, Norway, Finland and Sweden were also considered by the Competition Authority to lead to a substantial weakening of competition pressure. Nor could the Competition Authority find any support for the applicants´ statement of an important difference between a normal national cement market and a large one-off project.

Hence, the Competition Authority concluded that the notified consortium agreement infringed the prohibition on restrictive agreements. Further, the consortium agreement was not found to be eligible for exemption.

Co-operation between banks - Visa

Visa Sweden applied for a negative clearance concerning by-laws and operating regulations of Visa International, the regional rules concerning Europe, Middle East and Africa (EMEA), Regional Operating Regulations and the local Swedish rules.

The Swedish Competition Authority took the following view of the co-operation between the banks that are members of Visa Sweden.

According to Visa's rules an acceptor is prohibited from imposing a surcharge on transactions, unless local law expressly states that a merchant is permitted to do so. The Swedish Competition Authority took the view that the rule which prohibits an acceptor from passing on the cost or part of the cost to the cardholder restricts competition. According to Visa there are no exemptions allowed to this rule. The non-discrimination clause is incorporated in every agreement between the acquirers and acceptors. If an acceptor does not agree to this clause he is not permitted to accept Visa cards. As the acceptor is forced to adopt this rule, all the acceptors will apply the same rules. The acquirers are thus able to ensure that the acceptors can not offer different prices to customers. This means that the acceptor's freedom to set prices is restricted. Another effect of this horizontal co-operation between the acquirers is that the information to the cardholder concerning the costs of the card system will not be complete.

In its decision the Authority also stated that the horizontal co-operation concerning the fallback rules might lead to a price regulating effect upon the service charge. The co-ordination between the service charge and the interchange fee might furthermore lead to restrictions on competition. A negative clearance therefore could not be granted.

The Swedish Europay Co-operation applied for a negative clearance concerning their rules. The Swedish Competition Authority took the same view of this co-operation as in the case of Visa Sweden and a negative clearance was not granted. The Swedish Competition Authority in this decision furthermore declared that the fact that the member banks in Europay have decided on a common fallback price is a restriction on competition.

Taxi - booking offices

Taxi Trafikförening (TTF) is an association of small and medium-sized taxi service companies which are affiliated to a taxi booking office mainly for taxi transport in the Stockholm metropolitan area. The Competition Authority decided on 27 June 1994 to grant an exemption, combined with certain conditions, for the co-operation in the taxi booking office. In its decision the Competition Authority

established that the association had a market share of approximately 35 per cent. Given the strong competition in the market, with several competing taxi booking offices, the Authority considered that the companies co-operating within TTF could not eliminate competition in respect of a substantial part of the products in question.

The decision of the Competition Authority was appealed by a branch organisation, STIO, to the Stockholm City Court. STIO argued inter alia that TTF had a market share of 47 per cent and was thus totally dominant. The Court in its decision of 21 March 1995 stated that the Competition Authority calculated the market share on the number of taxi cars in circulation on the relevant market. The Court considered that the market share should be related to the total turnover in the relevant market.

The Court found that the market share of 35 per cent was too high to fulfil the conditions for exemption set out in Article 8 (4) of the Competition Act. The Authority's decision was thus not upheld.

The judgement of the Stockholm City Court was appealed by TTF to the Market Court, the last instance of appeal.

The Market Court overruled the judgement of the Stockholm City Court and confirmed the decision of the Competition Authority, stating:

The conditions for exemption in Article 8 of the Competition Act have been modelled on Article 85 (3) of the EEC Treaty. When judging the risk that the undertakings participating in a co-operation might be able to eliminate competition in respect of a substantial part of the products in question, two aspects are especially important. Firstly, the competition remaining between the parties and secondly, the competition from other undertakings in the relevant market should be considered. In those cases where competition between the parties to the agreement is practically eliminated, the European Commission usually accepts a market share not exceeding approximately 25 per cent. Considerably higher market shares, however, have been accepted in some cases. The judgement must be based on the circumstances in the individual case. Neither a certain size nor a certain market share by the co-operating undertakings excludes exemption. The investigation of the case gives reason to conclude that the market share does not differ from what the Competition Authority - and also the Stockholm City Court - have found i.e. approximately 35 per cent. However, it has been made clear that there is strong competition in the market in question. This fact has not been prevented by the co-operation within TTF. The Market Court did not find any reason as regards the competition situation to make any other assessment than that made by the Competition Authority. Also the condition under Article 8 (4) of the Competition Act must thus be considered as fulfilled and exemption should be granted.

2. Abuse of a dominant position

Swedish State Railways

The transportation of passengers by railway was partly liberalised in 1988. As a result an invitation to tenders for the transportation of passengers by rail was made jointly by three regional transportation authorities in 1989. For the first time a private company, BK-Tåg, submitted a tender in competition with the Swedish State Railways (Statens Järnvägar, SJ). The tender of BK-Tåg was chosen and the subsequent contract covered the transportation of passengers for four years. The wagons are owned by the regional transport authorities and the track is owned and managed by a separate authority (Banverket).

At the end of this four-year contract period in 1993, a new procurement was announced by the same three transportation authorities.

Following a complaint by BK-Tåg, that the tender submitted by SJ in 1993 was predatory pricing infringing Article 19 of the Swedish Competition Act, the Swedish Competition Authority found in its investigation that SJ has a dominant position on the market for carriage of passengers by railway. Furthermore, it considered that SJ had abused its dominant position on the market by applying predatory pricing in its tender. The Authority took account of the decision by the European Commission in 1985 (ECS/AKZO), according to which predatory intent can be assumed if the price were below average variable costs. Since it could not be demonstrated conclusively that all costs involved were variable costs and that pricing therefore could be below average variable costs, the Authority found that SJ's pricing was at least below the total cost of the undertaking and that SJ had also applied this pricing with the intent of eliminating competitors.

The Authority concluded that SJ due to its dominant position on the market with greater financial resources including the possibility of cross-subsidisation and its previous legal monopoly has a strong responsibility not to behave in a way detrimental to the competition on the market and thereby preventing potential competitors from entering this market.

The investigation resulted in an injunction on SJ with a claim amounting to 30 million SEK for abuse of dominant position by applying predatory pricing. The case is pending at the Stockholm City Court.

Sweden Post

The postal sector in Sweden was fully liberalised in 1993. Reserved postal services giving exclusive rights to the Swedish Postal Administration (Sweden Post), similar to the present conditions for most national postal administrations, 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, the distribution of addressed letters to businesses and households. Several of these new entrepreneurs have filed complaints concerning alleged abuse of a dominant position by Sweden Post. Sweden Post is still in many areas a de facto monopolist.

Sweden Post announced in October 1995 new prices for distribution of periodical publications for the coming year. The new prices were lower in the Stockholm area than in other parts of Sweden, compared to the 1995 prices. The Competition Authority found that the prices announced for distribution to the Stockholm area did not cover the total costs for such distribution and that the price reductions were part of a plan aiming to eliminate the only competitor, CityMail, from the postal market and to prevent potential competitors from establishing in this market. The Stockholm area was the only geographic market on which the distribution services of Sweden Post were exposed to competition. The Competition Authority considered the price reductions in the Stockholm area as predatory pricing and an abuse of a dominant position. Sweden Post appealed against the decision to the Stockholm City Court, where the case is still pending.

The Competition Authority considered that in markets where Sweden Post faced competition from other companies, it has tried to eliminate the competition with substantially lower prices. Sweden Post has moreover used different kinds of fidelity rebates in its agreements with customers. Customers, who use Sweden Post to cover all their distribution needs receive better conditions compared to customers

using other distributors as well. In several cases the Swedish Competition Authority has found that Sweden Post has abused its dominant position.

Interconnection

Telecommunications are fully liberalised in Sweden. The state-owned telecommunications company Telia controls the main telecom infrastructure in Sweden, including the access networks which competitors of Telia need to be able to carry on their activities.

In January 1995 Telia's competitor Tele2 requested that the Competition Authority should examine whether Telia's actions in connection with the signing of a new agreement on interconnected traffic were compatible with the Competition Act. Tele2 was of the opinion that the price demanded by Telia made competition impossible.

The Competition Authority found 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.

In an interim decision taken by the Authority on 15 March 1995, Telia was prohibited from charging the price it wanted for interconnection. On 11 May 1995 the interim decision was revoked since the parties had reached an agreement in principle regarding the conditions for interconnection. However, an interim decision was once again taken by the Authority on 17 January 1996 regarding the economic terms of interconnection between the networks of Telia and Tele2.

In a decision by the Competition Authority, Telia was prohibited from charging a price for interconnection higher than 0.20 SEK per single segment. The Authority concluded that the high level of the interconnection charge in relation to the customer tariffs set by Telia led to a foreclosure effect for competitors to Telia, both actual and potential, especially on the market for long-distance calls. At the end of 1995 Telia raised its tariffs for local calls and reduced its tariffs for long-distance calls keeping the charges for interconnection unchanged. It is important to bear in mind that Telia runs only a very small risk that competitors - under present conditions - should enter the market for local calls. However, Telia's reduction in its tariffs for long-distance calls in combination with unchanged charges for interconnection created a price squeeze for the only competitor to Telia on this market, Tele2. According to the Authority there was a great risk that Tele2 would exit from the market. The Authority found that there were strong reasons to consider Telia's behaviour an abuse of a dominant position. Under penalty of a fine amounting to 50 million SEK, an injunction was issued.

3. Mergers and concentrations

In-depth investigations

Farmek/Scan Syd

Farmek AB and Scan Syd, subsidiaries of the co-operative abattoirs Farmek and Skanek proposed combining in a jointly owned company, Scan HB, their respective activities in the meat production business.

The Competition Authority rejected an argument put forward by the parties that this could be seen as an internal reorganisation within the overall co-operative organisation of meat producers in Sweden, thereby creating a single economic unit. Since the co-operative abattoirs were separate legal entities, owned by their respective members, they could not be considered as forming a single economic unit.

Scan HB would acquire a dominant position on the relevant geographic market (Sweden) within part of the meat sector. Its position would be further strengthened by the fact that its parent companies control a large part (72 per cent) of the upstream market for slaughtered animals. In addition Scan HB would be the holder of a number of strong brand names.

The Competition Authority found that the creation of Scan HB would significantly impede the competitive position of competing companies on the market as well as the competition between the parent companies Farmek and Skanek.

Although Swedish membership of the European Union has reduced the barriers to imports of meat products, as a consequence of which the Swedish market is no longer protected from competition from other EU countries, the parties had to accept several undertakings vis-à-vis the Competition Authority to get the transaction cleared. Some undertakings concerned changes in the original shareholders´ agreement. The implementation of these undertakings was, by decision of the Stockholm City Court, made subject to the penalty of a fine of a total of 60 million SEK.

Arla/Gefleortens Mejeriförening

The Competition Authority received a notification of a planned merger between two co-operative producers of milk products. A planned merger between the same parties had in 1991 (under the Competition Act of 1982) been referred to the Market Court. The Market Court then found the merger to be incompatible with the rules of that Act and the parties then decided not to implement the merger.

In all there are eight co-operative milk producers in Sweden. Arla is the largest and handles about 64 per cent of the milk coming from farmers and produces a wide variety of different milk- based products. Gefleortens Mejeriförening on the other hand handles about 1.6 per cent of the milk coming from farmers and is more limited in its product mix, i.e. it sells mainly milk and cream to consumers.

The eight co-operative milk producers have, in practice, over a number of years not been competing with each other for deliveries from farmers in the geographic market of other co-operatives. Their sales have also to a large extent been limited to their respective geographic areas. Moreover all co-operatives market a very similar mix of products, and in some cases they conclude licensing or distribution agreements with each other. Competition from imported products is mainly limited to cheese and fruit yoghurt.

Following the Competition Authority's decision to open an in-depth investigation and having received the Authority's preliminary assessment of the proposed transaction, the parties decided not to go through with the deal and subsequently withdrew their notification.

Orkla/Fortos

This case concerned the acquisition by the Norwegian company Orkla of a number of companies within the Procordia group, all active in the food-stuffs sector. The acquisition concerned a number of

product markets, inter alia potato products, ready made dinners, dressings, pickled and frozen vegetables, fish and shellfish products and products made from fruits and berries.

Following an in-depth investigation the Competition Authority concluded that the notified acquisition would create or strengthen a dominant position on the Swedish markets for jam and fruit-juice. On other product markets, this would not create or strengthen a dominant position which wouldsignificantly impede, or be liable to impede, the existence or the development of effective competition on the Swedish market.

On the jam and fruit-juice markets, Orkla held a strong market position even before the notified operation. On the fruit-juice market the acquisition of Procordia would create a combined market share of about 67 per cent. The closest competitor of the merged entity would be Björnekulla, a company holding 16 per cent of the market. Björnekulla is however a subsidiary of one of Sweden's three large retail chains and sells almost exclusively through this chain. The next competitor would be Stockmos, holding about 10 per cent of the market. The structure of the jam market was largely identical to that for fruit-juice.

The competitive position of Orkla would be further strengthened by the fact that it would be the holder of a number of strong brand names. In these markets, which were relatively small in value, consumer taste preferences would seem to play a major role. Since Swedish jam and fruit-juice have a distinctive taste, it was unlikely that non-Swedish producers of jam and fruit-juice would enter the Swedish market on a significant scale.

Even though the Swedish food retail market is highly concentrated and consists mainly of three large chains, the buying power of these chains was largely outweighed by the fact that, following the notified acquisition, there would be a very limited number of alternative sources of supply left. Moreover one of the chains had, previously, entered into an agreement with Orkla which effectively hindered that chain from introducing its own private label products.

However, following undertakings by Orkla to, inter alia, divest one of its well-known brand names and to withdraw the agreement hindering one of the retail chains from introducing private label products, the Competition Authority decided not to oppose the notified acquisition. In a decision of 17 November 1995 the Stockholm City Court has made the undertakings entered into by Orkla enforceable and subject to the penalty of a fine of 50 million SEK.

Tamro/ADA

This case concerned an operation by which the Finnish company Oy Tamro, active in the field of wholesale and distribution of pharmaceuticals, acquired ADA AB, the largest Swedish distributor of pharmaceuticals. The market share of ADA was about 65 per cent. As consideration the previous owner of ADA, Apoteksbolaget AB (the state owned pharmaceutical retail monopoly), would receive 45 per cent of both the capital and the votes in Tamro.

The Competition Authority concluded that the notified operation would create a very strong position for Tamro on the Nordic market for distribution of pharmaceuticals. On the Swedish market, however, the direct effects of the operation would be limited, since Tamro, prior to the acquisition, only had a very limited presence on the Swedish market. Despite this fact the Competition Authority found that the notified acquisition, which would exclude Tamro as a potential entrant on the Swedish market, would strengthen the existing dominant position of ADA.

Apoteksbolaget had announced its intention to reduce its initial shareholding in Tamro from 45 per cent to 25 per cent. Even following such a reduction Apoteksbolaget would remain the single largest owner of Tamro. The Competition Authority found that such a structural link between the existing retail monopoly and the dominant pharmaceutical distributor could have negative effects on competition. However, the Swedish Government, as main owner of Apoteksbolaget, had stated that its ownership in Tamro will be phased out over time, and that the activities of Apoteksbolaget will be focused on retail trade in pharmaceuticals.

In view of the above, the Swedish Competition Authority concluded that the notified operation did not create or strengthen a dominant position that would significantly impede competition in a way detrimental to the public interest. Thus, no measures were taken against the notified operation.

Hawker/Varta

This case concerned the acquisition by Hawker Batteri (Sweden) of the assets of Varta Batteri (Sweden) in the field of industrial batteries. The acquisition was part of a world-wide transaction between Hawker (UK) and Varta (Germany).

The case is interesting because it sets out the view of the Competition Authority in the field of oligopolistic dominance. Given the structure of the Swedish market for industrial batteries, the investigation of this case focused on whether the notified operation would create or strengthen an oligopolistic dominant position between on the one hand the merged entity, and on the other hand the Exide-group.

On the market for standby batteries, Hawker would after the notified operation have a market share of about 40 per cent, whereas the market share of the Exide-group would be about 50 per cent. The remaining market would be held by a small number of companies, each holding a very small market share.

The Competition Authority concluded that the notified operation would result in Varta disappearing as an active competitor, leading to a situation where the two remaining large competitors would hold more equal parts of the market than before the operation. Moreover the technology used in the production of industrial batteries had reached a mature stage, making competition in terms of technological improvements less likely. The products in question were thus considered largely homogeneous. These facts led the Competition Authority to conclude that Hawker and Exide, through the notified operation, could obtain a collective dominant position on the Swedish market for standby batteries. Under such circumstances Hawker and Exide could have a common interest in engaging in anticompetitive parallel behaviour.

To ensure the functioning of such parallel behaviour, the dominant group of companies needs to receive sufficient information regarding each other's behaviour, i.e. the market needs to be sufficiently transparent. Factors contributing to create such transparency on the market for standby batteries is the homogeneity of the products and the fact that, given that raw materials (lead etc.) make up a large part of the total production cost, all producers should have largely similar costs for a major part of the production and thereby, indirectly, a certain insight into each other's pricing decisions.

On the other hand most buyers of industrial batteries are large companies. These companies generally conclude relatively long-term (one-two years) individual agreements with manufacturers of industrial batteries. To some extent these buyers also specify their individual requirements for the

products. These factors reduce the possibilities for Hawker and Exide to receive information on each other's strategies concerning pricing and other business decisions.

The market for standby batteries is characterised by the fact that the major part of the sales are made to a small number of large customers, of which the three largest account for about 70 per cent of total sales. These large customers have a high degree of technological skills and are well-informed about the products available on the Swedish market. Further, these customers are often active on export markets and therefore have good insight into what alternative products can be obtained on other European markets.

In view of the above, the Competition Authority concluded that the Swedish market for standby batteries is characterised by strong customers and the fact that sales are mainly made through individual agreements with each customer. This reduces the possibility of Hawker and Exide to receive sufficient information on each other's marketing behaviour. The Competition Authority found that the notified operation did not create or strengthen an oligopolistic dominant position between Hawker and Exide and cleared the acquisition.

ASG/Frigoscandia

ASG AB, one of Sweden's two large road transport companies (the other being Bilspedition), notified its intention to acquire, by way of a public bid, Frigoscandia AB. Frigoscandia is active predominantly in the field of road transport of refrigerated and frozen goods.

Following an extensive investigation of market characteristics, the Competition Authority concluded that the relevant markets affected by the notified operation were those of domestic long-distance transport of refrigerated and frozen goods. On these markets ASG would, following the notified operation, achieve market shares between 35 and 50 per cent (exact market shares not published in the decision). On both markets the closest competitor would be Coldsped, a company within the Bilspedition group, holding market shares between 10 and 30 per cent. All other companies held market shares below 10 per cent.

The investigation showed that one important factor that influenced the competitiveness of a company on these markets was what kind of distribution network it possessed, and that both ASG and Frigoscandia had very strong such networks. Moreover this network effect was likely to make it difficult for foreign road transport companies, at least in the short and medium term, to enter the Swedish market on a significant scale. In view of this fact and the market shares described above, the Competition Authority found that ASG, following the notified operation, would obtain a dominant position on the Swedish domestic markets for long-distance transport of refrigerated and frozen goods. However, given in particular the strength of Coldsped, this position would not significantly impede effective competition on the Swedish market. The notified operation was subsequently cleared by the Competition Authority.

Merger cases decided within the 30 day period

Carlsberg & others/Falcon

The Danish brewery Carlsberg, the Finnish brewery Sinebrychoff and Spira AB, a Swedish company with no previous activities in the brewery business, notified an operation by which they would jointly acquire all shares in Falcon, a Swedish brewery.

Through the operation Spira would acquire 40 per cent of the shares in Falcon, whereas Carlsberg and Sinebrychoff would acquire 30 per cent each. According to the shareholders´ agreement between the owners of Falcon, none of them would have a majority on the Board of the company, and decisions by the Board required the presence of at least one nominee from each owner. Decisions by the Board would be taken by simple majority. Rules on special majority voting or veto applied only in a limited number of issues, inter alia, agreements between Falcon and any of the owners, future acquisitions and changes to the statutes of the company.

The Competition Authority found, in view of the above, that neither Spira, Carlsberg or Sinebrychoff, acquired single or joint control over Falcon through the notified operation. Therefore the operation did not constitute a notifiable acquisition in the meaning of Article 4 of the Competition Act.

In this case it could be said that the Swedish Competition Authority took a decision that appears to be along the lines of the view developed by the EC Commission in the field of shifting alliances.

III. Deregulation

Deregulation of the Swedish electricity sector

Parliament decided in 1995 to deregulate the Swedish electricity sector as of 1 January 1996. Drawing on British and Norwegian experiences, a new system was adopted, which is based on a strict separation of network services and supply of electricity. The network is considered to be a natural monopoly, and network services will be strictly regulated. A special regulatory authority has been established to monitor the supply of these services. Supply of electricity, however, is considered to be a normal good subject to competition and as such under the competence of the Competition Authority.

Joint purchasing and joint sales organisations in the electricity sector

The notifications to the Competition Authority in the electricity sector are primarily concerned with joint purchasing and joint sales organisations for electricity. Both types are in principle considered to restrict competition. However, as long as the participating players do not achieve a strong position on the market, the notified agreements on co-operation are not considered to have an appreciable effect, and thus do no fall under the scope of the prohibition. All the agreements analysed so far have had market shares around or below one per cent.

Central to the analysis of market power is the definition of the relevant market and the competitive pressure exercised by primarily Norwegian producers acting within the commercially and technically integrated Norwegian - Swedish network system.

Deregulation of imports and the wholesale trade for alcoholic beverages

The former monopolies of alcoholic beverages in Sweden on manufacturing, exports, imports and wholesale trade were abolished as from 1 January 1995. However, the monopoly on retail sales to consumers has been maintained. The other monopolies have been replaced by a licensing system. A special agency, the Alcohol Inspection Board, was established to grant licences and to monitor that requirements on storage and sales etc. of alcoholic beverages, as laid down in the new act on the sales of alcohol, are complied with. During the first six months the market was successively opened up to

competition and at the end of 1995 the number of companies that had been granted licenses amounted to about 160.

As a result of the negotiations for EU membership between Sweden and the European Commission, the Swedish Competition Authority was assigned the task of monitoring the non-discriminatory functioning of the retail monopoly and of reporting its observations twice a year to the Commission. The Commission considered that any discriminatory effects between national products and products imported from EC member states must be eliminated. On the basis of current acquis, however, the Commission did not see any reason to proceed on its own initiative against the maintenance of the retail monopoly.

In its first report to the Commission, submitted in November 1995, the Swedish Competition Authority described the new market system, the transitional phase and the market distortions observed during that period, that is, during the first six months of 1995. The Authority concluded that even though it was too early to make any real assessment of the non-discriminatory functioning of the retail monopoly, there had been no indications of discrimination of imported alcoholic beverages.

UNITED KINGDOM*

(1995)

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 1995 to the existing competition legislation.

Final procedural changes brought about by the Deregulation and Contracting Out Act 1994, referred to in the report for 1994, came into effect on 3 January 1995.

Changes in competition law rules, policies or guidelines

There were no changes during 1995.

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 & 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 Office of Fair Trading (OFT) to be entered on the public register it maintains - 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 that have been made secretly, the operation of the restrictions in which is unlawful, with a view to referring them to the Court.

Agreements submitted for registration

Details of 1 393 agreements were sent to the OFT in 1995, compared with 1 280 in 1994. Not all agreements prove to be registrable. In 1995, 602 agreements were added to the register (four per cent

* The original language of this report is English

more than in 1994), bringing the total number entered since the register was established in 1956 to more than 12 500. The slight rise in the number of agreements submitted, evident in 1994, continued as economic activity picked up further.

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 - on the advice of the Director General of Fair Trading (DGFT) - direct that reference to the Court is not required. In 1995, the DGFT was able to advise the Secretary of State that 40 agreements (11 per cent more than in 1994) 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 a large number of agreements that embody restrictions are submitted for registration, 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 1976 Act - issue a statutory notice requiring them to provide details. In 1995, 45 new investigations were started, section 36 notices were issued in respect of two investigations and a number of less formal letters of enquiry were also sent.

When he has reason to believe that any unlawful agreement has deliberately been concealed, the DGFT almost invariably refers the matter to the Court. 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 for up to two years.

Review of restrictive agreements

On 19 June, the DGFT announced that British Sky Broadcasting Ltd (BSkyB), TeleWest Communications plc and Nynex CableComms Ltd had been given 30 days to reconsider significantly anti-competitive restrictions contained in BSkyB's supply agreements with each of the other companies. The parties have since agreed to remove or amend the restrictions, but further consideration is necessary before the OFT can confirm that the agreements do not warrant investigation by the Court. In the meantime BSkyB has undertaken to suspend operation of the restrictions.

Court proceedings

i) Net Book Agreement (NBA)

The NBA is an agreement between publishers which restricts them to standard conditions of sale for books whose "net price" (retail price) has been fixed by the publisher. Subject to certain exceptions, such "net books" may not be sold at less than the "net price".

On 31 March the DGFT applied to the Court under section 4 for leave to apply for an order to discharge the Court's 1962 and 1964 orders and replace them with an order declaring the restriction in the NBA contrary to the public interest, prohibiting its enforcement, and ordering the parties not to enter into other agreements to the like effect. On the same date he applied under section 17 of the Resale Prices Act 1976 for leave to apply for an order to discharge the Court's 1968 order exempting books and maps from the prohibition on resale price maintenance.

In May, the Publishers Association applied for a stay of the proceedings pending a European Commission decision on possible exemption for the NBA under Article 85(3) of the Treaty of Rome. Following a two-day hearing in July, the Court refused this application on 9 August. It found that the Publishers Association had not established sufficient grounds for a stay and that, since the DGFT's applications for leave were relevant to the continuing validity of the 1962 judgement, the Court should be prepared to make up its own mind and control its own proceedings.

On 28 September, following decisions by leading publishers to stop fixing the "net price" of their books, the Publishers Association announced that it would no longer call on signatories to enforce the NBA. The proceedings before the Court continued because the NBA had not been ended and because resale price maintenance was still lawful for books and maps. The Court granted the DGFT's applications for leave after a hearing held on 5/6 December. The application was made on 12 December.

ii) Grounds maintenance

Proceedings against 11 grounds maintenance contractors were successfully concluded at a hearing on 25 May. The Court found that the contractors had been party to a registrable agreement on the charges that were to be made or quoted for the supply of services when tendering for grounds maintenance contracts awarded by the Property Services Agency. There had also been an additional agreement among four of the contractors not to bid competitively for contracts which one of the four already held and wanted to retain. Ten of the contractors gave undertakings in lieu of an order under section 2 not to enforce the agreements and not to enter into similar agreements in the future and, in lieu of an order under section 35, not to give effect to any registrable agreements not furnished within the prescribed time limits. One contractor was made subject to orders under section 2 and section 35.

iii) Concrete

Proceedings against 17 ready-mixed concrete companies were successfully concluded on 4 August. All the companies admitted breaches of undertakings given to, or orders made by, the Court in 1978/79 that they would not be involved in secret price-fixing and market-sharing agreements. Record fines totalling £8 375 000 (plus costs) were imposed on the companies themselves, while five directors who were found to have aided and abetted the contempt were fined a total of £87 500 (including costs). The judge made it clear that any individuals who were found guilty of similar offences in the future should

expect to go to prison for a significant period. At the end of 1995, preparations were in hand to obtain orders under section 35 against other companies that had participated in the cartels but which were not in contempt of previous undertakings given to, or orders made by, the Court.

iv) Sugar

Proceedings continued against British Sugar plc and Tate & Lyle Industries Ltd concerning arrangements for the supply of sugar to the retail market between June 1986 and July 1990. On 15 December 1994, British Sugar applied to the Court for a declaration that the memorandum of agreement between the companies was not an agreement to which the 1976 Act applied. At the same time the company also made a further application to the Court to stay the proceedings until separate hearings before the European Commission, arising from the same matters, had been concluded. This application, heard on 21 July, was refused on 9 August. The Court ruled that the European Commission's tasks and its own were very different and a decision by the Commission would not dictate the result of the proceedings before the Court.

v) Newsagents

Proceedings continued against the National Federation of Newsagents under section 35 for failing to furnish details of letters that had been sent to its officials and members in August 1992, and which had contained implied recommendations to boycott the Saturday edition of *The Daily Telegraph*.

vi) Scottish solicitors' property centres

The Aberdeen and Edinburgh solicitors' property centres applied to the Restrictive Practices Court (Scotland) for an order, under section 26, to remove the two centres' respective agreements with their members from the Register of Restrictive Trading Agreements. Following a hearing in December the Court held that the arrangements disclosed no registrable agreements.

vii) Pre-recorded music charts

On 6 June the DGFT announced that, following the removal of a significantly anti-competitive clause, agreements that permitted the compilation of pre-recorded music charts would not, after all, be referred to the Restrictive Practices Court. A restriction in the existing agreement between, among others, Chart Information Network Ltd and the British Association of Record Dealers (BARD) - an umbrella organisation for retailers - had prevented BARD from supplying retail information to competing music charts.

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 1995 the OFT received 63 complaints alleging contravention of the Act, compared with 34 in 1994. In ten cases the DGFT obtained written assurances from suppliers that they would not seek to impose minimum prices at which dealers could resell their goods.

Review of medicaments exemption

In October, the DGFT announced a review of the exemption of medicaments from the general ban on resale price maintenance under the 1976 Resale Prices Act. The exemption was approved by the Restrictive Practices Court in 1970, and it can be ended only by order of that Court. And the Court can re-examine the case only if the DGFT can show *prima facie* evidence of a material change in the relevant circumstances since the exemption was so authorised.

The exemption covers two classes of medicament. The first is products available only on prescription. In practical terms, however, resale price maintenance does not now exist on these products, because manufacturers no longer prevent wholesalers from offering discounts to retailers. The second category consists of products available over the counter without a prescription. In 1970 the Court took the view that, without resale price maintenance, supermarkets would stock a wider range of the more popular products at reduced prices. At that time there was much concern about the number of small chemists going out of business: the Court was anxious that the supermarkets' commercial drive might accelerate that process, leaving fewer outlets at which the less popular over-the-counter products were available and fewer chemists where prescriptions could be dispensed.

The review is being conducted in three stages. The first will attempt to establish exactly what products are covered by the exemption, particularly those that come under the general heading of vitamin and mineral supplements. Next, information is to be sought about prices, sales and shopping habits. Finally, against this factual background, the views of interested parties will be canvassed in a full consultation exercise.

Anti-competitive practices (Competition Act 1980)

Anti-competitive practices can be investigated under the provisions of the Competition Act 1980. Many complaints to the OFT are dealt with through informal enquiries. In some cases, however, these enquiries persuade the DGFT that a reference to the MMC is warranted.

Following the introduction of the Deregulation and Contracting Out Act 1994 the DGFT is no longer required to complete a formal investigation and publish a report before making a reference to the MMC. Under new procedures set out in the Act, he may now - in lieu of a reference - accept undertakings from the company concerned in order to remedy the anti-competitive effects of the behaviour. The report referred to below was therefore the last such report to be published under the Competition Act.

Report by the DGFT

The DGFT published one report in 1995:

28 March United Automobile Services Ltd

The report concluded that United Automobile Services, operating buses in the Darlington area, had pursued a course of conduct which constituted an anti-competitive practice. Nevertheless, because there had been major changes in the competitive situation since the investigation had first started, the DGFT proposed no remedies. Nor did he refer the case to the MMC which was already examining the provision of bus services in the north-east of England generally, under the monopoly provisions of the Fair Trading Act.

Reference to the MMC

The DGFT made one reference in 1995:

21 June	Tambrands Ltd

Action on earlier reports:

Ford - In June, the Ford Motor Co was released from undertakings it had given in 1986. These had required the company - after a seven-year protection period - to license independent firms to manufacture or supply Ford vehicle body replacement parts, subject to a two per cent royalty. The DGFT decided that the undertakings were no longer needed following a House of Lords ruling that Ford did not have design rights in the various body parts.

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 and uncompetitive 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. It pays particular attention to the economic performance of firms with large market shares, taking account of the degree of import penetration and of information on price levels and movements, profits and market behaviour. Secondly, it takes note of complaints and other representations it receives from business and the public.

Where evidence of the existence of a monopoly situation is detected, 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 it operates, or may be expected to operate, against the public interest.

Alternatively, under new provisions introduced by the Deregulation and Contracting Out Act 1994, the DGFT may, in lieu of a reference, accept formal undertakings about their future conduct from the companies concerned.

References to the MMC

The DGFT made two monopoly references in 1995:

1 March	Classified directory advertising services
27 April	The supply of electrical goods

Informal undertakings in lieu of a reference:

The supply of programming to cable companies - In March, British Sky Broadcasting Ltd (BSkyB) gave the DGFT informal undertakings about the provision of programming to cable companies

and the accounting procedures of its Direct-to-Home (DTH) distribution business. These undertakings, which were accepted in lieu of a monopoly reference, addressed the practices of "bundling" (a requirement to take packages of programmes) and "full-line forcing" (an incentive discount scheme dependent on acceptance of the full range of BSkyB-owned channels) by way of a revised rate card for the supply of programming to cable operators. In addition, BSkyB undertook to maintain separate accounts for its DTH business in order to counter anxieties about cross-subsidisation. BSkyB's revised incentive discount scheme and a wholesale rate card, both effective from 1 May, were approved by the DGFT under the terms of the undertakings.

At this stage BSkyB had concluded programme supply agreements with TeleWest Communications plc and Nynex CableComms Ltd. In the light of these agreements BSkyB's wholesale rate card was amended so that it was broadly consistent with the rate cards in the agreements. The DGFT approved the amended rate card in August.

On 1 December, after the OFT had received further complaints from cable companies, the DGFT announced that he had decided to conduct a review of BSkyB's position in the pay-tv market. This review is to be confined to issues relating to the wholesale supply, within the United Kingdom, of programming and related services such as access to encryption, subscriber management and transponder space. It is to include the March undertakings given by BSkyB and BSkyB's subsequent agreements with TeleWest and Nynex. The review is expected to take six months. The DGFT will then decide whether any further action is appropriate.

Reports by the MMC

Two reports were published in 1995:

9 March	Video games
3 August	The supply of bus services in the north-east of England

i) Video games

In its report on the United Kingdom market for video games hardware and software (worth £550 million in 1993) the MMC identified a number of practices which operated against the public interest and had adverse effects on the price and availability of video games.

Nintendo and Sega were effectively the only suppliers of video games hardware, with 39 per cent and 60 per cent of the market respectively. They also dominated the market for software, though to a lesser extent. Nintendo's market share was just under 25 per cent, Sega's 38 per cent, and third-party publishers 37 per cent. In order to be useable on Nintendo or Sega machines however, third-party software had to conform to their formats - for which it required to be licensed by Nintendo or Sega.

The MMC concluded that third-party licensing arrangements enabled Nintendo and Sega to maintain their dominant positions in the market by exercising an unnecessarily restrictive control of the market for software development, and that these arrangements led to higher prices of games to consumers. In particular:

- Nintendo and Sega used their licensing conditions - under which games must be approved by the two companies, cartridges generally have to be manufactured by them and numbers and

timing of games are regulated - to control the market for software development, the flow of product into the market and thus the choice of and prices of games;

- prices charged by the two companies to software publishers for cartridges were excessive;

- the restrictions helped these companies to maintain discriminatory prices for software and hardware; and

- entry of software publishers and new systems was made more difficult.

The MMC recommended that restrictions in licensing conditions limiting the number of games published, requests for approval prior to publication and controls on packaging and presentation (in particular the requirement that the licensor arrange or control the manufacturer of cartridges) should be removed. If this did not prove possible the MMC suggested an alternative remedy of price controls.

It also recommended that restrictions on rental should be removed and that games software supplied by Nintendo and Sega should be freely available to rent - if necessary, on payment of an appropriate royalty.

The MMC further recommended that Sega should give clear guidance (possibly through the Entertainment Software Retailers Association, representing many retailers with an interest in rental) on the features that, in its view, would lead to an exchange scheme infringing its rights.

Subsequently, the Department of Trade and Industry (DTI) announced that there would be a consultation period to allow the video games software publishers to provide information about the precise nature of the intellectual property rights required to produce games for use on Nintendo and Sega consoles, and to give their views on the possible effect of the actions recommended by the MMC on the supply of video games by United Kingdom publishers. The consultation period was later extended to allow the DTI to take subsequent market developments into account and to allow for further consideration of the complex intellectual property issues involved.

ii) Bus services in the north-east of England

The MMC found that scale monopolies existed in favour of Stagecoach Holdings plc and The Go-Ahead Group plc, the two largest operators in the reference area, and that some of their actions had been against the public interest. The Minister for Competition and Consumer Affairs asked the DGFT to seek undertakings from Stagecoach and Go-Ahead to provide that, within the reference area:

- if, on any route, the companies reduced fares below those of a competitor or they increased frequencies against a competitor, and that competitor were to withdraw, they would maintain frequencies and fares for a period of at least three years at the levels ruling when the competitor withdrew;

- if they timed buses at a shorter interval before a competitor's service than the competitor had itself timed buses before their own services, and the competitor were to withdraw, they would similarly maintain fares and frequencies; and

- they would not operate services which did not at least cover their variable and semi-variable costs.

Negotiation of these undertakings was still in progress at the end of the year.

Informal enquiry

Brewers' wholesale pricing policy - This enquiry focused on the question whether tenants of tied pubs paid more for beer than their competitors in the free trade and, if so, whether any action was justified under United Kingdom competition legislation. It was prompted by concerns expressed by the European Commission about price differentials between the tied and free trades following an application by Inntrepreneur Estates Ltd (now Inntrepreneur Pub Co Ltd) for exemption of its pub leases under Article 85(3) of the Treaty of Rome.

On the basis of information and views supplied to the OFT by a broad cross-section of the beer industry, the DGFT concluded that there were insufficient grounds for a reference to the MMC. The enquiry found that price differentials between the tied and free trades had widened and there was a widespread desire for more transparency of information between pub estate landlords and their tenants. Nevertheless, in general, the higher prices paid by pub tenants for their beer were offset by benefits the free trade did not receive, including lower rents and a range of support measures such as training and promotional support. In a wider context, the enquiry indicated that divestment by the major brewers, following the Beer Orders put in place after the MMC's 1989 report on the supply of beer, had led to vigorous competition at retail level.

An account of the enquiry was passed in confidence to the European Commission to assist them in their work on the consideration of the Inntrepreneur leases under Article 85.

Action on earlier reports:

i) Animal waste

In 1993 the MMC found that a monopoly situation in the acquisition and processing of animal waste existed in England and Wales in favour of Prosper De Mulder Ltd and related companies (PDM), and that a similar monopoly situation existed in Scotland in favour of William Forrest & Son (Paisley) Ltd and its ultimate holding company Hillsdown Holdings plc. The MMC concluded that both companies had set prices and charges in a way which could not always be accounted for by physical factors such as the volume and condition of supplies, and that they had done so with the intention of exploiting and maintaining their monopoly position. The DGFT was asked to seek suitable undertakings from PDM and Forrest. These were agreed in February, when both companies undertook to ensure that relevant information on their prices was published in each edition of the *Meat Trades Journal*. This should place suppliers of animal waste in a stronger position in their negotiations with these companies, increase the transparency of PDM's business and facilitate competition in the animal waste business.

ii) Bus services in mid and west Kent

In 1993 the Secretary of State requested the DGFT to obtain undertakings from Maidstone & District Motor Services Ltd (M&D) in line with recommendations that had been made by the MMC. When, after extensive negotiations, M&D proved unwilling to give such undertakings in a satisfactory form, it was decided to proceed by making an order. However, following the publication of the statutory notice by the DTI and further negotiations, M&D agreed in August to give the undertakings that had been requested.

iii) Contact lens solutions

The DGFT continued to seek voluntary quarterly information about the price and availability of solutions from manufacturers, importers and a cross-section of retailers, including opticians, pharmacies and supermarkets.

vi) Fine fragrances

The DGFT received annual returns from the fine fragrance houses providing details of their range stocking and minimum purchase arrangements for the 1994 calendar year and, in December, invited them to volunteer information for 1995. Similar information will also be requested for 1996.

v) Films

Following the publication in October 1994 of a report by the MMC, the DGFT was asked to negotiate undertakings aimed at preventing alignment (the practice whereby, in 20 specified locations, distributors systematically prefer cinemas in one chain over those in another) and limiting the length of minimum exhibition periods imposed by distributors on exhibitors. By the end of the year, the negotiations had not produced any undertakings that could be regarded as satisfactory. Nevertheless, following discussions with the OFT - and in line with a suggestion made by the MMC - the industry had established a panel to deal with cases of refusal by distributors to supply films to exhibitors.

vi) Industrial and medical gases

In January, the Minister for Corporate Affairs accepted a recommendation from the DGFT to release BOC (formerly British Oxygen Co Ltd) from undertakings on the supply of oxygen and dissolved acetylene. These had been given in 1958, following an MMC investigation two years earlier. The DGFT's recommendation followed an informal review by the OFT of the industrial and medical gases market in the United Kingdom. The review, carried out in 1994, had concluded that the undertakings were either outdated or duplicated by undertakings which - with other European industrial gas producers - BOC had given the European Commission in 1989.

vii) Matches and disposable lighters

Bryant and May, identified by the MMC in 1992 as the monopoly supplier, complied with its undertakings to supply the DGFT with information about the profitability of its matches and lighters business.

viii) National newspapers

The OFT continued to monitor the wholesale distribution of newspapers following the 1993 report of the MMC and the introduction, in October 1994, of a code of practice setting out objective criteria to assess retailers' applications to wholesalers for supplies. The industry has estimated that the number of new retailers who receive supplies of newspapers has risen by more than 7 000 since the code came into effect. During the course of the year, the OFT received no complaints from retailers about the refusal of wholesalers to supply them with national newspapers. In June, following changes in wholesale

distribution areas and increases in wholesalers' carriage charges, the OFT received a submission from retailers asking that a further reference should be made to the MMC. Having examined the views put forward by all the interested parties, the DGFT concluded on 21 August that there were at that time insufficient grounds for a further reference.

ix) Structural warranties for new homes

After negotiations with the OFT, the National House Building Council (NHBC) agreed to amend its membership rules. The changes allow members to use competitors' warranty schemes instead of the NHBC scheme, and reflect other recommendations made in a report by the MMC in 1991. The NHBC also gave the Secretary of State an undertaking not to make any significant amendments or additions to the rules of membership without the DGFT's consent.

x) Electrical contracting services at exhibition halls in London

In line with the decision taken by the Minister for Corporate Affairs in August 1994, the DTI prepared a draft order designed to implement recommendations made by the MMC in 1990. The order was laid before Parliament in December.

xi) Beer

The OFT continued to monitor brewers' compliance with the 1989 Beer Orders. It has satisfied itself that the large brewery groups have complied with the requirement to keep their number of tied premises within the maximum permitted under the Supply of Beer (Tied Estate) Order 1989 (SI 1989/2390). In February, following intervention by the DGFT, Courage Ltd provided an assurance that it would in future comply with Article 7 of the order, so ensuring that tenants of Inntrepreneur Pub Co Ltd (then part of the same brewery group) would not be put at a disadvantage if they chose to supply a cask-conditioned beer from a supplier of their own choosing.

Financial services

The Financial Services Act 1986 requires the DGFT 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 rules and on the organisations' practices whenever he identifies competition concerns.

On the retail financial services front, the new product and commission disclosure rules of SIB and the Personal Investment Authority (PIA) came into force for "life products" in January. These rules have increased the information given to investors about such products. Officials from the OFT continued to consult with the PIA on new disclosure rules for non-life products such as unit trusts.

On the wholesale side, dealing with financial markets, the DGFT published reports on applications for recognition from two overseas investment exchanges. In the domestic financial markets, he reported on the rules of Tradepoint, a United Kingdom-based company seeking recognition as an

investment exchange, and published his review of the privileges and obligations of market makers on the London Stock Exchange.

The DGFT also continued his study of the underwriting of share issues. In a report published in March (under the auspices of the Fair Trading Act), he concluded that competition was not working effectively, as evidenced by the adoption of fixed fees for underwriting. Although there was no indication of agreements between suppliers, there was evidence of overcharging for underwriting and little sign that issue prices were adjusted to bring the fixed fee into line with the risks of particular issues. While he considered making a reference to the MMC, the DGFT decided not to take this course because of evidence that some practitioners were considering alternative arrangements, and the willingness of trade associations to take the debate forward. Issues made between June 1995 and May 1997 will be monitored to decide whether further action is justified.

London Stock Exchange

Rules of the London Stock Exchange relating to market makers - In a report to the Chancellor of the Exchequer, published in March, the DGFT concluded that certain rules of the London Stock Exchange were significantly anti-competitive. These rules gave market makers an exclusive right to display prices on the Stock Exchange Automated Quotation System (SEAQ) and prevented them from displaying better prices on other public display systems: they also covered restrictions on the dissemination of inter-dealer broker (IDB) quotes, delayed publication of post-trade information, and arrangements for stock borrowing. The DGFT commented that his views on the importance he attached to the anti-competitive effects of market makers' exclusive access to the IDB network had been influenced by the Exchange's rules delaying publication of the larger trades. Following the publication in June of the SIB's paper on the regulation of the United Kingdom equity markets, and having undertaken its own consultation exercise, the London Stock Exchange decided to abolish the rule preventing market makers from showing better prices on public display systems other than SEAQ. Taken with the immediate publication of all IDB and other riskless transactions, this move went a long way to remove the DGFT's concerns.

Applications for recognition

i) Tradepoint

Reporting in May, the DGFT cleared the rules of Tradepoint, a United Kingdom-based company seeking recognition as an investment exchange in domestic equities. He also commented that the advent of this company could introduce an important degree of competition into the London equity market.

ii) Stockholm Stock Exchange

Also in May, the DGFT reported on the application by the Stockholm Stock Exchange for recognised investment exchange status in the United Kingdom. He concluded that none of the rules governing the operation of the Exchange had, or was intended or likely to have, the effect of distorting or preventing competition to any significant extent.

iii) Delta Government Options Corporation

In August, the DGFT reported on an application by Delta, a US corporation, to become a recognised investment exchange in the United Kingdom. He identified two rules with potential anti-competitive effects: the first concerned the capital requirements for banks and insurance companies and the second the capital requirements for brokers and dealers. Nevertheless, following assurances by Delta about the way the corporation would apply the first rule, the DGFT concluded that it would not have a significant effect on competition. Taking account of the likely competition for Delta's services and also of consultees' views, he further concluded that the second rule, too, created no significant restriction or distortion of competition, although the OFT would monitor its effects if Delta were to be recognised.

Regulatory developments

Full details of regulatory developments are to be found in the annual reports of the regulatory bodies. Brief details are given below of the more significant developments during the year.

Electricity

In 1995 there were ten take-over bids for regional electricity companies. It is for the Secretary of State, having received the advice of the DGFT, to make the decision on whether to refer the bids to the MMC. Under a Concordat between the Office of Electricity Regulation and OFT the Director General of Electricity Supply (DGES) provides advice to the DGFT on bids involving electricity licences. During the year, two bids were withdrawn, two were referred to the MMC, and four mergers were completed.

Each case involved a previously independent regional electricity company becoming a subsidiary within a wider group. In order to ensure that customers continued to be fully protected, and that the DGES continued to have access to the information required to carry out his regulatory duties, additional licence conditions were imposed. These secure relevant information from other companies within the group, ringfence the assets of the public electricity supplier, and give assurances that the public electricity supply business will continue to have access to necessary financial resources.

Report by the MMC

On 15 June 1995 the MMC published a report following a reference made in 1994 by the DGES of Scottish Hydro-Electric plc's distribution and supply price controls, and the provisions of Hydro-Electric's licence that require a payment from the generation business to its distribution and transmission businesses. The reference followed Hydro-Electric's rejection of proposals for revised price controls made by the DGES in 1994.

The main features of the MMC's recommendations were that aspects of Hydro-Electric's distribution and supply price controls should be modified, as they could lead to higher charges than were necessary to finance the company's activities and undertake the necessary capital expenditure to improve the quality of supply. The recommendations implied a reduction in real prices of 8.5 per cent to the average customer over the three years from 1995 to 1998. At the same time, it would allow the company to accelerate the refurbishment of its distribution network and improve the reliability of supply.

Rail privatisation

Progress towards privatisation was maintained during 1995. Preparations continued for the May 1996 stock market flotation of Railtrack, which owns and manages the railway infrastructure. The first passenger franchise contracts were awarded in December, and invitations to tender were issued for a further six. Twenty-four businesses were sold, including BR Maintenance Ltd, BR Telecommunications Ltd and Rail Express Systems Ltd. Contracts were exchanged in November for the sale of the three rolling stock leasing companies.

Telecommunications

Proposed new licence condition

In December, The Office of Telecommunications (Oftel) published proposals for a new licence condition prohibiting anti-competitive practices, together with deregulatory measures which might be implemented on introduction of the proposed condition. Statutory consultation on the proposals would take place from May 1996.

The proposed new condition is modelled closely on the principles of European competition law. It would prohibit any abuse of a dominant position by a supplier in a telecommunications market, and any anti-competitive agreement between undertakings which materially affects competition in the United Kingdom market. In either case, whether particular behaviour breached the condition would depend not only on the precise form of the behaviour, but on its economic effect. Examples of practices which would be caught are refusal by a dominant supplier to supply a competitor in a downstream market on reasonable terms; denigration of competitors; extended negotiating periods for access to facilities; and excessively long exclusive supply agreements. Breach of the condition could result in an enforcement order, which would then enable third parties to take action for damages if the licensee failed to comply with the order. Oftel proposed that the introduction of the condition be complemented by the progressive removal of detailed, specific conditions from licences, providing licensees with more flexibility to innovate and respond to market forces.

Number portability

Following his failure to agree with British Telecommunications plc (BT) on a modification of the company's licence concerning number portability, the Director General of Telecommunications (DG Oftel) referred the matter to the MMC. Number portability is the facility which allows customers to retain their existing phone numbers when transferring their business to another operator. Under the provisions of BT's licence, the DG Oftel could direct the company to provide number portability, while the company was entitled to recover its reasonable costs.

In its report, published in December, the MMC explained that there were three main technical solutions for the provision of portability, of which only one, known as "tromboning" (where the call doubles back between the called party's previous local exchange and the associated trunk exchange) would be available in the immediate future. A more efficient version, "call drop-back" (where the local exchange sends a signal back to the trunk exchange and then releases the call), was expected to be available in late 1997. The third solution, "intelligent network" (which involves interrogating a database in the network to determine how a call should be routed), was identified as the likely preferred system in the longer term.

The MMC concluded that the introduction of number portability was necessary to promote effective competition between operators, thus benefiting customers and promoting efficiency. But the facility needed to be introduced more rapidly and effectively than was likely if BT were able to recover from other operators all the costs it was claiming under its licence. Consequently, the situation was against the public interest.

In order to remedy the situation, the MMC proposed modifications to BT's licence which would allocate the costs of implementing number portability between BT and other licensed operators. It proposed that BT should bear the initial costs of modifying its network (system set-up); BT should be able to pass on to the other operator concerned the costs of enabling individual customers to port their numbers (per line set-up); and, under call drop-back, BT should bear the additional costs involved in routing a call to a ported number (conveyance). During the period of tromboning, however, the additional costs by comparison with call drop-back should be shared equally between BT and the other operator. These recommendations would lead to BT bearing roughly two-thirds, and other operators one-third, of the total of BT's per line set-up and additional conveyance costs over the period 1996/97 to 1999/2000.

Mergers

Under 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 that 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 the MMC has identified. Alternatively, if recommended to do so by the DGFT, the Secretary of State may - in lieu of a reference - accept undertakings from the parties to remedy adverse effects identified by the DGFT.

A merger situation may qualify for investigation if the gross world-wide assets being acquired exceed £70 million, or if it produces a combined share of 25 per cent or more in the supply (or acquisition) of goods or services of any description in the United Kingdom or a substantial part of it. Successive Ministers have made clear that the main, though not necessarily the only, grounds for making a reference are the effects of the merger on competition within the United Kingdom.

In 1995 there was a further large rise in the number of merger cases considered by the OFT. This was despite procedural and statutory changes introduced in 1994, which had been designed to reduce the number of mergers qualifying for investigation. The total number of mergers considered by the OFT, whether as merger situations in the public domain (public mergers), under the confidential guidance procedure, or by way of informal advice, rose from 381 in 1994 to 473 in 1995. This represented a year-on-year increase of around 24 per cent and followed a rise of some 23 per cent in 1994.

The OFT considered 144 requests for confidential guidance, compared with 113 in 1994, an increase of some 21.5 per cent. The DGFT advised on 72 requests, a decrease of five per cent on the 1994 total of 76; 61 received favourable, and seven unfavourable, guidance. In two further cases - where, on the information available, it was impossible to establish the likelihood of reference with sufficient certainty - no guidance was given. The remaining 35 requests were found not to qualify or were abandoned. Another 37 cases remained outstanding at the end of the year. In addition, OFT staff gave informal advice to parties involved in possible mergers about qualification for investigation and the potential for reference in 48 cases.

Parties to a merger may provide details to the OFT before the proposal is made public. In such cases, the Secretary of State must announce his decision within a stipulated time, or the power to refer it to the MMC is lost. During 1995 the OFT advised on 12 proposed mergers under this procedure.

Unless a proposed merger has been prenotified under the statutory procedure there are no statutory time limits on reference to the MMC. For completed mergers, the Secretary of State loses the power to make a reference six months from the time the merger becomes public.

The OFT examined 306 proposed or completed public mergers, compared with 268 in 1994, an increase of 14 per cent. The DGFT advised on 191 cases, an increase of some 23 per cent on the 1994 total of 155. The remaining 115 were either found not to qualify for investigation or were abandoned before a decision was taken. Another 24 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. There was one reference under this head in 1995.

The total value of the assets acquired or bid for in the qualifying merger situations examined by the OFT in 1995 was £178 billion (1994, £162 billion). Horizontal mergers (where the largest and second largest activities of the merging firms overlap) accounted for 91 per cent of the total number of qualifying cases examined in 1995 (88 per cent in 1994). A more detailed statistical analysis of merger activity is given in the Annex to this report.

References to the MMC

In 1995 (besides the two newspaper mergers referred to in this report) the Secretary of State made eight merger references to the MMC under the Fair Trading Act, the same number as in 1994. All were made in accordance with the DGFT's advice, and all were on competition grounds. In addition the Secretary of State made one mandatory reference of a merger between water undertakings under the Water Industry Act 1991.

The references were:

30 April	Lyonnaise des Eaux SA/Northumbrian Water Group plc *(reference under the Water Industry Act)*
6 June	Stagecoach Holdings plc/Ayrshire Bus Owners (A1) Service Ltd
31 July	Nutricia Holdings Ltd/Valio International UK Ltd
1 August	Belfast International Airport Ltd/Belfast City Airport Ltd
6 September	Stagecoach Holdings plc/Chesterfield Transport (1989) Ltd
8 September	The Go-Ahead Group plc/OK Motor Services Ltd and associated companies
26 October	British Bus plc/Arrowline (Travel) Ltd, trading as Star Line Travel of Knutsford
23 November	Powergen plc/Midlands Electricity plc

23 November	National Power plc/Southern Electric plc

Reports by the MMC

Ten merger reports were published in 1995:

9 March	Stagecoach Holdings plc/20 % shareholding in Mainline Partnership Ltd
23 March	Thomas Cook Group Ltd/Interpayment Services Ltd
27 April	Stagecoach Holdings plc/20% shareholding in SB Holdings Ltd
27 April	SB Holdings Ltd/Kelvin Central Buses Ltd
23 May	The General Electric Company plc/VSEL plc
23 May	British Aerospace plc/VSEL plc
25 May	Service Corporation International Ltd/Plantsbrook plc
26 July	Lyonnaise des Eaux SA/Northumbrian Water Group plc *(reference under the Water Industry Act)*
3 November	Stagecoach Holdings plc/Ayrshire Bus Owners (A1) Service Ltd
21 December	Nutricia Holdings Ltd/Valio International UK Ltd

All except SB Holdings/Kelvin Central and British Aerospace/VSEL were found to operate against the public interest or to be likely to do so.

Stagecoach Holdings plc/20 per cent shareholding in Mainline Partnership Ltd

The MMC concluded that the merger was likely to operate against the public interest and recommended that Stagecoach should be prevented from increasing its shareholding beyond 20 per cent. The MMC found that the merger had reduced bus competition in South Yorkshire by removing actual and potential competition between the parties, had enhanced Mainline's ability to weaken smaller operators there, and would be a significant deterrent to new operators. As advised by the DGFT, the Secretary of State decided that stronger remedies than those recommended by the MMC were necessary. He invited the DGFT to seek undertakings from Stagecoach to divest its 20 per cent shareholding and its seat on Mainline's Board, and not to reacquire shares in Mainline subsequently. At the end of 1995 Stagecoach was understood to be seeking judicial review of the report and the Secretary of State's decision.

Thomas Cook Group Ltd/Interpayment Services Ltd

The MMC found that the merger was likely to operate against the public interest. It would reduce from three to two the number of significant issuers of travellers cheques and increase Thomas Cook's share of that market in the United Kingdom from 32 per cent to an estimated 49 per cent. There were likely to be detrimental consequences for sales agents such as banks, travel agents and bureaux de change, some of which had expressed concern about becoming agents for Thomas Cook, whose own retail travel operations competed with their businesses. In line with the MMC's recommendations the Secretary

of State asked the DGFT to seek behavioural undertakings from Thomas Cook designed to remedy the adverse effects.

Stagecoach Holdings plc/20 per cent shareholding in SB Holdings Ltd

The MMC found that the merger was likely to operate against the public interest and recommended that Stagecoach should be required to divest its shareholding and be prevented from entering into any agreement which inhibited competition between SB Holdings and Stagecoach in the affected area (in and around Glasgow). It found that the merger had eliminated competition between two of the largest bus operators in the area, and also deterred another adjacent operator from entering. Following advice given by the DGFT, the Secretary of State asked him to seek undertakings from Stagecoach in line with the MMC's recommendations. At the end of 1995 Stagecoach was understood to be seeking judicial review of the report and the Secretary of State's decision.

SB Holdings Ltd/Kelvin Central Buses Ltd

The MMC concluded that the merger did not operate against the public interest and was not likely to do so. One member of the inquiry team dissented from this conclusion.

The General Electric Company plc (GEC)/VSEL plc and British Aerospace plc/VSEL plc

These two competing bids were referred and reported on together. Normally, both bids would have fallen to the European Commission to consider, under the European Merger Regulation, rather than to the United Kingdom authorities. In this case, however, the United Kingdom Government used Article 223 of the Treaty of Rome to return the military aspects of the mergers to national jurisdiction. The European Commission cleared the non-military aspects (five per cent of VSEL's business) of both mergers. The MMC found that the British Aerospace bid was unlikely to operate against the public interest. At the same time, with two members of the inquiry team dissenting, it concluded that the bid by GEC was likely to do so, principally because of the loss of competition for forthcoming warship orders. It therefore recommended that this bid should be blocked - a view that was supported by the DGFT.

The Secretary of State, however, cleared both bids. He said that, among other considerations, he had had regard to the views of the two dissenting members of the MMC inquiry team. They believed that, in the face of sharply declining orders, the industry would almost certainly be further rationalised, regardless of VSEL's eventual ownership. As the sole customer, the Ministry of Defence would have considerable power to obtain value for money after the merger. Consequently, the merger would not affect competition. Moreover, in the subcontracting operations which the company ran as a prime contractor, GEC had a strong commercial incentive not to give its own subsidiaries unfair preference. The Secretary of State also took note of various assurances GEC had given the Ministry of Defence about its conduct of the business after the merger if its bid were to prove successful.

Service Corporation International Ltd (SCI)/Plantsbrook plc

The MMC concluded that the merger was likely to operate against the public interest in relation to competition between funeral directors and crematoria operators, and to the detriment of consumers. It

recommended the divestment of certain funeral directing businesses and suggested certain behavioural remedies.

The inquiry found that the merger would significantly increase the parties' market shares in parts of London and south-east England, where their strong presence (up to 51 per cent combined) would also deter new entry. The MMC was also concerned, among other things, about the transparency of charges for funerals and of the ultimate ownership of funeral directing outlets. It considered that the merger would increase SCI's ability to channel funerals to the crematoria it owned, where prices tended to be higher than those of competitors. The Secretary of State accepted these findings and asked the DGFT to seek undertakings from SCI in line with the MMC's recommendations. At the end of 1995 SCI was understood to be seeking judicial review.

Lyonnaise des Eaux SA/Northumbrian Water Group plc

The MMC found that this merger, which would bring together two water businesses (one also supplying sewerage services) in north-east England, was likely to operate against the public interest. It would involve the loss of Northumbrian as a separate "comparator", and so prejudice the ability of the Director General of Water Services (DGWS) to make comparisons between different water enterprises when carrying out his regulatory functions. If the merger were to be permitted to go ahead, the merged company should be required to maintain or exceed current customer service levels, and to make substantial price reductions, sufficient to compel it to the forefront of efficiency in the industry. The DGWS was best placed to offer advice as to what the levels of price and service should be. The Secretary of State accepted these findings. In the light of the advice he was subsequently given by the DGWS, he asked the DGFT to obtain undertakings from Lyonnaise that it would make price reductions amounting to 15 per cent over the six years following the merger, and ensure that the merged company was listed on the London Stock Exchange by the year 2005.

This merger would normally have fallen to be considered by the European Commission (under the European Merger Regulation) rather than by the United Kingdom authorities. In response to an application by the Government, however, the Commission recognised the United Kingdom's legitimate interest in examining the merger's implications for the regulatory arrangements in the Water Industry Act 1991, and returned the case to United Kingdom jurisdiction for that purpose. While the European Commission retained jurisdiction on other aspects of the merger, it did not seek to prohibit it.

Stagecoach Holdings plc/Ayrshire Bus Owners (A1) Service Ltd

The MMC found the merger operated against the public interest, principally because it significantly reduced potential competition for bus services in parts of the Strathclyde region of Scotland. With the dissent of one member of the inquiry team - who favoured divestment - it recommended a package of behavioural remedies. The Secretary of State accepted these findings. He asked the DGFT to obtain undertakings from Stagecoach, broadly in line with the MMC's recommendations, on a range of matters designed to foster competition and restrict the company's ability to exploit its position.

Nutricia Holdings Ltd/Valio International UK Ltd

The MMC concluded that the merger operated against the public interest since it would allow Nutricia to increase prices of certain gluten-free and low-protein products (including bread, rolls and

flour). It recommended that, for a period of four years, Nutricia should be required to set prices of such products at levels no higher than those currently in force, plus the annual change in the resale prices index less two percentage points. The Secretary of State accepted these findings, and asked the DGFT to seek an undertaking from Nutricia on the lines of the MMC's recommendation. Nevertheless, he took the view that the price controls should not automatically finish after four years; instead, the undertaking should then be reviewed to see whether it remained necessary.

Undertakings in lieu of a reference

There were two cases in which undertakings were given:

14 August	Scottish & Newcastle plc/the brewing assets of Courage plc
5 October	Granada plc/Pavilion Ltd

Scottish and Newcastle plc/the brewing assets of Courage plc

On 14 August, following an earlier recommendation to refer the merger to the MMC, the Secretary of State accepted undertakings that:

- Scottish and Newcastle would reduce the size of its tied estate to 2 624 licensed outlets within a year of completion of the merger; and

- the agreement for the supply of Courage beer to Inntrepreneur Pub Co's pubs would be ended at 500 Inntrepreneur pubs by 31 December 1995 and at a further 500 by 31 December 1996, and further supply to such pubs would be the subject of open tender procedures.

Granada plc/Pavilion plc

In accordance with the DGFT's recommendation, the Secretary of State accepted undertakings from Granada that it would sell two motorway service areas (one on the M4 and the other on the M61) and sell, close or cease to operate a third (also on the M4) unless the proposed new Severn Crossing were to be opened within 12 months. The undertakings were designed to remedy concerns about the reduction in competition and consumer choice in the provision of various goods and services on certain parts of the motorway network.

Action on earlier reports

Coats Viyella plc/Tootal Group plc

Coats Viyella asked to be released from an undertaking given in 1990 following its acquisition of the Tootal Group. This had required the merged company to divest and not reacquire Coats's "Drima" domestic sewing-thread business. The MMC had recommended the divestment because it believed that the merger would create an effective duopoly in domestic sewing thread. Coats now wanted to reacquire the business from its current owners, Amman und Söhne of Germany. In accordance with the advice he had been given by the DGFT, the Secretary of State refused the request.

Elders IXL Ltd/Grand Metropolitan plc

In November, in response to information provided by Inntrepreneur Estates Ltd (since renamed Inntrepreneur Pub Co Ltd), the DGFT indicated that he had no objections to the company taking over the management of its own affairs from Grand Metropolitan.

Stagecoach Holdings plc/assets of Lancaster City Transport Ltd

At the end of the year, negotiations continued with Stagecoach (North West) Ltd on undertakings following its acquisition of Lancaster City Transport Ltd.

Newspaper transfers and 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. The procedures, first introduced under the Monopolies and Mergers Act 1965 and retained in sections 57-62 of the Fair Trading Act 1973, are administered by the Secretary of State for Trade and Industry.

In some circumstances, newspapers cannot change hands without the Secretary of State's consent. Unless the proposed transfer meets particular conditions, the Secretary of State cannot give that consent until the MMC has reported on the matter.

References to the MMC

The Secretary of State made two references in 1995:

20 July	Trinity International Holdings plc/Thomson Regional Newspapers (report published on 10 November)
21 November	Northcliffe Newspapers Group Ltd/Aberdeen Journals Ltd

Trinity International Holdings plc/Thomson Regional Newspapers

The MMC concluded that there were no concerns on public interest grounds. Accordingly the Secretary of State gave his consent to the proposed merger.

Transfers not referred to the MMC

The Secretary of State announced his consent to the following transactions without requiring the MMC to report:

3 March	EMAP Newspapers Ltd/Scarborough & District Trader and Weekly News
30 June	United Provincial Newspapers Ltd/Spenborough Guardian
25 July	EMAP Newspapers Ltd/Luton and Dunstable Herald & Post, Sunday in Luton, and others
24 October	Independent Newspapers (UK) Ltd/London Recorder Newspapers Ltd
7 December	Johnston Press plc/W & J Linney Ltd

III. New Publications Relevant to Competition Policy

OFT reports

Competition Act report

United Automobile Services Ltd: the operation of local bus services in Darlington (March 1995)

Financial Services Act Reports

Rules of the London Stock Exchange relating to market makers. A report to the Chancellor of the Exchequer by the Director General of Fair Trading under the Financial Services Act 1986 (March 1995)

Fair Trading Act Reports

Underwriting of equity issues. A report by the Director General of Fair Trading (March 1995)

Research Papers

MMC reports

Video games: a report on the supply of video games in the UK (Cm 2781, March 1995)

Stagecoach Holdings plc and Mainline Partnership Ltd: a report on the merger situation between Stagecoach Holdings plc and Mainline Partnership Ltd (Cm 2782, March 1995)

Thomas Cook Group Ltd and Interpayment Services Ltd: a report on the acquistion by the Thomas Cook Group Ltd of the travellers cheque issuing business of Barclays Bank plc (Cm 2789, March 1995)

S B Holdings Ltd and Kelvin Central Buses Ltd: a report on the merger situation (Cm 2829, April 1995)

Stagecoach Holdings plc and S B Holdings Ltd: a report on the merger situation (Cm 2845, April 1995)

British Aerospace Public Limited Company and VSEL plc: a report on the proposed merger (Cm 2851, May 1995)

The General Electricity Company plc and VSEL plc: a report on the proposed merger (Cm 2852, May 1995)

Service Corporation International and Plantsbrook Group Plc: a report on the merger situation (Cm 2880, May 1995)

Scottish Hydro-Electric plc: a report on a reference under section 12 of the Electricity Act 1989 (ISBN 0-11-701932-1, June 1995)

Lyonnaise des Eaux SA and Northumbrian Water Group PLC: a report on the merger situation (Cm 2936, July 1995)

Portsmouth Water plc: a report on the determination of adjustment factors and infrastructure charges for Portsmouth Water plc (ISBN 0-11701946-1, July 1995)

South West Water Services Ltd: a report on the determination of adjustment factors and infrastructure charges for South West Water Services Ltd (ISBN 0-11-701945-3, July 1995)

The supply of bus services in the north-east of England (Cm 2933, August 1995)

Stagecoach Holdings plc/Ayrshire Bus Owners (A1 Service) Ltd: a report on the merger situation (Cm 3032, November 1995)

Trinity International Holdings plc/Thomson Regional Newspapers Ltd: a report on the proposed transfer to Trinity International Holdings plc of certain newspapers of Thomson Regional Newspapers Ltd (Cm 3033, November 1995)

Telephone number portability: a report on a reference under section 13 of the Telecommunications Act 1984 (ISBN 0-11-515451-5, December 1995)

Nutricia Holdings Ltd and Valio International UK Ltd (Cm 3064, December 1995)

Other published work on competition policy

Books

BUIGRES et al. *European policies on competition, trade and industry*. Edward Elgar, 1995

FINBOW R and PARR N. *UK merger control: law and practice*. Sweet and Maxwell, 1995

JONES et al. *EC competition law handbook*. Sweet and Maxwell, new edition 1995

LINDRUP, G (ed). *Butterworths competition law handbook*. Butterworth, new edition 1995

LIVINGSTON, D.. *Competition law and practice FT Law and Tax*, 1995

MAITLAND - WALKER, J. *Competition laws of Europe*. Butterworth, 1995

National Consumer Council. *Competition and consumers: policy and practice in the UK*. National Consumer Council, 1995

PHILIPS, L. *Competition policy: a game theoretic perspective*. Cambridge University Press, 1995

Articles

A selection of some of the interesting articles to appear in 1995:

ARMSTRONG J. *Compliance programmes.* European Competition Law Review 16(3) 1995 p. 147

GRAUPNER F. *Resale price maintenance in the books and pharmaceuticals industries* (1995) 16 Business law rev 27-29

ROBERTSON A and WILLIAMS M. *An Ice cream war: the law and economics of freezer exclusivity* I 16(1) 1995 p.7

RODGER, B. *Oligopolistic market failure: collective dominance versus complex monopoly* 16(1) 1995 p. 21

Annex

Statistics on merger activity

1. 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 the 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;

-- asset values have generally been rounded to the nearest £m, and percentages to one decimal place - consequently there may be a slight discrepancy between the sum of the individual entries and the totals shown;

-- because some time may elapse between the opening of a case and a decision by the Secretary of State on whether to make a reference to the MMC, the mergers that are referred in any particular year may not necessarily correlate to the cases first recorded in that year.

2. 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**.

Merger activity considered in 1995

3. In 1995 the OFT considered 473 mergers and merger proposals under the terms of the Fair Trading Act (see **Table 2**) - a 24 per cent increase on the total for 1994, when 381 cases were considered. There was a 19 per cent rise in the number of cases that qualified for reference to the MMC - from 231 in 1994 to 275 in 1995 (**Table 1**). The Director General recommended reference in 11 cases, and the Secretary of State followed his advice in nine of them. In 1994 there had been eight such recommendations, and the Secretary of State followed the Director General's advice in each case.

4. Of the 275 "qualifying cases" in 1995, 27 qualified for referral on both assets and share of supply criteria (**Table 3**); of these 27, two were referred (**Table 4**).

5. The value of assets bid for in all qualifying cases increased by eight per cent (**Table 5**). (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 - GDP - deflator). Despite the rise in the

number of qualifying mergers (**Table 2**) the average assets bid for fell from £702 million in 1994 to £648 million in 1995 (**Table 6**).

6. There were 107 confidential guidance cases in 1995, 41 per cent more than the 76 cases the year before. In addition there were 12 pre-notified cases, compared with seven in 1994.

7. The ratio of the number of qualifying industrial and commercial company mergers to those identified in the *Business Bulletin* rose considerably, from 31.7 per cent in 1991 to 52.9 per cent in 1995.

Analyses by size of target companies' gross assets

8. Comparing the figures for mergers within the United Kingdom examined in 1995 with those for 1991, there has been a dramatic increase in the proportion of target companies in the smallest asset-size band and a minimal increase in the second to largest band. The proportions of companies in all other bands has fallen (**Table 7**). Between 1994 and 1995, the proportion of total assets bid for accounted for by companies in the largest asset size class fell by more than five per cent (**Table 8**)

Analyses by target companies' activities

9. The industrial sector that has experienced the largest overall increase in its annual share in the five-year period since 1991 is "Transport and communications" (although there was a fall between 1994 and 1995). Over the same five-year period, "Chemicals" and "Insurance" saw the largest falls in their shares, of some seven per cent and six per cent respectively (**Table 10**).

10. In terms of assets, the "Banking and finance" sector accounted for more than 58 per cent of total assets in 1995, and the "Electricity, gas and water", and "Food, drink and tobacco" sectors each for over seven per cent (**Table 11**). The fluctuating year-on-year figures in these sectors clearly demonstrate how sensitive sectoral shares are to particular large acquisitions.

11. The number of foreign companies involved in mergers as targets and bidders rose in 1995. They also accounted for a higher proportion of total mergers than in 1994, but did not reach the 1991 high (**Table 12**).

Analyses by types of merger

12. The percentage shares of horizontal, vertical and diversifying mergers is shown in **Table 13** - while a numerical breakdown is given in **Table 15**. ("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".)

13. Comparing the analyses for 1995 with that for 1991, the figures show that, over the five-year period, horizontal mergers have remained the dominant type. Over the same period, the proportion of mergers classified as vertical has fallen.

Analyses by numbers and values of cases by size of assets

14. In 1995, the single most important category of bidding company was that with gross assets of at least £1 billion; it accounted for nearly 34 per cent of the total number of bids (**Table 16**). Bidding companies with gross assets in excess of £1 billion accounted for 87 per cent of total assets - compared with 51 per cent in 1994 (**Table 17**).

Table 1: Merger activitiy: 1991-95

Year	*Proposals qualifying under the Fair Trading Act 1973*			*Business Bulletin*	Fair Trading Act cases as percentage of industrial and commercial cases
	All cases		*Industrial and commercial*	*Industrial and commercial*	
	Numbers	*Assets bid for: £m*	*Numbers*	*Numbers*	
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
1995	275	178 096	255	482	52.9

Source: Office of Fair Trading

Table 2: Supplementary data on numbers of mergers examined and references to the MMC: 1991-95

Year	*Total numbers of cases examined*	*Found not to qualify and proposal abandoned*	*Qualifying cases*		*Confidential guidance cases*	*Pre-notified cases*	*Qualifying cases less confidential guidance cases*	*References to the MMC*				*Total references as % of*	
			Nos	*% change*				*Recommended by the Director General*	*Recom-mended but not made*	*Made but not recom-mended*	*Total references*	*Qualifying cases*	*Qualifying cases less confidential guidance cases*
1991	285	102	183	-29.9	15	38	168	8	1	0	7[1]	3.8	4.2
1992	200	75	125	-31.7	21	9[2]	104	10	0	0	10[3]	8.0	9.6
1993	309	112	197	+57.6	46	13	151	5	2	0	3	1.5	2.0
1994	381	150	231	+17.3	76	7	155	8	0	0	8	3.5	5.2
1995	473	198	275	+19.0	107	12	203	11	2	0	9	3.3	4.4

Source: Office of fair Trading

1. This figure excludes three divestments in lieu of reference: International Marine Holdings Inc/Benjamin Priest Group plc; Trafalgar House plc/The Davy Corporation; Williams Holdings plc/Racal Electronics plc.
2. One other merger notice was withdrawn.
3. This figure excludes three divestments in lieu of reference: Redland plc/Steetley plc; Bowater plc/Assets of Pembridge Investments plc (DRG Packaging); Schlumberger Ltd/Assets of the Raytheon Company (Seismographic Service Group). It includes The Gillette Company/Parker Pen Holdings Ltd reference 1.

Table 3: Analysis by main activity and qualification criteria: 1995

Industry	*Number of cases*		
	Market share of at least 25%	*Assets in excess of £70 million*	*Meeting both criteria*
Agriculture, forestry and fishing	1	0	0
Coal, oil and natural gas	0	2	0
Electricity, gas and water	2	10	2
Metal processing and manufacturing	4	0	1
Mineral processing and manufacturing	8	4	2
Chemicals and man-made fibres	2	5	3
Metal goods (not elsewhere specified)	1	1	0
Mechanical engineering	5	3	1
Electrical engineering	8	2	1
Vehicles	1	2	0
Instrument engineering	2	0	0
Food, drink and tobacco	12	9	6
Textiles	1	1	0
Leather goods and clothing	1	0	0
Timber and wooden furniture	1	0	0
Paper, printing and publishing	12	2	0
Other manufacturing industries	12	3	1
Construction	3	0	1
Distribution	11	10	3
Hotels, catering and repairs	5	5	2
Transport and communications	49	3	0
Banking and finance	0	9	2
Insurance	0	3	0
Ancillary financial services	0	6	0
Other business services	0	6	0
Other services	2	7	1
Totals	153	95	27

Source: Office of Fair Trading

Table 4: References to the MMC under the Fair Trading Act 1973: 1995

Findings of the MMC	*Qualifications criteria under the Fair Trading Act 1973*			
	Market share of at least 25%	*Assets in excess of £70 million*[1]	*Meeting both criteria*	*Totals*
Not against the public interest	2	0	0	2
Against the public interest	3	1	0	4
Proposal abandoned	0	0	0	0
	1	0	2	3
Totals	6	1	2	9
as percentage of all qualifying mergers in this category	2.2	0.4	0.7	3.3

Source: Office of Fair Trading

1. Threshold raised from £30 million in February 1994.

Table 5: Value of assets bid for in merger proposals qualifying under the Fair Trading Act 1973 at current and at constant prices : 1991-95

Year	*All cases: assets bid for*			
	at current prices		*at 1990 prices*	
	£m	*% change*	*£m*	*% change*
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
1995	178 096	+9.8	150 081	+7.9

Source: Office of Fair Trading

1. Deflated by GDP at factor cost; estimate based on first three quarterly statistics only (not full year).

Table 6: Analysis by size of gross assets of target companies: 1995

Size of assets : £m	*Numbers*	*Total assets: £m*	Average assets: £m
0-24.9	118	758	7
25-49.9	23	845	37
50-99.9	33	2 574	78
100-249.9	46	7 366	160
250-499.9	21	7 330	349
500-999.9	18	12 856	714
1 000 and over	16	146 368	9 148
Totals	275	178 096	648

Source: Office of Fair trading

Table 7: Analysis by size of gross assets of target companies numbers and percentages of totals: 1991-95

Numbers in:	*Gross assets of target companies: £m*							
	0-24.9	*25-49.9*	*50-99.9*	*100-249.9*	*250-499.9*	*500-999.9*	*1 000 and over*	*Totals*
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
1995	118	23	33	46	21	18	16	275
Percentages of totals in:								
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
1995	42.9	8.4	12.0	16.7	7.6	6.5	5.8	100.00

Source: Office of Fair Trading

Table 8: Analysis by size of gross assets of target companies - value of assets and percentages of totals: 1991-95

Total assets in:	*Gross assets of target companies : £m*								*(Average assets: £m)*
	0-24.9	*25-49.9*	*50-99.9*	*100-249.9*	*250-499.9*	*500-999.9*	*1 000 and over*	*Totals*	
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)
1995	758	845	2 574	7 366	7 330	12 856	146 368	178 096	(648)
Percentages of totals in:									
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	
1995	0.4	0.5	1.4	4.1	4.1	7.2	82.2	100.0	

Source: Office of Fair Trading

Table 9: Analysis by main activity, number, assets size and nationality of target companies: 1995

Industry	*Numbers*	Assets £m	*Average assets £m*	*Foreign companies*	
				Target numbers	*Bidding numbers*
Agriculture, forestry and fishing	1	13	13	0	0
Coal, oil and natural gas	2	254	127	0	0
Electricity, gas and water	12	12 629	1 052	0	5
Metal processing and manufacturing	5	117	23	0	2
Mineral processing and manufacturing	12	830	69	1	4
Chemicals and man-made fibres	7	1 221	174	2	7
Metal goods (not elsewhere specified)	2	2 056	1 028	0	0
Mechanical engineering	6	419	70	1	2
Electrical engineering	10	1 091	109	4	4
Vehicles	3	568	189	1	0
Instrument engineering	3	259	86	0	2
Food, drink and tobacco	29	13 475	465	9	10
Textiles	2	882	441	2	0
Leather goods and clothing	1	21	21	0	0
Timber and wooden furniture	2	150	75	1	0
Paper, printing and publishing	16	895	56	4	4
Other manufacturing industries	22	9 994	454	11	8
Construction	5	823	165	1	3
Distribution	24	4 921	205	1	4
Hotels, catering and repairs	11	1 872	170	2	3
Transport and communications	50	1 170	23	0	2
Banking and finance	14	103 773	7 412	3	0
Insurance	4	8 202	2 051	0	2
Ancillary financial services	5	5 346	1 069	2	1
Other business services	17	2 720	160	4	2
Other services	10	4 395	440	2	5
Totals	275	178 096	648	51	70

Source: Office of Fair Trading

Table 10: Analysis by activity of target companies - numbers of cases and percentages of totals: 1991-95

Industry	*Number of cases*					*Percentages of all cases*				
	1991	*1992*	*1993*	*1994*	*1995*	*1991*	*1992*	*1993*	*1994*	*1995*
Agriculture, forestry and fishing	0	0	1	1	1	0.0	0.0	0.5	0.4	0.4
Coal, oil and natural gas	9	4	4	5	2	5.0	3.2	2.0	2.2	0.7
Electricity, gas and water	2	3	3	0	12	1.1	2.4	1.5	0.0	4.4
Metal processing and manufacturing	5	4	4	2	5	2.7	3.2	2.0	0.9	1.8
Mineral processing and manufacturing	9	2	7	3	12	5.0	1.6	3.6	1.3	4.4
Chemicals and man-made fibres	18	15	20	19	7	9.8	12.0	10.2	8.2	2.6
Metal goods (not elsewhere specified)	2	1	4	2	2	1.1	0.8	2.0	0.9	0.7
Mechanical engineering	7	10	13	5	6	3.8	8.0	6.6	2.2	2.2
Electrical engineering	13	7	11	5	10	7.1	5.6	5.6	2.2	3.6
Vehicles	3	0	4	9	3	1.6	0.0	2.0	3.9	1.1
Instrument engineering	1	2	1	2	3	0.5	1.6	0.5	0.9	1.1
Food, drink and tobacco	15	20	15	23	29	8.2	16.0	7.6	10.0	10.6
Textiles	3	0	1	2	2	1.6	0.0	0.5	0.9	0.7
Leather goods and clothing	2	1	1	0	1	1.1	0.8	0.5	0.0	0.4
Timber and wooden furniture	1	0	0	1	2	0.5	0.0	0.0	0.4	0.7
Paper, printing and publishing	5	6	5	6	16	2.7	4.8	2.5	2.6	5.8
Other manufacturing industries	7	5	4	2	22	3.8	4.0	2.0	0.9	8.0
Construction	3	4	4	8	5	1.6	3.2	2.0	3.5	1.8

Industry	*Number of cases*					*Percentages of all cases*				
	1991	*1992*	*1993*	*1994*	*1995*	*1991*	*1992*	*1993*	*1994*	*1995*
Distribution	18	8	17	24	24	9.8	6.4	8.6	10.4	8.7
Hotels, catering and repairs	2	2	11	5	11	1.1	1.6	5.6	2.2	4.0
Transport and communications	13	11	30	63	50	7.1	8.8	15.2	27.3	18.2
Banking and finance	12	11	9	10	14	6.6	8.8	4.6	4.3	5.1
Insurance	13	1	3	1	4	7.1	0.8	1.5	0.4	1.5
Ancillary financial services	2	1	4	5	5	1.1	0.8	2.0	2.2	1.8
Other business services	12	4	12	16	17	6.6	3.2	6.1	6.9	6.2
Other services	6	3	9	12	10	3.3	2.4	4.6	5.2	3.6
Totals	183	125	197	231		100.0	100.0	100.0	100.0	100.0

Source: Office of Fair Trading

Table 11: Analysis by activity of target companies - values of assets and percentages of totals: 1990-94

Industry	*Values of assets: £m*					*Percentages of total asset values*				
	1991	*1992*	*1993*	*1994*	*1995*	*1991*	*1992*	*1993*	*1994*	*1995*
Agriculture, forestry and fishing	0	0	2	73	13	0.0	0.0	(.)	(.)	(.)
Coal, oil and natural gas	8 807	352	107	55 540	254	4.4	0.4	0.2	34.2	0.1
Electricity, gas and water	189	1 898	270	0	12 629	0.2	2.3	0.5	0.0	7.0
Metal processing and manufacturing	2 752	160	382	47	117	3.2	0.2	0.8	(.)	0.1
Mineral processing and manufacturing	441	15	1 509	543	830	0.5	(.)	3.0	0.3	0.5
Chemicals and man-made fibres	4 483	787	1 996	13 762	1 221	5.1	0.9	4.0	8.5	0.7
Metal goods (not elsewhere specified)	198	668	358	17	2 056	0.2	0.8	0.7	(.)	1.1
Mechanical engineering	384	469	625	647	419	0.4	0.6	1.2	0.4	0.2
Electrical engineering	10 778	586	2 313	190	1 091	12.3	0.7	4.6	0.1	0.6
Vehicles	341	0	583	2 806	568	0.4	0.0	1.2	1.7	0.3
Instrument engineering	109	63	2	20	259	0.1	0.1	(.)	(.)	0.1
Food, drink and tobacco	1 189	6 007	758	6 110	13 475	1.3	7.2	1.5	3.8	7.6
Textiles	502	0	6	32	882	0.6	0.0	(.)	(.)	0.5
Leather goods and clothing	283	236	326	0	21	0.3	0.3	0.7	0.0	(.)
Timber and wooden furniture	51	0	0	147	150	0.1	0.0	0.0	(.)	0.1
Paper, printing and publishing	2 703	320	705	12 036	895	3.1	0.4	1.4	7.4	0.5
Other manufacturing industries	630	626	495	77	9 994	3.1	0.8	1.0	(.)	5.6
Construction	3 753	1 283	1 298	1 069	823	4.3	1.5	2.6	0.7	0.5
Distribution	4 498	2 056	2 052	1 856	4 921	5.2	2.5	4.1	1.1	2.8

Industry	*Values of assets: £m*					*Percentages of total asset values*				
	1991	*1992*	*1993*	*1994*	*1995*	*1991*	*1992*	*1993*	*1994*	*1995*
Hotels, catering and repairs	115	581	2 914	448	1 872	0.1	0.7	5.8	0.3	1.0
Transport and communications	2 235	508	11 960	3 158	1 170	2.6	0.6	23.9	1.9	0.7
Banking and finance	39 223	64 272	3 751	51 387	103 773	44.9	77.3	7.5	31.7	58.3
Insurance	4 197	30	1 088	5 527	8 202	4.8	(.)	2.2	3.4	4.6
Ancillary financial services	221	2	1 279	811	5 346	0.3	(.)	2.6	0.5	3.0
Other business services	2 343	318	10 220	4 354	2 720	2.7	0.4	20.4	2.7	1.5
Other services	1 908	1 935	5 086	1 545	4 395	2.2	2.3	10.2	0.9	2.5
Totals	87 333	83 172	50 085	162 202	178 096	100.0	100.0	100.0	100.0	100.0

Source: Office of Fair Trading

(.) Less than 0.05

Table 12: Foreign companies involved in merger situations: 1991-95

Year	*Target companies*		*Bidding companies*	
	Total numbers	*Total as % of all mergers*	*Total numbers*	*Total as % of all mergers*
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
1995	51	18.5	70	25.5

Source: Office of Fair Trading

Table 13: Percentages of proposed mergers by number and value of assets of target companies classified by type of integration: 1991-95

Year	*Horizontal*		*Vertical*		*Diversifying*	
	by number	by value	by number	by value	by number	by value
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
1995	91	96	1	0	8	4

Source: Office of Fair Trading

Table 14: Analysis by main activity, numbers of cases, total value of assets of target companies and type of merger: 1995

Industry	*Horizontal*		*Vertical*		*Diversifying*	
	numbers of cases	*value of assets £m*	*numbers of cases*	*value of assets £m*	*numbers of cases*	*value of assets £m*
Agriculture, forestry and fishing	1	13	0	0	0	0
Coal, oil and natural gas	2	254	0	0	0	0
Electricity, gas and water	11	11 761	0	0	1	869
Metal processing and manufacturing	5	117	0	0	0	0
Mineral processing and manufacturing	12	830	0	0	0	0
Chemicals and man-made fibres	6	1 113	0	0	1	108
Metal goods (not elsewhere specified)	1	6	0	0	1	2 050
Mechanical engineering	5	317	0	0	1	103
Electrical engineering	9	1 003	1	88	0	0
Vehicles	3	568	0	0	0	0
Instrument engineering	3	259	0	0	0	0
Food, drink and tobacco	29	13 475	0	0	0	0
Textiles	2	882	0	0	0	0
Leather goods and clothing	1	21	0	0	0	0
Timber and wooden furniture	1	2	0	0	1	148
Paper, printing and publishing	13	359	1	273	2	264
Other manufacturing industries	20	9 785	0	0	2	209
Construction	5	823	0	0	0	0
Distribution	21	4 347	0	0	3	574
Hotels, catering and repairs	9	1 761	1	30	1	81
Transport and communications	49	1 090	0	0	1	209
Banking and finance	13	103 564	0	0	1	209
Insurance	3	8 087	0	0	1	115
Ancillary financial services	4	4 766	0	0	1	580
Other business services	16	2 515	0	0	1	205
Other services	7	2 890	0	0	3	1 505
Totals	251	170 607	3	391	21	7 100

Source: Office of Fair Trading

Table 15: Analysis by size of assets of target companies, and type of merger: 1995

Size of assets: £m	*Horizontal*		*Vertical*		*Diversifying*	
	numbers of cases	*value of assets £m*	*numbers of cases*	*value of assets £m*	*numbers of cases*	*value of assets £m*
0-24.9	118	758	0	0	0	0
25-49.9	22	815	1	30	0	0
50-99.9	28	2 165	1	88	4	321
100-249.9	34	5 578	0	0	12	1 788
250-499.9	19	6 799	1	273	1	258
500-999.9	16	11 408	0	0	2	1 449
1 000 and over	14	143 084	0	0	2	3 284
Totals	251	170 067	3	391	21	7 100

Source: Office of Fair Trading

Table 16: Analysis by size of assets of target companies by assets of bidding companies Number of cases: 1995[1]

Assets of bidding companies: £m	*Assets of target companies: £m*							
	0-24.9	*25-49.9*	*50-99.9*	*100-249.9*	*250-499.9*	*500-999.9*	*1,000 and over*	*Totals*
0-24.9	18	0	2	4	3	1	2	30
25-49.9	25	1	0	0	0	0	0	26
50-99.9	20	1	5	2	2	0	0	26
100-249.9	29	5	6	4	2	0	0	30
250-499.9	10	7	2	7	2	1	0	29
500-999.9	5	4	2	8	0	2	0	21
1 000 and over	11	5	16	21	12	14	14	93
Totals	118	23	33	46	21	18	16	275

Source: Office of Fair Trading

1. This table excludes management buyouts where the assets of the bidding company are recorded as zero. Also excluded are the insurance sector (SIC 8200-8299) and other takeovers where the assets of the bidding company are unknown

Table 17: Analysis by size of assets of target companies by assets of bidding companies
Total values of assets: 1995[1]

Assets of bidding companies: £m	*Assets of target companies: £m*							
	0-24.9	*25-49.9*	*50-99.9*	*100-249.9*	*250-499.9*	*500-999.9*	*1 000 and over*	*Totals*
0-24.9	47	0	179	670	1 001	631	10 431	12 959
25-49.9	138	41	0	0	0	0	0	179
50-99.9	130	29	420	363	660	0	0	1 602
100-249.9	244	168	414	578	699	0	0	2 103
250-499.9	61	231	174	1 127	677	808	0	3 078
500-999.9	52	151	172	1 297	0	1 504	0	3 176
1 000 and over	86	226	1 215	3 331	4 293	9 914	135 937	155 002
Totals	758	845	2 574	7 366	7 330	12 856	146 368	178 097

Source: Office of Fair Trading

1. This table excludes management buyouts where the assets of the bidding company are recorded as zero. Also excluded are the insurance sector (SIC 8200-8299) and other takeovers where the assets of the bidding company are unknown.

UNITED STATES*

(1 October 1994 - 30 September 1995)

Introduction

This report describes federal antitrust developments in the United States for Fiscal Year 1995 ("FY95" -- 1 October 1994 through 30 September 1995). It summarises the activities of the Antitrust Division ("Division") of the U.S. Department of Justice ("Department" or "DOJ") and of the Bureau of Competition of the Federal Trade Commission ("FTC" or "Commission").

Robert Pitofsky was sworn in as Chairman of the FTC in April 1995. He appointed William Baer as Director of the Bureau of Competition, Joan Bernstein as Director of the Bureau of Consumer Protection, Jonathan Baker as Director of the Bureau of Economics, and Stephen Calkins as General Counsel.

Joel I. Klein became Principal Deputy Assistant Attorney General with responsibility for international and policy matters in August 1995. Other Deputies appointed in 1995 were Lawrence R. Fullerton (August; merger enforcement), David S. Turetsky (August; civil and regulatory matters), Gary R. Spratling (February; criminal enforcement), and Carl B. Shapiro (August; economic analysis).

I. Changes in law or policies

Changes in Antitrust Rules, Policies or Guidelines

The International Antitrust Enforcement Assistance Act (IAEAA). As reported in last year's annual report, President Clinton signed the IAEAA into law 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 sharing with foreign antitrust authorities of most otherwise confidential information, subject to strict assurances against its improper use or disclosure. The law does

* The original language of this report is English

not, however, permit the sharing of Hart-Scott-Rodino premerger notification information or certain other categories of information related to national security.

On 23 March 1995, the Commission and Department announced eight major steps to streamline the Hart-Scott-Rodino ("HSR") premerger review process in order to reduce the cost of compliance and make the process quicker and more efficient. The eight step program involves: a determination of which agency will review proposed mergers within nine business days from the date of filing; issuance of a joint, annotated model "second request"; establishment of a procedure for pre-clearance co-ordination by the agencies; adoption of a formal internal appeals process for second requests; open invitations for parties to identify issues and provide analysis to assist the reviewing agency in early termination of the investigations; pursuit of a joint project with the American Bar Association's Section of Antitrust Law to study second request practice issues; expansion of co-operative efforts to harmonise merger review and promote consistency; and development of proposals to exempt certain categories of transactions from premerger notification (see below).

The DOJ and FTC issued their *Antitrust Enforcement Guidelines for International Operations* on 5 April 1995, replacing those issued by the DOJ in 1988. The new Guidelines articulate the agencies' resolve to protect both American consumers and American exporters from anticompetitive 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 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.

The DOJ and FTC issued *Antitrust Guidelines for the Licensing of Intellectual Property* on 6 April 1995. The Guidelines explain the generally complementary relationship between the antitrust laws and the laws that protect intellectual property, and the circumstances in which an attempt to exploit intellectual property rights can raise antitrust concerns. The Guidelines replace those provisions and examples in the 1988 International Guidelines that related to intellectual property licensing. 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 Guidelines announce a "safety zone" within which the agencies generally will not challenge most licensing arrangements if the parties collectively account for no more than 20 per cent of each relevant market.

On May 30, l995, Commission Chairman Pitofsky announced the creation of an internal task force to review agency rules and policies governing litigation in administrative cases. The objective of the task force is to evaluate current rules in Part 3 of the FTC Rules of Practice and related rules with a view to recommending possible changes to minimise delay, increase clarity and streamline procedures. Public comments were requested until 30 July l995.

The Commission announced two new Commission policies on 22 June l995, aimed at reducing the burden on companies involved in FTC merger cases. Noting that the HSR premerger notification law works so well as a tool for protecting consumers and the public from anticompetitive mergers, the FTC decided to no longer routinely require parties to a merger it has challenged to obtain prior approval for future transactions in the same market. The FTC, however, may impose a narrow prior-approval or

prior-notice provision where there is a credible risk that the parties will engage in another anticompetitive transaction. At the same time, the FTC issued a policy statement announcing that it will determine on a case-by-case basis whether to pursue administrative litigation after a federal district court judge has refused to bar parties to a proposed merger from merging pending the outcome of such litigation. The FTC also clarified the issues it will consider in making that determination.

On 21 June 1995, the FTC announced a new policy that will expand co-operative efforts between the Commission and the state Attorneys General in all merger investigations. Under the new policy, states may receive two types of information previously unavailable in HSR investigations: *i)* information obtained from third parties, except for the identity of third parties and other identifying information which will continue to be protected unless the third party consents to disclosure; and *ii)* staff analytic memoranda, once the Commission has determined whether or not to challenge the merger. Requests for information from states will be decided on a case-by-case basis, taking into account whether they are consistent with the Commission's law enforcement mission.

On 19 July 1995, the FTC announced that it would hold public hearings at Commission headquarters beginning in October l995 to examine the need for changes in enforcement of antitrust and consumer protection laws stemming from the increasingly global and innovation-based nature of competition. The agency, among other things, will seek input on whether the changing nature of competition requires modifications in: the analysis of market power; efficiency claims or the failing firm defence; the application of competition policy to markets in which companies compete based on innovation rather than price; and FTC procedures to enhance its ability to protect consumers and promote competition. The hearings will bring together U.S. business leaders who have first-hand experience with such issues as well as consumer representatives, and recognised leaders from state law enforcement agencies and the academic, legal and economics communities. The Commission's objective is to learn what is working well in its enforcement policy and what may need some adjustments. Following the conclusions of the hearings, a report on the findings and possible policy recommendations will be released.

The FTC proposed on 21 July 1995, new rules, drafted in co-operation with the Department, to exempt from HSR reporting requirements certain classes of transactions that, based on enforcement experience, are not likely to raise antitrust concerns. The exemptions are intended to reduce an unnecessary regulatory burden on business and to allow both the FTC and DOJ to focus resources on transactions more likely to pose competitive harm. The proposals were subject to public comment until 25 September 1995. On 25 March 1996, the Commission adopted new rules amending the HSR reporting requirements that would exempt the following classes of transactions: *i)* certain purchases of goods or realty in the ordinary course of business, including certain purchases of used durable goods where the purchase is designed to replace or expand production capacity; *ii)* certain real estate acquisitions, such as acquisitions of shopping centres and hotels and motels, not likely to violate the antitrust laws; *iii)* acquisitions of oil and natural gas reserves and certain associated production and exploration assets valued at $500 million or less; *iv)* acquisitions of coal reserves and certain associated productions and exploration assets valued at $200 million or less; *v)* acquisitions of voting securities of companies that hold real property or carbon-based mineral reserves the direct acquisition of which would be exempt, and other assets valued at $15 million or less; and *vi)* acquisitions of realty acquired solely for rental or investment purposes.

A new antitrust co-operation agreement, which became effective on 3 August l995, reflects the significant growth in recent years in the co-ordination of antitrust enforcement investigations between the United States and Canada and extends co-operation to cover deceptive marketing practices laws. The agreement replaces a non-binding memorandum of understanding executed in l984. The parties, among

other things, agree to exchange antitrust-related information consistent with confidentiality restraints, to co-ordinate related enforcement activities, to assist each other in locating evidence and witnesses, and to maintain the confidentiality of sensitive information provided by the other party. The agreement also contains a "positive comity" provision modelled on the l991 U.S.-EC antitrust co-operation agreement. The agreement is not a comprehensive antitrust mutual assistance agreement of the kind permitted by the International Antitrust Enforcement Assistance Act of 1994.

On 9 August l995, the Commission announced that, effective immediately, the core injunctive provisions of future administrative orders in FTC antitrust cases ordinarily will terminate after 20 years, absent the filing of a complaint or consent decree alleging an order violation. Supplemental provisions in future administrative competition orders will terminate after ten years.

In FY 95, the Division continued its efforts to co-ordinate with State Attorneys General in the enforcement of state and federal antitrust laws. These efforts led to more than a dozen joint investigations. Increased state-federal co-operation avoids unnecessary duplication of enforcement efforts and harmonises the application of state and federal antitrust laws, thus creating greater certainty for businesses and their counsel and lowering compliance costs.

The Charitable Gift Annuity Antitrust Relief Act of 1995, Public Law 104-63, was signed into law by President Clinton on 5 December 1995. The Act provides antitrust protection to qualified charities that issue charitable gift annuities by creating a specific statutory exemption for charities that "use, or...agree to use" uniform rates for the purpose of issuing charitable gift annuities. While antitrust exemptions generally are disfavoured by U.S. lawmakers, the protection afforded in this narrowly tailored measure reflects a strong policy concern that the funds of charities not be placed at risk in treble damage litigation.

Telecommunications Act of 1996

The "Telecommunications Act of 1996," Public Law 104-104, was signed into law by President Clinton on 8 February 1996. It is designed to open up the entire telecommunications industry to the influence of competitive market forces. By bringing down long-established barriers to competition in the local telephone and cable markets, and requiring incumbent telecommunications monopolies to open their network facilities to competing firms, the new law should enable consumers to benefit from lower prices, improved service, increased choices, and improved technology.

One of the key competition issues addressed in the new law is how to determine whether and when the Bell operating companies, which have held a monopoly in local telephone service in their respective regions for most of this century, can safely be permitted to offer long distance service in their regions. Providers of long distance service still largely depend on the local telephone exchange as an "essential facility" to reach their customers and connect them to one another. The old Bell System abused this essential facility to impede competition in long distance service. This was a central concern underlying the DOJ’s antitrust enforcement action that led to the 1984 break-up of the Bell System under the Modification of Final Judgment (MFJ), which has now been superseded by the new law.

The new law addresses this concern by requiring that, before a Bell company may provide long distance service in a State within the region where it has historically possessed a monopoly in local telephone service, it must satisfy specified interconnection and related requirements. These requirements, known collectively as the "competitive checklist," combined with the requirement that there be a

facilities-based local telephone service competitor in the area, will give important impetus to the arrival of local competition.

These requirements are augmented by a requirement that the Federal Communications Commission ("FCC") find the proposed Bell company entry into long distance to be in the public interest, and a requirement that the FCC consult with the Attorney General regarding the proposed entry and accord "substantial weight" to the Attorney General's evaluation. Under the public interest test, the FCC has authority to consider a broad range of competitive issues.

The legislation also includes an antitrust savings clause, so that the antitrust laws will continue to apply fully. The antitrust savings clause, combined with the "substantial weight" requirement, will ensure that the antitrust laws, and the DOJ, can continue to perform their historical role in nurturing and safeguarding competition.

The new law provides an important additional safeguard against possible abuse of local telephone market power. It requires that, for a minimum of three years after a Bell company is permitted to provide long distance service, it must do so only through a separate affiliate, with separate accounting, and with all transactions kept at arm's length. The FCC may extend the three-year period for as long as it determines the public interest may require. In providing services to each other, the Bell companies and their affiliates are prohibited from discriminating against competing telecommunications service providers. Similar separate affiliate and non-discrimination requirements apply to telecommunications equipment manufactured by a Bell company, and to information services provided by a Bell company, two other lines of telecommunications business in which Bell company abuse of monopoly power has historically been a concern.

II. Enforcement of Antitrust Laws and Policies: Action against anticompetitive practices

Department of Justice and FTC Statistic

DOJ Staffing and Enforcement Statistics

During FY95 the Division continued its increase in personnel, adding five attorneys and 39 paralegals. At the end of FY95, the Division had 768 employees, comprised of 330 attorneys; 51 economists; 170 paralegals and 217 support staff.

In FY95, the Antitrust Division opened 249 investigations and filed 84 antitrust cases, both civil and criminal, in federal court. The Division was a party to eleven U.S. antitrust cases decided by the federal Courts of Appeals and filed *amicus curiae* briefs in four Court of Appeals cases and one Supreme Court case.

In FY95, the Division filed 60 criminal cases against 40 corporations and 32 individuals. Thirty-three corporate defendants and 25 individuals were assessed fines totalling $41.7 million and 16 defendants were sentenced to a total of 3 902 days of incarceration. Another 16 individual defendants were sentenced to spend a total of 2 933 days in some form of alternative confinement. The Division obtained the highest criminal antitrust fines ever in its still ongoing investigation of the commercial explosives industry, which has generated over $27 million in criminal fines. The $15 million fine paid by Dyno Nobel (see below) was the biggest fine ever imposed in a criminal antitrust matter. The larger fines obtained recently in criminal cases reflect in part the Division's focus on more significant cases. In 1992, the average corporate fine imposed was slightly under $500 000. The average fine imposed on

corporations in FY95 exceeded $1.2 million. The Division is concentrating its resources on international and nation-wide conspiracies -- nearly 25 per cent of its grand juries are focused on international price-fixing cartels and another 25 per cent are focused on national price-fixing conspiracies.

In FY95, the Division reviewed 2 816 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 134 mergers and challenged 18.

The Division opened 227 civil investigations in FY95, both merger and non-merger, and issued 2 029 civil investigative demands (a form of compulsory process). During the year, the Division filed 24 civil complaints and 18 proposed consent decrees or final judgements.

FTC Staffing and Enforcement Statistics

At the end of FY95, the FTC's Bureau of Competition had 219 employees: 151 attorneys, 38 other professionals, and 30 clerical staff. The FTC also employs about 40 economists who participate in its antitrust enforcement activities.

During FY95, 2 816 proposed mergers and acquisitions were submitted for review under the notification and filing requirements of the Hart-Scott-Rodino Act. Fifty-eight second requests were issued. The Commission authorised the staff to seek preliminary injunctions in federal district court to block five proposed mergers, accepted 30 consent agreements for public comment to settle anticompetitive concerns raised by proposed transactions, and issued two administrative complaints. This is the largest number of mergers challenged since at least 1980. In addition, acting on two cases begun in previous years, the Commission dismissed one administrative complaint and upheld another. Another eight mergers or acquisitions were abandoned before the Commission could act and after FTC staff raised concerns that the transactions might reduce competition. A wide variety of industries were involved, including medical devices, drugs and vaccines, national defence, computer software, consumer money wire transfers, retail pharmacies and supermarkets.

In the non-merger area, 12 enforcement cases were brought during fiscal year l995. Eleven of these cases were settled by consent agreements; ten concerned cases of alleged horizontal restraints, including boycotts, market allocation or price fixing, and one concerned an alleged vertical restraint. One administrative complaint was filed that concerned an alleged horizontal restraint. An initial decision was issued by an Administrative Law Judge upholding a l993 Commission complaint. The anticompetitive conduct was engaged in by, among others, baby furniture manufacturers, medical professionals, athletic shoe makers, video rental stores, automobile dealers and cable TV providers.

The Commission obtained $225 000 in civil penalties against a U.S. company for violations of an outstanding order and $425 000 in civil penalties against a U.S. company for its failure to observe the premerger notification requirements and waiting periods under the HSR Act before consummating a notifiable acquisition.

Staff of the Bureau of Competition also responded to eight requests from industry for advice on whether specific health care arrangements might violate antitrust laws. These letters can help businesses avoid enforcement actions.

Antitrust Cases in the Court

United States Supreme Court

DOJ or FTC Cases

There were no DOJ or FTC cases decided in the Supreme Court in FY95.

Private Cases

There were no private antitrust cases decided in the Supreme Court in FY95.

Court of Appeals Case

Significant DOJ Cases Decided in 1995

United States v. Western Electric Co., 46 F.3d 1198 (D.C. Cir. 1995) ("*AT&T-McCaw Appeal*") involved a petition for modification of the 1982 AT&T antitrust consent decree (Modification of Final Judgment or "MFJ"), which broke up the old Bell System and imposed line-of-business restrictions on the divested Bell Operating Companies ("BOCs"). The decree also prohibited AT&T from "acquir[ing] the stock or assets of any BOC." Because cellular systems in which BOCs held majority interests were BOCs as defined in the decree, AT&T needed a partial waiver or modification of this decree prohibition in order to consummate its acquisition of McCaw Cellular Communications, Inc., which owned stock in several such systems. The United States supported AT&T's motion for a limited modification of the decree for this purpose; BellSouth opposed it. Judge Greene granted the modification; BellSouth and Bell Atlantic appealed. The D.C. Circuit Court of Appeals affirmed. Both courts agreed with the United States that BOC ownership of "Block A" cellular systems, originally assigned by the FCC to nonwireline carriers, was a significant changed circumstance not foreseen by the parties when the decree was entered, and that the resulting unintended prohibition on AT&T's acquisition, in most major markets, of either of the two cellular systems the FCC has licensed, made the decree's prohibition on AT&T more onerous. The courts also agreed with the government that a limited modification allowing AT&T to acquire McCaw's interests in BOC cellular systems, subject to continuing equal access obligations, would not undermine the decree's central procompetitive purposes and was suitably tailored to the changed circumstances. Accordingly, the modification was proper under Fed. R. Civ. P. Rule 60(b), and the Supreme court's decision in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992). The United States brought a separate action under Section 7 of the Clayton Act, which was settled with the filing of a proposed consent decree. The Telecommunications Act of 1996, enacted on 8 February 1996, (see above) eliminated any prospective effect of the *AT&T* decree and the proposed *AT&T-McCaw* decree.

In *United States v. Microsoft Corp.*, 56 F.3d 1448 (D.C. Cir. 1995), the district court (Sporkin, J.), refused to enter a consent judgement proposed by the Department of Justice and Microsoft, concluding that entry of the decree would not be "in the public interest" as required by the Tunney Act, 15 U.S.C. 16(e). The proposed decree, among other things, prohibited Microsoft from employing "per processor" licenses that, the Department alleged, raised barriers to entry in the operating system market. The court of appeals reversed the district court's judgement that the decree should not be entered, concluding that the court exceeded its authority in requiring the government to explain why it failed to file a different Complaint, and in concluding that the decree did not provide a sufficient remedy for the

allegations the Complaint contained. The court of appeals also removed Judge Sporkin from the case, concluding that he appeared biased against Microsoft.

United States v. Eastman Kodak Co., 63 F.3d 95 (2d Cir. 1995). As a result of monopolisation cases brought by the government, Kodak was subject to two consent decrees relating to the sale of film. The first, entered in 1921, barred Kodak from selling film without its name on the package, and prohibited exclusive dealing contracts. The second, entered in 1954, barred it from tying or bundling the sale of film and photoprocessing. On Kodak's motion, opposed by the Department, a district court terminated both decrees, finding that Kodak no longer had monopoly power in the sale of film or photoprocessing in the United States. The Second Circuit Court of Appeals affirmed. It accepted the government's contention that the standard for relief was whether the purposes of the decree, including the elimination of monopoly and unduly restrictive practices, had been achieved. However, while recognising that another fact finder might have found otherwise, it concluded that the United States as appellant had not carried its burden of showing on appeal that the district court abused its discretion in finding, based on the volume of film imports and exports, that the relevant geographic market for film was world-wide, that Kodak had four competitors in that market, and that its market share of 36 per cent was too small to support the exercise of monopoly power. The court, despite Kodak's domestic market share (67 per cent measured in units, and 75 per cent dollar share), rejected the government's contentions that the United States should be considered a separate geographic market. It found no substantial evidence that Kodak was able to engage in price discrimination against United States customers; it saw no error in the district court findings that the retail premium for Kodak film and the stated preference for Kodak film in consumer surveys were not significant; and it was unpersuaded that Kodak's admitted "own elasticity" of two, which normally implies prices twice marginal cost, showed market power.

FTC Cases Decided in 1995

The Coca Cola Company and Coca Cola Enterprises v. FTC, Nos. 94-1595 etc. (D.C. Cir.) were petitions to review an order of the Commission holding that the Coca Cola Company's proposed 1986 acquisition of the Dr Pepper company was unlawful. On 18 May 1995, the case was dismissed by stipulation of the parties to permit entry of a modified order of the Commission settling the case (FTC Docket No. 9207). The modified order deleted a provision that had expressly defined Coca-Cola Enterprises, Inc. as a Coca-Cola Co. subsidiary or affiliate subject to prior-approval requirements before acquiring certain brand-name soft-drink concentrate manufacturers for the next ten years. The Commission found that there was no need to single out Coca-Cola Enterprises in the order for identification as a subsidiary or affiliate since it was not a party to the cases against Coca-Cola Co.

FTC v. Freeman Hospital, 69 F.3d 260 (8th Cir. 1995), was a suit to enjoin a proposed consolidation of two hospitals pending an administrative proceeding to determine the legality of the transaction under Section 7 of the Clayton Act. The court of appeals held that the district court did not abuse its discretion in concluding that the Commission had failed to make the requisite showing of a geographic market in support of its complaint.

Private Cases Having International Implication

In *United Phosphorus, Ltd. v. Angus Chemical Co.*, (available in Westlaw at 1994 WL 577246 or Lexis at No. 94C 2078, 1994 U.S. Dist. LEXIS 14786 (N.D. Ill. Oct. 13, 1994)), the plaintiffs, two Indian companies and a U.S. company, alleged that the defendants, a U.S. company, its German subsidiary, and their Indian customer, engaged in a multitude of anticompetitive acts to thwart the plaintiffs from entering

the market for certain chemicals necessary for the production of a tuberculosis treatment drug. Plaintiffs alleged that the defendants' conduct had prevented them from manufacturing the chemicals in India, and later in the United States. The court held that the jurisdictional provisions of the Foreign Trade Antitrust Improvements Act (FTAIA) applied. To meet the FTAIA standard, the plaintiffs had to show a "direct, substantial, and reasonably foreseeable effect" on domestic commerce from the foreign commercial conduct. Although some of the alleged anticompetitive conduct had taken place in the U.S., the court noted that "it is the situs of the effect, not the conduct, which is crucial." Allegations concerning the defendants' intent to affect domestic commerce were not relevant, as the "test is whether the effect would have been evident to a reasonable person making practical business judgements, not whether actual knowledge or intent can be shown." Although many of the effects alleged in the complaint would occur in India, there were also allegations of antitrust injury in the U.S., albeit broad and conclusory ones, as the plaintiffs claimed that but for the anticompetitive conduct they would have entered the U.S. market as well as the Indian one. Although the court denied the defendants' motion to dismiss, it noted that "the allegations will need much more than merely economic theories to survive later dispositive motions."

Virgin Atlantic Airways v. British Airways, 872 F. Supp. 52 (S.D.N.Y. 1994). Virgin Atlantic sued British Airways ("BA"), alleging various claims, including attempted monopolisation, monopoly leveraging, and unreasonable restraint of trade, in relation to transatlantic airline passenger service between the United Kingdom and the United States. In pre-trial motions, BA sought to dismiss the complaint. The court rejected justiciability defences based on *i)* the act of state doctrine (the acts alleged were those of BA, not of the UK government, and there was no suggestion that BA's conduct was "compelled" or "necessitated" by the UK government), *ii)* the political question doctrine (no evidence that the suit would interfere with executive branch foreign affairs responsibility in negotiating aviation treaties), and *iii)* international comity (the complaint alleged "specific harms to competition and consumers in the United States"; although any relief granted would "have extraterritorial effect," there was no showing that remedies would be "disproportionate"). The court then weighed a series of factors relevant to BA's forum non convenience claim and concluded that BA had failed to demonstrate that the balance of convenience was strongly in favour of trial in a foreign forum. On the monopolisation claim, BA argued for dismissal on the grounds that international treaty constraints made acquisition of monopoly power impossible and that BA's alleged market shares were too low to sustain a finding of a dangerous probability that it would be able to control prices or exclude competition in transatlantic air travel. The court rejected BA's argument, noting that whether monopoly power exists depends on a number of factors (e.g., the strength of competition, the probable development of the industry, consumer demand, the defendant's market share, and the effect of government regulation). The court also observed that the market shares alleged (39 per cent to 52 per cent of potentially relevant markets) may in "certain circumstances demonstrate dangerous probability of acquiring monopoly power." The court also denied BA's motion to dismiss the monopoly leveraging claim based on BA's monopoly power over London airports used to gain an unfair competitive advantage in transatlantic routes, and the claim based on allegations of unlawful exclusive dealing arrangements in corporate travel programs and travel agent incentive programs. Other antitrust and common law claims were dismissed.

In *Eskofot A/S v. E.I. DuPont De Nemours & Co.*, 872 F. Supp. 81 (S.D.N.Y. 1995), Eskofot, a Danish manufacturer of printing equipment, brought suit against a United States corporation, DuPont, and a British subsidiary of DuPont, alleging that the defendants had monopolised the domestic and international market for specified printing equipment and materials, and that they continued to engage in intentional conduct restraining trade. The court rejected defendants' motion to dismiss for lack of subject matter jurisdiction. Eskofot argued that the defendants' anticompetitive conduct had precluded it from exporting to the U.S., causing a significant anticompetitive effect on U.S. commerce. The court held that these allegations, combined with claims that defendants had initiated marketing activities in the U.S. and

that U.S. consumers would be hurt by higher monopoly prices, were sufficient to allege "an impact on import trade and import commerce into the United States." The FTAIA standard ("direct, substantial, and reasonably foreseeable effect"), which does not apply to restraints on import commerce, therefore was not applicable to this case. The court also rejected the UK subsidiary's argument that it did not have the minimum contacts with the U.S. necessary to sustain personal jurisdiction. The court held that Eskofot's allegations in this regard were sufficient because if true they would establish the requisite level of foreseeability that the subsidiary's anticompetitive conduct outside the U.S. would have an effect in the U.S. This finding was buttressed by allegations relating to two alternative grounds for asserting personal jurisdiction, transaction of business in the U.S. and "general contacts," even though on their own the latter would not have been sufficient. The defendants' argument that the case should be dismissed or stayed on international comity or judicial efficiency grounds, based on the plaintiff's filing of a suit against the UK subsidiary alleging violations of article 86 of the Treaty of Rome four months prior to filing in the U.S., was also rejected, on the grounds that the English action would not resolve various issues in the U.S. case (the lawfulness of defendants' conduct under U.S. law, for example) and DuPont, a major party in the U.S. action, was a party there.

George Fischer Foundry Systems, Inc. v. Adolph H. Hottinger Maschinenbau GmbH, 55 F.3d 1206 (6th Cir. 1995) concerned arbitral proceedings in Zurich pursuant to the arbitration clause of a contract between a U.S. subsidiary of a Swiss company and a German corporation. The contract was a license for the manufacture and marketing of machines in the U.S. Fischer, the U.S. company, brought suit in the U.S., alleging that its defence in the arbitration proceeding -- that the defendant had violated U.S. antitrust law (which would give rise to a claim for treble damages) -- would not be recognised by the Swiss arbitral tribunals, which did not have the power to grant treble damages. The Sixth Circuit Court of Appeals sustained the District Court's dismissal of the suit without prejudice, on the grounds that it was not ripe: the Swiss tribunal had not yet decided what law to apply. The Court noted that "if any part of a contract, including a choice-of-law provision, waives a party's right to collect damages for antitrust violations, the provision is void for public policy reasons." If the eventual arbitral award were to violate U.S. public policy on these grounds, "the aggrieved litigant may request a federal court, at the award-enforcement stage, to determine whether the arbitration award violates public policy."

Statistics on Private and Government Cases Filed During CY 1995

According to the annual report of the Director of the Administrative Office of the U.S. Courts, 811 new civil and criminal antitrust actions, both governmental and private, were filed in the federal district courts in the calendar year ending 30 December 1995.

Significant DOJ and FTC Enforcement Actions

DOJ Criminal Enforcement

The Division is working to develop leads to significant national and international criminal antitrust cases by obtaining more referrals of possible antitrust crimes from other investigative and prosecutorial agencies, such as U.S. Attorneys' Offices, the Fraud Section of the DOJ's Criminal Division, the Federal Bureau of Investigation, and the Inspector Generals' Offices of federal agencies. These organisations, in the course of investigations in their particular areas of responsibility, often obtain evidence of conduct that amounts to criminal antitrust violations. FY95 saw an increased number of cases in which the Division employed statutes other than the Sherman Act to prosecute anticompetitive schemes. The use of other criminal statutes, sometimes as the primary offence, gives the Division

additional capacity to stop a wider range of anticompetitive criminal activity and to undertake joint investigations, or to make co-operative arrangements, with other law enforcement agencies. The other statutes used include those relating to tax fraud, securities fraud, mail fraud, and false statements; individual cases are described in more detail in the case descriptions below.

The Division filed 60 criminal antitrust cases against 40 corporations and 32 individuals in FY95. Sentences resulted in $41.7 million in total fines, 3 902 days of actual incarceration, and 2 933 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) ¶ 45 095.

On 20 October 1994, the Division charged two executives of a defunct New Jersey company -- AM-PM Sales Co. Inc. -- for their involvement in a $25 million bid rigging and kickback conspiracy for contracts awarded by Philip Morris Inc. in New York City to supply product advertising and display materials to retail stores. The two defendants were also charged with tax fraud in connection with a conspiracy to raise and accumulate substantial amounts of cash to pay kickbacks to purchasing agents at Philip Morris and engaging in series of transactions, many of them sham deals, to receive approximately $3 million in false billings to overstate their company's expenses, take false tax deductions and conceal substantial cash income. These cases are part of the Division's ongoing antitrust investigation of bid rigging, commercial bribery and tax-related offences in the display industry.

On 21 November 1994, the Division brought criminal contempt charges against a Chicago bedding company, Restonic Corporation, for allegedly violating a 1960 consent decree that prevented it from assigning geographic territories to its licensees for the distribution of its products. According to the 1960 suit, Restonic and three other companies who licensed trademarks for the sale of mattresses, conspired with its licensee owners to allocate territories and fix resale prices. This case was the Division's first antitrust enforcement effort using criminal contempt laws since 1990. On 23 March 1995, Restonic pled guilty and was fined $220 000.

On 22 November 1994, the Division filed a one-count felony information in federal district court in Tampa, Florida, charging two residential door manufacturers -- Illinois Flush Door Inc. and LEDCO, Inc. -- with participating in a conspiracy to fix the prices of residential flush doors. On 30 January 1995, following guilty pleas, Illinois Flush Door and LEDCO were fined $160 000 and $250 000, respectively. On 23 February 1995, the Division charged Southwood Door Company of Quitman, Mississippi with participating with a co-conspirator in a price-fixing conspiracy for sales of eight-foot solid core and bifold Colonist-style doors in the south-eastern United States. On 11 August 1995, following a guilty plea, Southwood Door was fined $25 000. This marks the fifth case filed as a result of the Division's investigation into collusive practices in the $600 million flush door industry. To date, more than $6 million in fines have been imposed.

On 9 December 1994, the Division filed a one-count felony information in the federal district court in Fort Worth, Texas, charging two companies, Morrison Supply Company and Amarillo Winnelson Company, Inc., and two individuals with fixing prices on wholesale plumbing supplies in Amarillo, Texas. On 5 May 1995, another Amarillo, Texas wholesale plumbing supply company, Fields & Company, was charged with conspiring with others to raise, fix, and maintain prices of wholesale plumbing supplies. In addition, on 28 September 1995, a federal grand jury in Dallas indicted two more Texas wholesale plumbing companies -- Oberkampf Supply Company of Lubbock, Texas and Clowe & Cowan Inc. of Amarillo, Texas and the president of the Lubbock company -- for conspiring to fix prices on wholesale plumbing supplies.

On 15 December 1994, the Division filed a one-count indictment in the federal district court in Chicago, charging a former executive of the Russell-Stanley Corporation, a manufacturer of steel drums, with conspiring to fix prices on steel drums used for packaging chemicals and petroleum products. This indictment resulted from the Division's investigation in the metal container industry -- an investigation that has resulted in criminal cases against 13 companies and 16 individuals and over $10 million in fines over a three year period.

On 12 January 1995, the Division filed a one-count felony information in the federal district court in New York City, charging a former salesman of Southern Container Corporation with conspiring to rig bids on Philip Morris Inc. advertising contracts worth millions of dollars in New York City. The effect of the conspiracy was to provide Southern Container Corporation with $10 million in contracts to supply Philip Morris with "point-of-purchase" display materials used to advertise and promote products in retail stores. On 11 May 1995, following a guilty plea, the defendant was fined $100 000 and was sentenced to two years' probation.

On 19 January 1995, the Division filed a one-count felony information in the federal district court in Philadelphia charging Federal Food Marketers, a Rumson, New Jersey, food marketing company, with mail fraud for submitting false and fictitious bids to a federal agency to manipulate the awarding of $1.5 million in contracts for canned foods, such as sweet potatoes, which are distributed to armed forces personnel in the United States. According to the information, Federal Food, an agent for manufacturers and distributors of processed food items, submitted false bids to create the appearance of competition and avoid submitting to the federal agency information to justify its prices.

On 6 April 1995, the Division filed a one-count information in the U.S. District Court in Manhattan, New York, charging a leading international dealer in rare banknotes with bid rigging in connection with a November 1990 auction involving the sale of old and rare banknotes, proofs and specimens from the archives of the American Bank Note Company. The Division alleged that the William Barrett Numismatics Limited, a Canadian corporation, and its co-conspirators agreed to refrain from bidding against one another at a major auction conducted by Christie, Manson & Woods International Inc. in New York City in November 1990. On 7 April 1995, following a guilty plea, the defendant was fined $125 000. On 7 September 1995, the Division filed an indictment charging Mel Steinberg, Inc., a dealer in rare banknotes, with conspiring to rig bids on the purchase of old and rare banknotes at the same November 1990 auction in November 1990. Following a guilty plea, Mel Steinberg, Inc. was fined $50 000.

On 9 May 1995, the Division filed a one-count information in the U.S. District Court in Boston, Massachusetts, charging Elof Hansson Paper & Board Inc., a New York based importer of fax paper produced in Japan, and a wholly owned subsidiary of Elof Hansson AB of Sweden, with conspiring with others to fix and raise the price of thermal fax paper sold in the United States from August 1991 through March 1992. The Division alleged that the New York-based subsidiary of Elof Hansson AB had meetings and telephone contacts with competitors in order to facilitate the price-fixing conspiracy which caused a ten per cent increase in the cost of thermal fax paper to U.S. customers. On 9 June 1995, following a guilty plea, Elof Hansson Paper was fined $200 000. Similar charges were brought in the summer of 1994 against Mitsubishi Corporation of Tokyo, Japan -- the first criminal antitrust prosecution of a major Japanese corporation headquartered in Tokyo. On 26 September 1995, two additional Japanese paper companies, Mitsubishi Paper Mills Ltd. and New Oji Paper Co. Ltd., agreed to plead guilty and to pay fines totalling more than $3.5 million for their involvement in the same fax paper price- fixing conspiracy. This prominent example of international co-operation was jointly investigated by Canadian antitrust authorities and the Division.

On 1 June 1995, the Division filed a five-count felony information in the U.S. District Court in Los Angeles, California, charging three California companies and two executives with conspiring in 1991 to fix the price of aluminum parts that are used as structural support in aeroplanes. These aluminum parts are known as small press hard alloy aluminum extrusions. The companies involved -- TD Materials, Inc., Pioneer Aluminum Inc., and Tiernay Metals -- in the conspiracy accounted for approximately 75 per cent of the $150 million world-wide market.

On 7 June 1995, the Division filed two one-count felony informations in the U.S. District Court in Atlanta, Georgia, charging Sunrise Carpet Industries Inc. of Chatsworth, Georgia and Johnny A. West, its chief executive officer, with conspiring with others to fix, raise, and maintain the prices of carpet sold throughout the United States. These were the first criminal charges to come out of a nation-wide investigation into alleged price fixing in the nine billion dollar-a-year carpet industry.

On 14 June 1995, the Division filed a one-count felony information in the U.S. District Court in Harrisburg, Pennsylvania, charging Ben's Truck Parts & Equipment Inc., a Toledo, Ohio, truck parts company and its president, Donald Solomon, with conspiring to rig bids on the purchase of two million dollars worth of military surplus materials, such as vehicles and vehicle parts, sold at government auctions in Pennsylvania. From the same investigation, on 13 September 1995, the Division charged the owner of a Dover, Delaware jeep parts company with conspiring to rig bids on the purchase of military surplus material sold at government auctions in the Harrisburg, Pennsylvania area.

On 22 August 1995, the Division filed a one-count felony information in the U.S. District Court in Dallas, Texas, charging ICI Explosives USA, Inc. with conspiring with others from the Fall of 1988 through mid-1992 to rig bids for the sale of commercial explosives sold in western Kentucky, southern Indiana, and southern Illinois. One day earlier, on 21 August 1995, ICI's senior vice president of sales was also charged with bid rigging. Following a guilty plea and later court approval, ICI was sentenced to pay a record $10 million fine. The $10 million fine was at the time the largest fine from a single defendant and the first time that the statutory maximum had been levied and approved. The sale of commercial explosives is an approximately one billion dollars-per-year market in the United States.

On 6 September 1995, from the same investigation, the Division charged Dyno Nobel, the world's largest manufacturer of commercial explosives, with conspiring to fix the prices of commercial explosives and eliminating competition in the sale of commercial explosives to three limestone quarries in central Texas. Dyno Nobel agreed to plead guilty and pay $15 million in criminal fines, the biggest fine ever imposed in a criminal antitrust matter. Also on 6 September 1995, Mine Equipment & Mill Supply Inc., a 50 per cent joint venture by Dyno, also pleaded guilty as a co-conspirator, and agreed to pay a $1.9 million fine. The Division in FY95 obtained record corporate criminal antitrust fines in its investigation of the commercial explosives industry which is still ongoing, generating over $26 950 000 in criminal fines.

On 14 September 1995, the Division filed a two-count information in the U.S. District Court in New York City, charging a New York executive and his company with bid rigging, contract allocation, and conspiring to defraud the federal government. The charges arose out of contracts awarded by a Connecticut liquor company to supply product advertising and display materials to retail stores. The defendants were also charged with tax fraud in connection with a conspiracy to raise and accumulate cash to pay kickbacks to purchasing agents and engaging in sham transactions to overstate company expenses, take false tax deductions and conceal cash income not reported to tax authorities.

On 22 September 1995, the Division filed a one-count information in the U.S. District Court in Buffalo, New York, charging Elkem Metals Company, a subsidiary of Elkem A/S of Norway, one of the

world's leading producers of ferrosilicon products, with participating in a nation-wide conspiracy between late 1989 and mid-1991 to fix prices of commodity ferrosilicon products sold in the United States. Commodity ferrosilicon products are alloys of iron and silicon, used primarily in the production of steel and cast iron. Sales in the ferrosilicon products industry exceed $100 million a year.

On 27 September 1995, the Division filed a one-count felony information in the U.S. District Court in Philadelphia charging Action Embroidery Corporation, a manufacturer of embroidered military insignia, with conspiring to rig bids between January 1990 and December 1993 on sales of military insignia to the Army-Air Force Exchange for resale to United States military personnel at military facilities throughout the United States and abroad. The Division also charged D.M.E. Industries Inc. with participating in the bid-rigging conspiracy.

On 27 September 1995, the Division filed separate felony informations in the U.S. District Court in Alexandria, Virginia, charging two real estate buyers with conspiring to rig bids at public residential real estate foreclosure auctions in northern Virginia. On 28 September, a third real estate buyer was charged. The three buyers had conspired with a group of real estate speculators who agreed not to bid against each other at certain real estate foreclosure auctions. This agreement allowed them to buy real estate for low, non-competitive prices. The charges resulted from the Division's ongoing antitrust investigation into foreclosure auction bid rigging in northern Virginia. Thus far, 12 individuals and one corporation have been convicted.

On 27 September 1995, a federal grand jury in Dallas returned a two-count indictment charging Mrs. Baird's Bakeries Inc., a Forth Worth, Texas baking company, and its former president with conspiring for more than 15 years to raise and maintain the prices of bread and bread products sold in much of Texas. They were also charged with participation in price-fixing and bid-rigging conspiracies on contracts to supply bread and bread products to governmental entities located in west Texas. In addition, a former president of Campbell Taggart Baking Companies' Dallas bakery was charged with making false statements to a federal grand jury about discussions he had with competitors about raising prices for bread and bread products.

On 28 September 1995, the Division filed a two-count felony information in the U.S. District Court in San Francisco, California, charging Municipal Government Investment Associates, Inc., a California securities brokerage firm, with wire fraud and securities fraud for arranging false and non-competitive bids during the restructuring of a Tampa, Florida, municipal bond escrow account. The firm was charged with fraudulently deriving more than $1.2 million by colluding with co-conspirators to rig bids on specialised securities known as forward supply contracts. There was no Sherman Act charge because the Division determined that securities and mail fraud charges were the most effective way to prosecute this case. The charges resulted from a federal grand jury investigation into collusive bidding and fraud in the municipal bond escrow restructuring business. It was the first prosecution of its kind.

On 29 September 1995, the Division filed a one-count criminal information in the U.S. District Court in Atlanta charging Alliance Metals Inc., a Pennsylvania aluminum company, and its chief executive with conspiring with other sellers and distributors of painted aluminum products to fix, raise, and maintain prices of painted aluminum products they sold throughout the United States. These charges were the first charges to come out of a nation-wide investigation into price fixing in the painted aluminum industry.

As of 31 December 1995, the Division had filed 132 criminal cases against 79 corporations and 84 individuals in the milk and dairy products industry. To date, 66 corporations and 59 individuals have been convicted and fines imposed total $59.8 million. Twenty-nine individuals have been sentenced to

serve a total of 5 776 days, or an average of approximately seven months in jail. Civil damages total approximately eight million dollars. Ten grand juries in seven states continue to investigate the milk industry.

DOJ Non-Merger Civil Enforcement

The Division filed a civil suit in *U.S. v. Association of Retail Travel Agents*, No. 1:94CV02305 (D.D.C. filed 25 October 1994). The complaint charged the trade association, which represents 2 000 travel agents in the $90 billion-a-year travel industry, with boycotting travel providers such as airlines and car rental companies who would not adhere to the association's commission levels and other policies. The Association entered into a consent decree that prohibited it from engaging in such activities and required it to conduct periodic reviews of antitrust requirements with its officers and directors. The text of the consent decree appears at 1995-1 Trade Cas. (CCH) ¶ 70 957.

In *U.S. v. Classic Care Network, Inc., et al.*, No. 94-5566 (E.D.N.Y. filed 5 December 1994), the Division filed a complaint charging eight Long Island, N.Y., hospitals with setting up an organisation to jointly resist cost-cutting efforts by health maintenance organisations and managed care plans. According to the Division's complaint, Classic Care acted as the hospitals' exclusive bargaining agent by ensuring that all HMO agreements were approved by the other members of the network, by deterring discounting on inpatient services, and by prohibiting per diem pricing in HMO contracts, and by adopting one payer's most favoured nation clause for the reimbursement of outpatient services. At the same time, the Division filed a proposed consent decree that would prevent the Classic Care Network (a hospital network), and its eight member hospitals from co-ordinating their contract negotiations with HMOs and other third party payers, and from engaging in any further efforts to prevent hospital discounts or using Classic Care as a joint sales agent. The consent decree was entered on 18 May 1995 and the text appears at 1995-1 Trade Cas. (CCH) ¶ 70 997. For a similar case involving the illegal use of most favoured nation clauses in contracts, see *U.S. v. Oregon Dental Service*, No. C95-1211-FMS (N.D. Cal. filed 10 April 1995). A summary of the complaint appears at 6 Trade Reg. Rep. (CCH) ¶ 45 095 (Case No. 4130) and the text of the consent decree is located at 1995-2 Trade Cas. (CCH) ¶ 71 062.

In December 1994, the Division filed a lawsuit and a proposed consent decree in *U.S. v. Topa Equities*, No. 1994-179 (D.V.I. filed 7 December 1994), to end anticompetitive practices by a Virgin Islands liquor wholesaler who controlled about 96 per cent of the Islands' liquor business. The Division alleged that Topa obtained the exclusive Virgin Islands distribution rights of almost every brand of distilled spirits in the world market, and that actions to obtain and retain these rights were contracts in restrain of trade. In a consent decree, entered on 14 July 1995, the wholesaler, Topa Equities Ltd., agreed to let its suppliers deal with other wholesalers and not to interfere with the business operations of its competitors. The text of the consent decree appears at 1995-2 Trade Cas. (CCH) ¶ 71 061.

The Division filed a complaint and consent decree in *U.S. v. Vision Service Plan*, No. 94CV02693 (D.D.C. filed 15 December 1994) accusing Vision Service Plan, the nation's largest vision care insurance plan, of reducing discounting and price competition through a contract provision known in the industry as a "most favoured nation" clause, that inhibited doctors from reducing their fees to competing vision care insurance plans and to individual patients. As a result of the most favoured nation clause, vision care insurance plans that had previously contracted with doctors at discounts between 20 and 40 per cent were no longer able to obtain discounts at that level. The consent decree eliminates the most favoured nation clause and prevents Vision Service Plan from engaging in other actions that would limit future discounting by its participating doctors. The text of the consent decree appears at ¶ 50 792.

In a significant action co-ordinated with the U.S. Securities and Exchange Commission, the Division in December 1994 obtained $25 million in civil antitrust fines from Steinhardt Management Company and Caxton Corporation for their settlement of antitrust charges connected with the auction of U.S. Treasury securities. The Division's complaint, filed in the Southern District Court of New York on 16 December 1994 (No. 94CIV 9044), charged that Steinhardt and Caxton conspired to limit the supply of, or to "squeeze," the Two-Year Treasury note issued in April 1991, causing investors to pay inflated prices for the securities. In addition to paying $25 million in antitrust fines and $51 million in securities fines, Caxton and Steinhardt agreed to an injunction that will prevent them from conspiring to inflate the price of Treasury securities in the future. The text of the consent decree appears at 1995-1 Trade Cas. (CCH) ¶ 70 983.

In January 1995, the Division filed a complaint and proposed consent decree in *U.S. v. El Paso Natural Gas Co.*, No. 95-0067 (D.D.C. filed 12 January 1995) to prohibit El Paso Natural Gas -- a major gas pipeline owner and gatherer in the San Juan Basin (ranging from New Mexico to Colorado) -- from tying the sale of meters and meter installation services to the use of the company's gas gathering system. The Division alleged that El Paso was requiring producers to purchase El Paso's meter installation service as a condition for connecting natural gas wells to the El Paso system. The consent decree ends this tying arrangement and allows producers to seek alternative contractors, which could lower the cost of natural gas production and save millions of dollars. The text of the consent decree appears at 1995-2 Trade Cas. (CCH) ¶ 71 118.

In *U.S. v. Playmobil USA, Inc*., No. 95-0214 (D.D.C. filed 31 January 1995), the Division filed a civil antitrust suit and proposed consent decree accusing Playmobil, one of the nation's largest specialty toy companies, of reaching agreements on retail price levels with certain dealers and threatening others with termination in order to induce them to cease discounting. A consent decree, finalised on 22 May 1995, prohibits Playmobil from attempting to coerce its dealers to adhere to any specified level of resale prices and from withholding advertising rebates from a dealer who advertises Playmobil products at a discount. This case was referred to the Division by the Pennsylvania Attorney General's office and was the second vertical price-fixing case filed by the Division. The text of the consent decree appears at 1995-1 Trade Cas. (CCH) ¶ 71 000.

In June 1995, the Division filed a civil lawsuit and proposed consent decree in *U.S. v. American Bar Association*, No. 1:95CV01211 (D.D.C. filed 27 June 1995), to resolve charges that the ABA process for accrediting law schools had been distorted to serve the interests of faculty members. The ABA was charged with fixing faculty salaries at inflated rates and effectively boycotting state-accredited law schools and their students. Under the consent decree, the ABA would be prohibited from enforcing base salary and benefit requirements among ABA- accredited schools or making it a stipulation of the accreditation process. The ABA would also have to allow ABA-accredited schools to accept students from non-accredited schools and provide transfer credits. Finally, the ABA would no longer be able to refuse to accredit a school simply based on its for-profit status. The decree also opens up the accreditation process so that it is no longer controlled by the law school faculty. The text of the proposed consent decree is located at 7 Trade Reg. Rep. (CCH) ¶ 50 782.

On 2 August 1995, the Division filed a petition in the U.S. District Court in Detroit against the Florists' Transworld Delivery Association (FTD) for violating a 1990 consent decree. The FTD, after it had been purchased by an investment banking group in 1994, split into a for-profit corporation that handles the business, including the Mercury network, and into a non-profit trade association that provides assistance to retail florists. The for-profit corporation had set up an incentive program which allowed members financial and other benefits if they gave up their membership with other flower wire services. This so-called "FTD Only" program was a clear violation of the 1990 Consent Decree because it had the

effect of limiting membership to FTD. The FTD agreed to end the "FTD Only" program and to set up an internal antitrust compliance program.

In September 1995, the Division joined the Attorney General of Connecticut in filing a joint complaint against medical providers in Danbury, Connecticut, in *U.S. v. HealthCare Partners, Inc. et al.*,, No. 395-CV-01945NC (D.Conn. filed 13 September 1995). The complaint alleged that Danbury Hospital, the only acute care hospital in its area, had conspired with a majority of the doctors on its staff to delay and impede the development of managed health care plans in the Danbury area. The complaint also charged that the hospital had hindered competition among local physicians by working with doctors to limit the size and scope of its medical staff. The hospital was charged with illegally abusing its monopoly position in inpatient services to maintain profits and to gain undue power in the market for outpatient services. A proposed consent decree was negotiated that would end the anticompetitive practices and that would allow doctors and hospitals to cut costs while preventing them from limiting competition. This case, along with a similar case the Division filed in St. Joseph, Missouri on the same day (*U.S. v. Health Choice of Northwest Missouri, Inc. et al.*, No. 95-6171-CVSJ6 (D.Mo. filed 13 September 1995), represents the Division's first venture into lawsuits pertaining to physician-hospital organisations. The text of the consent decree in *HealthCare* which was finalised on 15 February 1996, appears at 6 Trade Reg. Rep. (CCH) ¶ 50 786. The text of the proposed consent decree in *Health Choice* appears at 6 Trade Reg. Rep. (CCH) ¶ 50 787.

In September 1995, the Division filed a complaint and proposed consent decree in *U.S. v. National Automobile Dealers Ass'n*, No. 1:95CV01804 (D.D.C. filed 20 September 1995), to end anticompetitive practices by the National Automobile Dealers Association (NADA), which represents 80 per cent of all U.S. franchised car dealers. NADA was engaged in a pattern of anticompetitive activities such as *i)* attempts to persuade car dealers to boycott or reduce purchases from auto manufacturers offering consumer rebates, *ii)* asking member dealers to reduce inventories so that manufacturers would be pressured to reduce high-volume discounted sales to fleet buyers, and *iii)* attempting to persuade member dealers to stop advertising retail prices based on the dealer's wholesale cost which NADA believed led to lower retail prices. The proposed consent decree prohibits these practices and forbids NADA from terminating the membership of a dealer for reasons relating to the dealer's prices or advertising policies. The text of the proposed consent decree appears at 6 Trade Reg. Rep. (CCH) ¶ 50 788.

In September 1995, the Division filed a lawsuit and a proposed consent decree in *U.S. v. Lykes Bros. Steamship Co., Inc.*, No. 1:95CV01839 (D.D.C. filed 26 September 1995), to challenge an agreement between the Lykes Bros. Steamship Co., Inc., a major carrier of wine and spirits, and the Universal Shippers Association, the largest association of importers of wine and spirits. The agreement between Lykes and Universal Shippers required Lykes to charge other importers at least five per cent more in shipping costs than it charged Universal. This agreement made it more difficult for smaller domestic competitors to transport products from Europe to the United States at lower prices. The lawsuit alleged that the contract provision, called an "automatic rate differential," gave Universal an unreasonable advantage over its competitors. Universal handles about half of the wine and spirits carried from Europe to the United States. The consent decree prohibits Lykes from agreeing to or enforcing an automatic rate differential clause in any contract. It also requires Lykes to nullify any automatic rate differential clause in any existing contract and to maintain an antitrust compliance program. The text of the final consent decree which was entered on 20 December 1995, is located at 1996-1 Trade Cas. (CCH) ¶ 71 272.

On 28 September 1995, the Division filed a civil antitrust suit and proposed consent decree in the U.S. District Court in Washington, D.C., challenging a lease provision used by Greyhound Lines Inc.,

the nation's largest bus company, that prevented smaller bus companies that lease space at Greyhound terminals from making tickets available for purchase anywhere else within 25 miles. The "25-mile" rule caused bus tickets to be sold in fewer places and caused other bus companies to offer riders fewer services (such as intercity bus service, service at competing bus terminals, college campuses, train stations and airports) and limited other bus companies from competing effectively against Greyhound. In the consent decree Greyhound agreed to drop its 25-mile rule from all its lease agreements and to cease using leasing in other ways to limit bus companies from selling tickets outside Greyhound terminals. The text of the final consent decree appears at 1996-1 Trade Cas. (CCH) ¶ 71 334.

Modification or Termination of DOJ Consent Decrees

In documents filed on 11 January 1995, the Division agreed to terminate a 1919 consent decree against the New England Fish Exchange, an operator of a daily auction for the purchase and sale of fresh fish on the Boston Fish Pier. The 1919 judgement had settled a civil action which alleged that the New England Fish Exchange and numerous other defendants had conspired to monopolise and restrain interstate trade and commerce in the fresh fish industry. The Division agreed to terminate the decree because the New England Fish Exchange faces competition from several other auction houses and the industry has changed significantly, such that none of the Exchange's co-defendants are currently active in the industry.

On 15 September 1995, the Division filed documents in U.S. District Court in New York City, agreeing to terminate a 1968 consent decree against Gestetner Corporation, a Greenwich, Connecticut seller of stencil duplicators, printers, digital duplicators, fax machines, and related products. The Division agreed to terminate the consent decree since there have been dramatic changes in the industry resulting in Gestetner no longer having market dominance. In addition, a competitor was recently released from a more restrictive consent decree.

FTC Non-Merger Enforcement Actions

i) Commission Administrative Decisions

On 25 October l994, the Commission issued an administrative complaint charging the International Association of Conference Interpreters (AIIC), a voluntary professional association of interpreters based in Geneva, Switzerland, and the United States Region of the International Association of Conference Interpreters, its U.S. affiliate members, with conspiring or combining to fix or stabilise the fees that they could charge for interpretation services performed in the U.S., and with imposing a variety of restrictions that illegally restrain competition among them such as limitations on the numbers of hours members may work per day and specified minimums as to the number of interpreters per job. The FTC is seeking an order that would prohibit the organisations from, among other things, fixing, or otherwise interfering with price, fee or certain other forms of competition among members working in the U.S. The case is currently before an Administrative Law Judge. *International Ass'n of Conference Interpreters*, Docket No. 9270, 5 Trade Reg. Rep. (CCH) ¶ 23 705.

On 17 July 1995, an Administrative Law Judge found that the California Dental Association (CDA), through its component societies and members, conspired to illegally restrict dentists' truthful, non-deceptive advertising about prices and quality of service by adopting rules to prohibit such advertising and coercing compliance through expulsion and other means. The Administrative Law Judge issued an order prohibiting the CDA, whose members comprise 75 per cent of the dentists in the state, from interfering

with any truthful, non-deceptive advertising in which its members engage and to take steps to correct the membership status of dentists who have been suspended, disciplined, or denied membership by CDA for certain advertising practices. The decision upholds charges in an administrative complaint issued in l993. *California Dental Association*, Docket No. 9259, 5 Trade Reg. Rep. (CCH) ¶ 23 866.

The Commission gave final approval to separate consent agreements with Baby Furniture Plus Association, Inc. (BFPAI) and the New England Juvenile Retailers Association (NEJRA) on 18 January l995, settling charges that they separately threatened to boycott manufacturers that sold their products through the New Hampshire Buyer's Service (NHBS), which operates a mail- order juvenile-products catalogue with prices discounted up to 20-40 per cent below speciality store prices. The final order against NEJRA prohibits NEJRA-member retailers and their officers from combining, agreeing or conspiring to fix or maintain prices of juvenile furniture or to engage in actual or threatened boycotts or actual or threatened refusals to deal in order to influence or coerce how or to whom a juvenile furniture manufacturer distributes its products or which marketing method it uses. The order also would require the dissolution of NEJRA within 60 days, and prior thereto requires NEJRA to send a letter to manufacturers it allegedly threatened outlining the terms of the consent order. The final order against BFPAI would prohibit it from taking any action on behalf of its members or encouraging its members to interfere with a juvenile-manufacturers' decisions on distributing its products or from coercing, through actual or threatened refusals to deal, such manufacturers to use or not use any marketing method. *New England Juvenile Retailers Ass'n*, Docket No. C-3541; *Baby Furniture Plus Ass'n Inc*., Docket No. C-3553, 5 Trade Reg. Rep. (CCH) ¶ 23 661.

On 2 June l995, the Commission gave final approval to a consent agreement settling charges that the Medical Association of Puerto Rico, its physiatry section, and two of its individual physiatrists (collectively "respondents") co-ordinated and supported a long-standing boycott campaign against a government insurance program in order to obtain exclusive referral powers and to increase reimbursement rates from insurers in Puerto Rico. The final order prohibits the respondents from encouraging, organising or entering into any boycott or refusal to deal with any third-party payer or from encouraging, organising, or entering into any agreement to refuse to provide services to patients covered by any third-party payer. The order also contains various provisions designed to prevent the respondents from engaging in conduct that might lead to another illegal boycott. *Puerto Rican Physiatrists*, Docket No. C-3583, 5 Trade Reg. Rep. (CCH) ¶ 23 785.

The Commission issued a final consent order on 20 June l995 settling charges that the Korean Video Stores Association of Maryland and its individual members agreed to raise and fix the rental fees for Korean-language video tapes charged by members' stores throughout the Washington, D.C. area. The final order would prohibit the Association and its members from entering into any agreement to raise or fix prices in the retail video tape business and would require the members to display an announcement of the settlement in their respective stores as well as publish such an announcement in three Korean-language newspapers. *Korean Video Stores*, Docket No. C-3588, 5 Trade Reg. Rep. (CCH) ¶ 23 789.

In another price fixing case, the Commission issued on 18 July 1995 a final consent order settling charges that Reebok International, Ltd. and its subsidiary, The Rockport Company, Inc., agreed with certain retailers to maintain at certain levels the resale price at which they sold Reebok and Rockport brand athletic and casual shoes. The settlement would prohibit both companies from fixing the prices at which dealers advertise or sell athletic or casual footwear products to consumers in the future. *Reebok International, Ltd*., Docket No. C-3610, 5 Trade Reg. Rep. (CCH) ¶ 23 813.

On 11 August l995, the Commission gave final approval to a consent order settling charges that Physicians Group, Inc., an un-integrated association of competing physicians in the Danville, Virginia

area, and its board of directors conspired to prevent third-party payors from doing business, to fix terms of reimbursement from payors, and to resist their cost-containment measures. The settlement would require the dissolution of Physicians Group, Inc. and prohibit its seven board members from engaging in similar anticompetitive conduct with regard to third-party payors. Prior to its dissolution, the settlement requires Physicians Group to distribute copies of the complaint and settlement to its members and each payor who communicated any interest in contracting for physician services with the group or its directors since it was established. *Physicians Group, Inc*., Docket No. C-3610, 5 Trade Reg. Rep. (CCH) ¶ 23 807.

The Commission accepted for public comment on 5 June l995 a proposed consent agreement with the Council of Fashion Designers of America, the trade association representing most of the nation's best-known fashion designers, and 7th on Sixth, Inc., an organisation that produces the two major fashion shows for the industry each year, settling charges that they agreed to fix prices paid by designers for models' fees. The proposed consent agreement, among other things, contains provisions that would prohibit similar illegal conduct and require the respondents to take steps to educate their members, officers and directors that such conduct is illegal and prohibited by the settlement. [Final on 17 October 1995] *The Council of Fashion Designers of America*, Docket No. C-3621, 5 Trade Reg. Rep. (CCH) ¶ 23 837.

The Port Washington Real Estate Board (PWREB) agreed to settle FTC allegations that it has restrained competition among real estate brokers and between brokers and homeowners in the sale of residential real estate in and around Port Washington, New York. The complaint alleged that several PWREB rules governing membership, advertising, and listing have substantially reduced competition by limiting the use of signs, open houses, exclusive-agency listings (listings permitting homeowners to pay a reduced fee or commission, or no fee or commission, if they sell the properties themselves), and advertising as well as a requirement for member brokers to maintain a staffed office in the PWREB service area in order to use the multiple listing service. Under the proposed settlement which was accepted for public comment on 14 June l995, the Board would be prohibited from, among other things, restricting the use of exclusive-agency listings; fixing commission splits between listing and selling brokers, restricting brokers from advertising free services to property owners; and excluding from membership brokers who do not operate a full-time office in the territory served by the Board's multiple listing service. [Final on 6 November l995] *Port Washington Real Estate Board*, Docket No. C-3625, 5 Trade Reg. Rep. (CCH) ¶ 23 847.

On 3 July l995, the Commission accepted for public comment a consent agreement with Summit Communications Group, Inc. and seven Wometco Cable TV companies settling charges that they illegally agreed to allocate between themselves customers they would serve in Cobb County, Georgia where their local cable systems overlap. The settlement would prohibit Summit and Wometco from engaging in similar illegal conduct to allocate or divide markets, customers, contracts or territories for cable television service in any of the 14 counties where they offer cable service in Georgia. [Final on 20 October l995] *Summit Communications Group Inc*., Docket No. C-3623, 5 Trade Reg. Rep. (CCH) ¶ 23 858.

On 31 July l995, the Commission accepted for public comment a proposed consent agreement with the Santa Clara Country Auto Dealers Association to settle charges that the Association members agreed to cancel ads each had scheduled for the San Jose Mercury News and withheld their advertising after the paper ran an article advising consumers on how to analyse new car factory invoices so they could better negotiate their purchase of new cars. The proposed consent would prohibit the Association in any effort to boycott any media outlet (newspaper, periodical, television or radio station) and would require it take certain steps to educate its members about the Commission's action. [Final on 13 December l995] *Santa Clara Motor Car Dealers*, Docket No. C-3630, 5 Trade Reg. Rep. (CCH) ¶ 23 874.

On 22 September l995, the Commission accepted for public comment proposed consent agreements to resolve charges in related complaints that the nation's two largest sellers of fast-turnaround verbatim news transcripts, Federal News Service Group, Inc. (FNS) and Reuters America, Inc. entered into market allocation agreements that ended competition between them, which resulted in FNS becoming the sole producer of verbatim news transcripts at higher prices. The agreement, among other things, would prohibit each from soliciting, entering into, renewing or continuing any agreement to allocate customers or divide markets with any provider of new transcripts; to prevent competition between themselves; or to fix or maintain any resale price for news transcripts. [Final on 18 December l995] *Reuters America, Inc*., Docket No. C-3632; *Federal News Service Group, Inc*., Docket No. C-3631, 5 Trade Reg. Rep. (CCH) ¶ 23 900.

ii) Federal District Court Decisions

On 18 August 1995, the district court entered a final judgement approving a settlement for $225 000 in civil penalties in a case involving violations by Onkyo U.S.A. Corp., a manufacturer of audio components, of a 1982 Commission order prohibiting it from fixing or maintaining the resale price at which its products are sold. *FTC v. Onkyo U.S.A. Corp.*, No. 95-1378-LFO (D.D.C.).

Business Reviews Conducted by the Department of Justice

From 1 October 1994 through 30 September 1995, the Antitrust Division responded to 49 requests for review of written business proposals and issued 23 business review letters. Eight of the 23 letters issued dealt with health care joint provider networks. An example of a joint provider network business review follows in paragraph 98.

On 31 October 1994, the Division cleared a proposal by Pulmonary Associates Ltd. and Albuquerque Pulmonary Consultants P.A. to merge their two groups. The Division concluded that the combination of the two groups, which would contain about ten physicians, would not create an entity that has market power -- the power to raise prices and affect the availability of certain specialised surgical services. The text of the business review letter appears at 6 Trade Reg. Rep. (CCH) ¶ 44 094 (Letter 94-21).

On 22 February 1995, the Division approved a proposal by the Intermodal Council of the American Trucking Associations Inc. to begin a series of fora to discuss how people who work in the intermodal freight transportation industry can improve their efficiency in shipping cargo. The Division stated that the fora could enhance competitiveness among shippers by demonstrating that intermodal service is an attractive low-cost option because it is a more efficient and effective way to ship freight. The text of the business review letter may be found at 6 Trade Reg. Rep. (CCH) ¶ 44 095 (Letter 95-2).

On 7 March 1995, the Division approved a proposal by the Association of Independent Television Stations Inc. ("INTV") in which INTV would collect information from its members about the prices they are paying to A.C. Nielsen Company for television ratings services, aggregate the information to mask the identity of the reporting stations and issue an annual report on its findings. INTV is a non-profit trade association composed of television stations not affiliated with the ABC, CBS, or NBC networks, whose membership consists of some 460 of the nation's more than 1 100 commercial television stations. The Division concluded that the proposed information sharing in a manner that did not reveal the prices paid by individual stations would not hamper competition among the stations, and might be

beneficial. The text of the business review letter may be found at 6 Trade Reg. Rep. (CCH) ¶ 44 095 (Letter 95-3).

On 9 March 1995, the Division approved a proposal by Northwestern National Life Insurance Company ("NWNL"), a Minneapolis insurance company, to work with its competitors, HMOs, and self-funded employer health plans, to weed out fraudulent medical claims. The Division stated that NWNL has alleviated any competitive concerns by proposing safeguards to prevent the exchange of competitively sensitive information among NWNL, the Special Investigations Unit (especially created for uncovering medical claim fraud and abuse) and outside clients. The text of the business review letter is located at 6 Trade Reg. Rep. (CCH) ¶ 44 095 (Letter 95-4).

On 14 July 1995, the Division approved a proposal by Business Travel Contractors Corporation ("BTCC"), a Pennsylvania business travel corporation, to form a joint buying group to negotiate domestic air travel fares on behalf of its corporate customers. To avoid the risk of creating undue collective buyer power, BTCC will limit the total number of customers (as a group) to not more than 35 per cent of the purchases of air transportation services in any city-pair transportation market. The Division stated that the proposal will not affect competition in any markets where a single BTCC member already has market power and may actually have a procompetitive effect to the extent that it provides corporations with another option for purchasing air travel services, or reduces the cost and improves the efficiency of corporate air services purchases. The text of the business review letter may be found at 6 Trade Reg. Rep. (CCH) ¶ 44 095 (Letter 95-8).

On 18 July 1995, the Division cleared a proposal by the Promotion Marketing Association of America ("PMAA") to receive, aggregate and distribute information relating to rebate fraud in order to facilitate effective law enforcement against such conduct. The Division stated that the proposal may have procompetitive effects to the extent that it reduces the costs to manufacturers of stolen or counterfeit rebate certificates which may reduce prices and expand output to the benefit of consumers. The text of the business review letter is located at 6 Trade Reg. Rep. (CCH) ¶ 44 095 (Letter 95-10).

On 21 July 1995, the Division announced that it would not challenge a proposal by the American Society of Composers, Authors & Publishers, Broadcast Music, Inc. and SESAC, Inc. to participate in a series of meetings to be held to discuss proposed legislation concerning the licensing practices of musical rights societies. The Division stated that the antitrust laws do not proscribe joint activities among economic rivals conducted for the purpose of petitioning the Government for legislative action. While there are exceptions to this general rule, none appear to be involved in the joint discussions and agreements that would be reached with respect to the legislation in this case. The text of the business review letter appears at 6 Trade Reg. Rep. (CCH) ¶ 44 095 (Letter 95-11).

On 27 July 1995, the Division approved a proposal by the National Court Reporters Association ("NCRA") to add provisions to its Code of Professional Ethics that would require a member, when making the official court record, to inform all parties to the litigation if it has a contractual relationship with one of the parties. In approving the proposal the Division provided four guidelines that the amendments to the NCRA's Code of Ethics should follow in order to avoid raising any antitrust concerns. Adherence to these guidelines ensures that the ethical codes will not have the effect of restraining price or quality competition, limiting output, or discouraging innovation. The text of the business review letter appears at 6 Trade Reg. Rep. (CCH) ¶ 44 095 (Letter 95-12).

On 29 September 1995, the Division stated that it would not challenge a proposal by the Metal Building Manufacturers Association ("MBMA") to make company certification under the American Institute of Steel Construction Metal Building Certification Program a condition of MBMA membership.

According to information provided to the Division, the proposal would not appear to have the effect of facilitating price collusion or reducing output. In fact, the proposal may have procompetitive effects to the extent that it promotes safety, or lower costs by making compliance with the law cheaper. The text of the business review letter may be found at 6 Trade Reg. Rep. (CCH) ¶ 44 095 (Letter 95-14).

III. Enforcement of Antitrust Laws and policies: Mergers and Concentrations

Department of Justice and FTC Merger Statistics

The Department and the Commission maintain statistics respecting the mergers and acquisitions reported under the Hart-Scott-Rodino Act (HSR). The HSR Premerger 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 FY95, 2 816 proposed mergers and acquisitions were submitted under the notification and filing requirements of the HSR Act. This represents a 20 per cent increase over the number reported in the previous fiscal year.

DOJ Review of Mergers

The Division initiated 134 merger investigations, 89 HSR and 45 non-HSR. Of the 89 HSR investigations, 56 involved second requests and/or civil investigative demands ("CIDs"). Of the 45 non-HSR merger investigations, nine involved the issuance of CIDs.

FTC Review of Mergers

The Commission initiated 81 merger investigations, 61 HSR and 20 non-HSR. Of the 61 HSR investigations, 58 involved second requests for information.

Enforcement of Premerger Notification Rules

The Commission and the Department actively have 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 11 January 1995, in connection with a complaint filed by the FTC, a stipulated civil penalty judgement for $425 000 was filed in settlement of charges that William J. Farley had failed to observe Hart-Scott-Rodino waiting periods in acquiring stock of West-Point Pepperell, Inc. *United States v. Farley*, No. Civ. 92 C1071 (N.D. Ill.).

Merger Cases

DOJ Merger Challenges or Cases

Calendar year 1995 represented a record year in merger activity in the United States: 8 956 mergers worth a total of $457.88 billion. In FY95, the Division challenged or restructured

18 transactions. Of the nine actions filed in district court, two led to full trials. Of the cases summarised below, only one resulted from a non-HSR merger investigation.

On 27 October 1994, the Division filed a complaint and a proposed settlement to alleviate the anticompetitive aspects of Nextel Communications' purchase of the assets of Motorola's specialised radio service. Without the settlement, the acquisition would have eliminated competition in 15 major metropolitan cities in the United States and would have caused higher prices and poorer services for consumers. Under the proposed settlement, Nextel and Motorola have to relinquish control of certain specialised mobile radio channels they own or manage. The consent decree does not affect Nextel's strategy to create a wireless telephone service that will compete with cellular telephone service, and the decree will allow Nextel to proceed with its plans to introduce new digital wireless telephone technology. The text of the proposed consent decree appears at 6 Trade Reg. Rep. (CCH) ¶ 50 771.

On 1 December 1994, the Division joined the Attorney General of Maryland and the Attorney General of Florida in filing a joint complaint against Browning-Ferris Industries in connection with Browning-Ferris' hostile take-over of Attwoods. The complaint alleged that the acquisition of Attwoods would lessen competition in small containerised waste hauling service, or so-called "dumpster" service, in certain areas of Maryland, Florida, Pennsylvania, and Delaware. A consent decree was filed that required the divesture of Attwoods' small container assets in markets where both Attwoods and Browning-Ferris compete. Moreover, in the Baltimore, Maryland area and in Polk and Broward counties in Florida the consent decree stipulates that Browning-Ferris must offer commercial customers new contracts that contain terms less restrictive than those it currently uses. These less restrictive contracts should enable new entrants to build profitable routes in these markets. On 30 March 1995, the consent decree was entered. The text of the final consent decree appears at 1995-2 Trade Cas. (CCH) ¶ 71 079.

On 26 January 1995, the Division approved a restructured merger between the two largest marine construction companies in the Gulf of Mexico -- McDermott International Inc. and Offshore Pipelines Inc. The two companies proposed merging their domestic and international marine construction operations. The proposed merger raised antitrust concerns in the markets for furnishing barge services to lay pipe and for providing derrick barge services in the Gulf of Mexico, a $50 million a year business. To satisfy the Division's concerns, Offshore Pipelines agreed to sell a pipelay barge to Sub Sea International Inc. and a derrick barge to Global Industries Ltd.

On 6 February 1995, the Division filed an antitrust suit and a proposed consent decree in the U.S. District Court in Washington, D.C. challenging the proposed acquisition of Midcoast Aviation from Trans World Airlines by Sabreliner Corp. Midcoast and Sabreliner are the only two providers of aircraft fuelling, cleaning, de-icing, and certain other terminal services at Lambert International Airport in St. Louis, Missouri. The consent decree required Sabreliner to divest its transient general aviation fuelling facilities at Lambert Field in St. Louis, Missouri, since the merger would have created a monopoly in the sale of jet fuel to transient general aviation customers. The text of the consent decree which was entered on 5 May 1995, is located at 1995-1 Trade Cas. (CCH) ¶ 70 995.

On 7 March 1995, the Division approved a restructured merger between BJ Services, the third largest U.S. pressure pumping service company, and The Western Company of North America, the fourth largest U.S. provider of pressure pumping services to the oil and gas industry. After the Division indicated that the proposed merger raised serious antitrust questions in oil pressure pump services market in the Rocky Mountain region, BJ Services agreed to sell its pressure pumping equipment located at its Brighton, Colorado facility.

On 28 March 1995, the Division filed suit in the U.S. District Court in Fayetteville, Arkansas, to block the common ownership of the two local daily newspapers serving the Fayetteville/Springdale metropolitan area. The complaint, filed against D.R. Partners and NAT, L.C., alleged that since both newspapers are owned and controlled by the same family trusts and are each other's primary competitor, combining them under common ownership and control would lead to lower quality and higher prices for newspaper readers and advertisers. On 30 June 1995, after an eight day trial, the U.S. District Court in Fayetteville, agreed with the Division and issued a permanent injunction against the merger of the Northwest Arkansas Times and the Morning News of Northwest Arkansas. This was the first merger case won by the Division in the Clinton Administration which was litigated from start to finish. See 1995-1 Trade Cas. (CCH) ¶ 70 049.

On 18 April 1995, the Division approved a $120 million deal that allowed The Hearst Corporation, which operates The Houston Chronicle, to buy its major daily newspaper competitor in Houston, The Houston Post, because the Post fulfilled the requirements of the "failing firm" defence. In this case, each of the three elements of the failing firm defence were satisfied: *i)* The Houston Post was unable to meet its financial obligations in the immediate future; *ii)* The Post was unable to reorganise successfully under Chapter 11 of the Bankruptcy Act; and *iii)* The Post had completed good faith efforts to elicit reasonable alternative offers of acquisition that would keep its assets in the market.

On 27 April 1995, the Division filed a civil antitrust suit in the U.S. District Court in San Francisco to challenge Microsoft's planned two billion dollar acquisition of Intuit, Inc., the dominant producer of personal finance/checkbook software. The Division alleged that the acquisition would substantially reduce or eliminate competition in the personal software market, leading to higher prices and lessened innovation. At the time of the suit, Intuit's Quicken software was the leading home personal computer software product with a 1994 market share of 70 per cent and Microsoft's Money was the number two competitor with a market share of 22 per cent, and between them Intuit and Microsoft would have accounted for more than 90 per cent of the personal finance software sales in the United States. The Division also alleged that allowing Microsoft to buy a dominant position in such a highly concentrated market would have resulted in higher prices and lessened innovation. In addition, the Division claimed that Microsoft's control of the personal finance software market would have given it a cornerstone asset that could be used with its existing dominant position in operating systems for personal computers to seize control of the markets of the future, including PC-based home banking. The Division rejected Microsoft's proposed "fix" in which some, but not all, of its Money assets would have been transferred to Novell Inc. since the Division believed that Novell would not be as effective a competitor with Money as was Microsoft. Microsoft announced on 20 May 1995 that it would no longer pursue its proposed acquisition of Intuit, Inc.

On 25 May 1995, the Division approved Ingersoll-Rand Company's one billion dollar cash tender offer to buy Clark Equipment Company after Ingersoll-Rand sold its asphalt paver business to a third party who will operate it as a viable on-going business. Initially, the Division expressed concern that the original proposal would lessen competition in the manufacture and sale of medium and large asphalt pavers since it would have combined two of the five competitors in the U.S. asphalt paver industry.

On 12 June 1995, in the U.S. District Court in Macon, Georgia, the Division sued to block Engelhard Corporation's proposed acquisition of Floridin Company -- Engelhard's largest competitor in the gel clay business. The Division's complaint alleged that Engelhard's proposed acquisition of Floridin's processing plant and reserves would make it the largest company in the industry, controlling approximately 83 per cent of the $20 million a year U.S. gel clay business. In addition, the Division claimed that the acquisition would lead to higher prices for gel clay and reduce product innovation. The Division rejected Engelhard's attempted "fix" -- a contract with ITC, Inc., an export distributor of

Floridin's clay products -- as inadequate. The trial ended in August 1995, and the parties are awaiting the court's decision.

In a significant international matter, the Division filed a complaint and proposed consent decree on 13 July 1995, in the U.S. District Court in Washington, D.C. to restructure the proposed alliance of Sprint/France Telecom/Deutsche Telekom (involving a four billion dollar purchase of Sprint stock). The alliance was intended to promote more competition in international telecommunications markets. However, according to the Division's complaint, the deal as originally proposed -- a combination of foreign monopolies with a U.S. long distance carrier -- could actually reduce competition in international telecommunications by placing other U.S. telecommunications firms at a competitive disadvantage. Under the consent decree, Sprint and the joint venture cannot own, control or provide certain services until competitors have the opportunity to provide similar services in France and Germany. Likewise, they are prohibited from obtaining anticompetitive advantages from their affiliation with FT and DT. In addition, they cannot gain proprietary information or pricing data about their US competitors that FT or DT may have gained through their relationship as suppliers to Sprint's and the joint venture's competitors. Moreover, the French and German public telephone networks and public data networks cannot limit access to those networks in such a way as to exclude competitors of Sprint and the joint venture. The text of the final consent decree appears at 1996-1 Trade Cas. (CCH) ¶ 71 300.

On 20 July 1995, the Division filed a complaint and proposed settlement in the U.S. District Court in Chicago that substantially modified the proposed acquisition of Continental Baking Company (maker of Wonder Bread) by Interstate Bakeries Corporation (maker of Sunbeam, Butternut and Weber's). The complaint alleged that the merger would reduce competition for white pan bread in five local markets -- Los Angeles, San Diego, Chicago, Milwaukee and Central Illinois. Under the proposed settlement, Interstate has agreed to sell either the Wonder brand name or one of Interstate's premium white pan breads brands in each of the geographic areas where the transaction may have an anticompetitive effect. It will also sell any other assets, such as bread plants and route systems, that may be needed to maintain the divested brand's level of sales in the marketplace. On 9 January 1996, the final consent decree was entered. The text of the decree appears at 1996-1 Trade Cas. (CCH) ¶ 71 271.

On 28 July 1995, the Division filed a complaint and proposed settlement in the U.S. District Court in Washington, D.C., to alleviate the anticompetitive aspects of the $1.7 billion acquisition of Legent Corporation by Computer Associates, the largest and second-largest independent vendors of systems management software products for IBM mainframe computers. The Division's complaint alleged that the acquisition would have had an anticompetitive effect in the markets for five relevant software products for use with the VSE operating system: *i)* security software, *ii)* tape management software, *iii)* disk management software, *iv)* job scheduling software, and *v)* automated operations software. The proposed settlement has three key elements and is designed to offer customers of certain products an alternative to Computer Associates. First, a new viable competitor would be established for each of the five computer systems management software products. Second, the proposed settlement would give the Department total discretion on whether to accept or reject proposed licensees. Third, if suitable licensees cannot be found, the settlement would permit the court to order Computer Associates to dispose of additional assets or to establish a new viable competitor. The text of the proposed consent decree appears at 6 Trade Reg. Rep. (CCH) ¶ 50 785.

On 27 September 1995, the Division approved the acquisition by Land-O-Sun Dairies Inc. of Flav-O-Rich Inc. after Mid-America Dairymen Inc., the owner of Flav-O-Rich, agreed to divest milk distribution routes to a strong third party. The divestiture of milk routes to Valley Rich Dairy will help assure that school milk prices in Virginia, West Virginia, North Carolina, South Carolina and Tennessee remain competitive.

In September 1995, the Division concluded its investigation of United Healthcare's $1.65 billion purchase of MetraHealth Companies after the state of Missouri entered into an agreement with the parties. The agreement required the divestiture of MetraHealth's St. Louis subsidiary. The Division worked closely with Missouri officials during the investigation, and the agreement resolved the Division's competitive questions.

Another case that went to trial during FY94 and ended in FY95 involved the merger of two hospitals -- the Mercy Health Center and Finley Hospital -- in Dubuque, Iowa. A bench trial took place from 26 September 1994 to 6 October 1994. Closing arguments were held on 5 December 1994. On 27 October 1995, the judge issued an opinion and judgement refusing to enjoin the merger. He found that regional hospitals offered a competitive alternative to the merged Dubuque hospitals. The Division has appealed his judgement. See 1995-2 Trade Cas. (CCH) ¶ 71 162.

Merger Cases Brought by the FTC

i) Preliminary Injunctions Authorised

In October 1994, the Commission authorised its staff to seek a federal court order to enjoin, pending the outcome of an administrative trial, B.A.T. Industries, Inc.'s ("B.A.T.") proposed acquisition of assets of American Tobacco Co.("ATC"), alleging restraint of trade in the market for cigarettes. The case was dismissed in December 1994, pursuant to a settlement of the administrative proceeding, requiring that B.A.T. divest ATC's manufacturing facility in Reidsville, North Carolina and a number of ATC's cigarette brands as a condition of its completing the acquisition. *FTC v. B.A.T. Industries*, Docket No. 9271, 5 Trade Reg. Rep. (CCH) ¶ 23 733.

In November 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 hospitals in Port Huron, Michigan. Before the court could rule on the FTC's request for a preliminary injunction, the parties subsequently abandoned the transaction and entered an administrative consent order requiring the parties to terminate their merger agreement. *Local Health System, Inc*., Docket No. C-3618, 5 Trade Reg. Rep. (CCH) ¶ 23 854.

In January 1995, the Commission authorised its staff to seek a federal court order to enjoin, pending the outcome of an administrative trial, a proposed acquisitions by Boston Scientific Corporation of Cardiovascular Imaging Systems ("CVIS") and SCIMED Life Systems, Inc., alleging that the transaction would eliminate competition in the market for the intravascular ultrasound catheters ("IVUS") used in the diagnosis and treatment of heart disease. The matter was resolved by an administrative consent decree that, among other things, requires Boston Scientific to grant a non-exclusive license to Hewlett Packard or another Commission-approved purchaser to a broad package of patents and technology related to the manufacturing, production and sale of IVUS catheters; and to sell IVUS catheters to the licensee and provide the technical assistance and advice to obtain the Food and Drug Administration approval to manufacture IVUS catheters. The order also prohibits Boston Scientific from entering into exclusive contracts with manufacturers of IVUS consoles that would exclude a new IVUS-catheter producer from the market. *FTC v. Boston Scientific Corp*., Docket No. C-3573, 5 Trade Reg. Rep. (CCH) ¶ 23 774.

In February 1995, 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 two of the only three general acute care hospitals in Joplin, Missouri -- Freeman Hospital and Oak Hill Hospital. A

district court judge denied the Commission's request, but the court of appeals entered an injunction pending appeal and directed the district court to hold an evidentiary hearing. Following the hearing, the district court again denied the Commission's request for injunctive relief, and, on 1 November 1995, the court of appeals affirmed. The Commission thereafter dismissed its adjudicative complaint issued on 21 March l995. *FTC v. Freeman Hospital*, Docket No. 9273, 5 Trade Reg. Rep. (CCH) ¶ 23 936.

In July l995, the Commission authorised its staff to seek a federal court order to enjoin, pending the outcome of an administrative trial, the acquisition by Ferro Corp. of Chi-Vit Corporation on the grounds that the acquisition would combine two of the three leading producers of a speciality glass called "frit" and likely would lead to higher prices, reduced product innovation, and reduced customer service. The parties abandoned the transaction. *Ferro Corp.*, File No. 951-0032.

ii) Commission Administrative Decisions

On 4 August l995, the Commission unanimously dismissed charges that the 1990 acquisition by R.R. Donnelly & Sons Co of Meredith/Burda Company L.P. would reduce competition would substantially reduce competition in a section of the U.S. commercial printing business. The Commission found that the product market for analysing the effects of the acquisition was not as narrow as alleged and that the competitive effects were unlikely. The Commission decision reversed the initial decision issued in l994 by the Administrative Law Judge, nullifying the initial order that Donnelly divest various printing plants. *R.R. Donnelly & Sons*, Docket No. 9243, 5 Trade Reg. Rep. (CCH) ¶ 23 876.

On 1 February l995 the Commission gave final approval to a consent agreement with Oerlikon-Burhle Holding AG settling charges that its proposed acquisition of Leybold AG could raise prices and reduce innovation in markets for two markets: the U.S. market for turbomolecular pumps used in the manufacturing of semiconductors and other scientific applications; and the world market for compact disc metallizers used in making compact discs. Under the final order, Oerlikon-Burhle can proceed with the acquisition but must divest its turbomolecular pump and Leybold's compact disc metallizer business to entities that will operate them as ongoing, viable businesses independent of Oerlikon-Burhle. *Oerlikon-Burhle Holding AG*, Docket No. C-3555, 5 Trade Reg. Rep. (CCH) ¶ 23 697.

The Commission issued a final consent order on 14 February l995 against Charter Medical Corp., settling charges that its purchase of National Enterprise's ("NME") psychiatric facilities would substantially lessen psychiatric care competition in four geographic markets - Atlanta, Memphis, Orlando and Richmond. Under the final order, Charter agreed to modify its purchase agreement to delete acquisition of the NME facilities in these four localities. *Charter Medical Corp*. Docket No. C-3558, 5 Trade Reg. Rep. (CCH) ¶ 23 711.

On the same day, the Commission gave final approval to a consent agreement with American Home Products Corp. ("AHP"), settling charges that its acquisition of American Cyanamid Corp. may substantially lessen competition in the U.S. market for tetanus and diphtheria vaccines, for certain biotechnology drugs used in treating cancer, and for research for a vaccine for treating rotavirus. Under the final order, AHP will divest its tetanus and diphtheria vaccine business to a Commission-approved buyer and manufacture the vaccines for the buyer, under contract, while the buyer awaits the Food and Drug Administration's approval to manufacture them, and will license Cyanamid's rotavirus vaccine research to a Commission-approved licensee and provide the licensee with certain technical assistance. Also the order requires that AHP change a previously-established licensing agreement to assure that it

does not obtain competitively-sensitive data about a class of drugs used in chemotherapy. *American Home Products*, Docket No. C-3557, 5 Trade Reg. Rep. (CCH) ¶ 23 712.

On 23 March l995, the Commission gave final approval to a consent agreement with Wright Medical Technology, Inc., settling charges that Wright's proposed acquisition of Orthomet, Inc. would eliminate potential competition in the market for the sale of orthopaedic implants used in human hands. Under the final order, the respondents, among other things, are required to transfer to the Mayo Foundation a full and complete copy of the Orthomet/Mayo Orthopaedic Finger Implant Research Assets, and grant Mayo a license to those assets with the rights to sublicense them in perpetuity. The consent order is intended to free the Mayo Foundation to find another non-exclusive licensee to develop orthopaedic implants used or intended for use in human hands for eventual commercialisation to compete against Wright. Also Wright is required to make any arrangements necessary to enable Mayo to find a licensee and then assist that licensee for six months following the effective date of the order. *Wright Medical Technology, Inc*., Docket No. C-3546, 5 Trade Reg. Rep. (CCH) ¶ 23 659.

In *IVAX Corp*., the Commission issued on 27 March l995 a final consent order settling charges that a proposal by IVAX to acquire all of the voting securities of Zenith Laboratories, Inc. would lead to a monopoly resulting in higher prices and/or reduced supply in the U.S. market for the drug used to treat patients with chronic cardiac conditions -- generic verapamil in extended-release form. Under the final order, IVAX would be permitted to acquire Zenith except for Zenith's rights to market or sell the extended-release verapamil under Zenith's exclusive distribution agreement with Searle. Also IVAX would be barred from renegotiating an exclusive agreement with Searle following the acquisition of Zenith. *IVAX Corp*., Docket No. C-3571, 5 Trade Reg. Rep. (CCH) ¶ 23 734.

On 4 April l995, the Commission gave final approval to a consent agreement with Reckitt & Colman PLC, settling charges that Reckitt's acquisition of L&F Products, Inc. would reduce substantially competition in the U.S. market for carpet-deodoriser products. Under the final order, Reckitt was required to divest the carpet-deodoriser assets to a Commission-approved buyer, which it complied with by selling the assets to Playtex Products Inc. *Reckitt and Colman PLC*, Docket No. C-3566, 5 Trade Reg. Rep. (CCH) ¶ 23 752.

In *Alliant Techsystems Inc*., the Commission on 7 April l995 settled charges that Alliant's proposed acquisition of the aerospace division of Hercules Inc. would reduce weapons research, innovation, and quality. The complaint alleged that once Alliant became a propellant supplier by virtue of the acquisition, its ammunition and munitions division could gain access to significant, non-public information concerning other ammunition and munitions suppliers. The final order would permit the acquisition but would require Alliant to prevent its newly-acquired propellant division, which needs certain non-public information from other ammunition and munitions makers in order to provide them with propellant and explosives, from sharing the information with Alliant's ammunition and munitions division. Alliant also must notify its propellant customers of the Commission order before obtaining any non-public information from them. *Alliant Techsystems, Inc*., Docket No. C-3567, 5 Trade Reg. Rep. (CCH) ¶ 23 714.

The Commission gave final approval to a consent agreement on 11 April l995 settling charges that an existing long-term supply agreement between Del Monte Corp. and Pacific Coast Producers ("PCP") - under which Del Monte effectively took control over PCP's canned fruit business -- eliminated PCP as a substantial and direct competitor to Del Monte. The final order requires, among other things, PCP and Del Monte to terminate the purchase option agreement and the provisions of the supply agreement that relate to planning for the l995 canning season within three days after the order becomes

final and to terminate the remaining provisions of the supply agreement by 30 June l995. *Del Monte Corp*., Docket No. C-3569, 5 Trade Reg. Rep. (CCH) ¶ 23 747.

On 12 April l995, the Commission issued a final consent order against HEALTHSOUTH Corp. settling charges that HEALTHSOUTH's merger with ReLife Inc. could lead to higher prices or reduced services at rehabilitation hospital facilities in Birmingham, Alabama, Charleston, South Carolina, and Nashville, Tennessee. Under the final order, HEALTHSOUTH is required to divest Nashville Rehabilitation Hospital, which was owned by a ReLife-controlled partnership, to a entity that would operate it in competition with HEALTHSOUTH. Also HEALTHSOUTH must terminate management contracts to operate rehabilitation units in Birmingham and Charleston. *HEALTHSOUTH Corp*., Docket No. C-3570, 5 Trade Reg. Rep. (CCH) ¶ 23 738.

In *Sensormatic Electronics Corp*., the Commission charged that Sensormatic's proposed acquisition of Knogo Corp. would decrease competition in research and development for new systems to prevent retail shoplifting. Under the final consent order issued on 12 April l995, Sensormatic was allowed to proceed with the acquisition except that it is prohibited from acquiring patents and other exclusive rights for Knogo's "SuperStrip" manufacturer-installed disposable anti-shoplifting labels, as they pertain to the U.S. and Canada, and exclusive rights to manufacture and sell SuperStrip labels outside the U.S. and Canada. *Sensormatic Electronics Corp*., Docket No. C-3572, 5 Trade Reg. Rep. (CCH) ¶ 23 742.

On 8 May l995 the Commission gave final approval to a consent agreement with Tele-Communications, Inc. (TCI), settling charges that TCI's acquisition of TeleCable Corp. would eliminate competition for cable television in Columbus, Georgia. Under the final order, TCI was allowed to acquire TeleCable but must divest its own Columbus cable TV assets, or those of TeleCable within 12 months. *Telecommunications, Inc*., Docket No. C-3575, 5 Trade Reg. Rep. (CCH) ¶ 23 760.

In *Lockheed Corp*., the Commission charged that the merger of Lockheed and Martin Marietta into a new entity called Lockheed Martin would substantially reduce competition in the U.S. markets for military aircraft, military satellites and satellite launching-vehicles. The final consent order issued on 9 May l995, requires the merged firm, Lockheed Martin, to open up the exclusive teaming arrangements that each individual firm, prior to the merger, had with infrared sensor products, so as to restore competition for certain types of military satellites. The order also prohibits certain divisions of Lockheed Martin from gaining access through other divisions to competitively-sensitive information about competitors' satellite launch vehicles or about competitors' military aircraft. Finally the settlement places restrictions on Lockheed Martin's ability to modify a military aircraft infrared navigation device in any way that could disadvantage competing military aircraft manufacturers. *Lockheed Corp*., Docket No. C-3576, 5 Trade Reg. Rep. (CCH) ¶ 23 748.

On 15 May l995, the Commission gave final approval to a consent agreement settling charges that The Penn Traffic Co.'s plan to acquire 45 grocery stores in Pennsylvania and New York from Acme Markets, Inc. would reduce supermarket competition substantially and possibly lead to higher grocery prices and reduced selection and quality in three areas of northeastern Pennsylvania. Under the final order, Penn Traffic is required to divest one supermarket in each of the three areas within 12 months. *The Penn Traffic Co*., Docket No. C-3577, 5 Trade Reg. Rep. (CCH) ¶ 23 754.

On the same day, the Commission gave final approval to a consent agreement with Service Corporation International (SCI) settling charges that its acquisition of Uniservice Corporation would substantially reduce competition for funerals and perpetual care cemetery services in and around Medford, Oregon. The final order allows SCI to acquire Uniservice provided it divests all of Uniservices's Medford facilities within 12 months to a Commission-approved purchaser and keeps all of the Medford assets and

operations separate from its own until they are sold. *Service Corporation International*, Docket No. C-3579, 5 Trade Reg. Rep. (CCH) ¶ 23 776.

On 25 May l995, the Commission issued a final consent order resolving charges that the formation of Montell Polyolefins, a joint venture between the world's largest polypropylene producers, Montedison S.p.a. and the Royal Dutch/Shell Group, could reduce competition substantially in several polypropylene and polypropylene-related production and licensing markets, and reduce U.S. export sales. The settlement would require the Royal Dutch/Shell Group to divest all of Shell Oil's polypropylene assets to Union Carbide Corp., or to another Commission-approved acquirer, that would then compete with Montell, Shell and Montedison. The Commission also challenged the royalty and profit-sharing agreement between Montedision and Mitsui Petrochemical Industries Ltd, Montedison's partner for the licensing of both polypropylene technology and catalyst, as restricting price competition and allocating markets. The settlement would require Montedison to forsake revenues under the agreement from future U.S. licenses by Mitsui and would prohibit the company from entering into similar illegal agreements. *Royal Dutch Petroleum Co*., Docket No. C-3580, 5 Trade Reg. Rep. (CCH) ¶ 23 749.

On 2 June l995, the Commission gave final approval to a consent agreement with Schwegmann Giant Super Markets, Inc., settling charges that its acquisition of 28 supermarkets in New Orleans, Louisiana, and elsewhere from National Holdings, Inc. would combine direct supermarket competitors in New Orleans and would lessen competition substantially. Under the final order, Schwegmann was required to divest seven stores in the New Orleans area within 12 months to entities that would operate them in competition with Schwegmann. *Schwegmann Giant Super Markets, Inc*., Docket No. C-3584, 5 Trade Reg. Rep. (CCH) ¶ 23 780.

In *Schnuck Markets, Inc*., the Commission charged that Schnuck's acquisition of the U.S. supermarkets owned by National Holdings, Inc would combine direct supermarket competitors in St. Louis and could lead to higher prices and a decrease in quality and selection of food and other grocery products. Under the final order issued on 8 June l995, Schnuck must divest 24 stores in the St. Louis area within 12 months to entities that would operated them in competition with Schnuck. *Schnuck Markets, Inc*., Docket No. C-3585, 5 Trade Reg. Rep. (CCH) ¶ 23 780.

On 7 June l995, the Commission announced that, based on new evidence obtained during the comment period for the proposed settlement announced in December l994, it had closed its investigation of Nestle Food Co.'s proposed acquisition of Alpo PetFoods and nullified the agreement under which Nestle would have been required to divest an Iowa cat food plant. In closing the case, the Commission said that the new evidence, which related to the definition of the relevant product market, market concentration and entry conditions, cast substantial doubt on the evidentiary basis underlying its allegation that the transaction would violate the antitrust laws. *Nestle S.A*., File No. 941-0124, 5 Trade Reg. Rep. (CCH) ¶ 23 839.

On 14 June l995, the Commission issued a final consent order against Glaxo plc, settling charges that its acquisition of Wellcome plc could substantially lessen competition in the U.S. market for the research and development of an improved class of medicines in a non-injectable form for the treatment of migraine headaches, known as $5HT_{1D}$ agonists. The final order requires Glaxo to divest Wellcome's worldwide research and development assets for non-injectable $5HT_{1D}$ agonists in order to create a viable competitor to replace the competition lost in the acquisition. *Glaxo plc*, Docket No. C-3586, 5 Trade Reg. Rep. (CCH) ¶ 23 784.

In *Eli Lilly and Co*., the Commission on 28 July l995 gave final approval to a consent agreement with Lilly settling charges that is acquisition of McKesson Corp.'s prescription management business

("PBM"), PCS Health Systems, Inc., ("PCS") would reduce competition substantially in the manufacture and sale of pharmaceuticals, potentially leading to higher prices and reduced quality. The final order requires Lilly to take measures to ensure that its drugs are not given unwarranted preference over those of its competitors in the PBM services Lilly will provide to health insurers and others after the acquisition, including, among other things, a requirement that PCS maintain an "open formulary." The order also prohibits PCS and Lilly from sharing proprietary or other non-public information, such as price data, from competitors of Lilly whose drugs may be placed on a PCS formulary or from PBM competitors of PCS that must deal with Lilly to complete their formularies. Also, citing the potential for anticompetitive results in the rapidly evolving markets for pharmaceutical products and PBM, the Commission pledged to monitor the industry carefully and cautioned that it might take future action, including post-acquisition divestiture, if it concluded there were signs of anticompetitive conduct in the industry. *Eli Lilly and Co*., Docket No. C-3594, 5 Trade Reg. Rep. (CCH) ¶ 23 783.

The Commission on 8 September l995 gave final approval to a consent agreement with The Scotts Co., settling charges that its acquisition of Stern's Miracle-Gro Products, Inc. would substantially lessen competition and increase prices for water-soluble fertilisers for U.S. consumers. Under the final order, Scotts is required to divest its Peters Consumer Water Soluble Fertilizer Business and related assets to Alljack & Co. or another Commission-approved buyer no later than 31 December l995. *The Scotts Co*., Docket No. C-3616, 5 Trade Reg. Rep. (CCH) ¶ 23 823.

The Commission accepted for public comment on 21 April l995 a proposed consent agreement with Columbia/HCA Healthcare Corp. to resolve charges that its proposed merger with Healthtrust, Inc. would impair hospital competition in six different geographic areas resulting in higher prices and/or reduced services for acute-care inpatient hospital services. Under the proposed settlement, Columbia would be required to divest seven hospitals in five different geographic areas and to terminate a joint venture that owns another hospital in sixth geographic area. [Final on 3 October l995] *Columbia/HCA Healthcare Corp*., Docket No. C- 3619, 5 Trade Reg. Rep. (CCH) ¶ 23 804.

On 9 June l995, the Commission issued for public comment a proposed consent agreement with Silicon Graphics, Inc. ("SGI") to resolve charges that SGI's proposed acquisition of Alias Research, Inc. and Wavefront Technologies, Inc. would reduce substantially competition on the basis of price and innovation for software and hardware (workstations) involved in producing sophisticated computer-based graphics for the entertainment industry. The proposed order, among other things, would require SGI to enter into a Commission-approved porting agreement by 31 March l996 with Digital Equipment Corp., Hewlett-Packard Corp., IBM Corp., Sun Microsystems, Inc., or another Commission-approved partner, by which Alias's two major entertainment graphics software programs could be run on their porting partner's computer system; and require SGI to maintain an open architecture and to publish its application programming interfaces so that software developers other than Alias and Wavefront could develop entertainment graphics software for use on SGI's workstations. [Final on 14 November l995] *Silicon Graphics, Inc*., Docket No. C-3626, 5 Trade Reg. Rep. (CCH) ¶ 23 838.

In *Mustad International Group NV*, the Commission provisionally accepted a consent agreement, subject to public comment, on 24 July l995 to settle charges that, through a series of acquisitions, Mustad International and its subsidiary, Mustad Connecticut, illegally monopolised the manufacture and sale of rolled horseshoe nails in the U.S., allowing Mustad to raise prices as much as 50 to 75 per cent. The proposed settlement requires Mustad to either divest all of its Connecticut horseshoe nail manufacturing assets, or to divest four, fully-functioning nail machines and to license technology and know-how to operate them, to a Commission-approved acquirer by 15 May l996, in order to re-establish a

viable competitor. [Final on 30 October l995] *Mustad International Group NV*, Docket No. C-3624, 5 Trade Reg. Rep. (CCH) ¶ 23 875.

On 23 August l995, the Commission accepted for public comment a consent agreement with Phillips Petroleum Co. whereby it agreed to modify its proposed acquisition of certain natural gas pipeline gathering systems owned by Enron Corp. so that Enron would not sell 830 miles of pipe and related assets within the Texas and Oklahoma Panhandle region to Phillips. The consent agreement would settle charges that the proposed acquisition would eliminate competition between the two companies in providing natural gas gathering services in the region, resulting in higher prices and reduced gas drilling and production. [Final on 28 December l995] *Phillips Petroleum Co*., Docket No. C-3634, 5 Trade Reg. Rep. (CCH) ¶ 23 882.

The Commission accepted for public comment on 28 August l995 a proposed consent agreement with Columbia/HCA Healthcare Corp. to resolve charges that its proposed acquisition of John Randolph Medical Center in Hopewell, Virginia, which has an inpatient psychiatric unit, would increase the already high level of concentration in the market for psychiatric hospital services in the Tri-Cities area of south central Virginia and would eliminate John Randolph Medical Center as a substantial competitive force there. Under the proposed order, Columbia will divest Poplar Spring Hospital, its psychiatric hospital in Petersburg, Virginia to a Commission-approved entity that would operate it in competition with Columbia. [Final on 24 November l995] *Columbia /HCA Healthcare Corp*., Docket No. C-3627, 5 Trade Reg. Rep. (CCH) ¶ 23 885.

On 18 September l995, the Commission issued for public comment a proposed consent agreement with Hoechst AG settling charges that its merger with Marion Merrell Dow, Inc. ("MMD") would injure competition in four drug markets -- a hypertension and cardiac drug (diltiazem), drugs used to treat severe leg cramps caused by arteriosclerosis; a drug used to treat inflammatory bowel disease (oral-dosage forms of mesalamine); and a drug used to treat tuberculosis (rifadin). With the exception of the diltiazem market, the proposed order would require divestitures to a Commission-approved entity that would develop and market the drugs in competition with the ones that Hoechst retains. As to the diltiazem market, the Commission alleged that competition was injured because the possibility of merger with MMD affected Hoechst's incentives to jointly develop a new, competing drug (Tiazac) with Bioval Corp. Apart from returning the rights to Tiazac to Bioval Corp., the proposed order requires Hoechst to take additional steps to ensure that Tiazac becomes an effective competitive product, including removing barriers to entry for new drugs by, among other things, requiring Hoechst to agree to settle ongoing litigation between MMD and Biovail and to provide Biovail with a toxicology package necessary to secure additional approvals of the Food and Drug Administration. [Final on 5 December l995] *Hoechst AG*, Docket No. C-3629, 5 Trade Reg. Rep. (CCH) ¶ 23895.

The Commission provisionally accepted on 21 September l995 a consent agreement with First Data Corp. settling charges that its proposed merger with First Financial Management Corp. would lead to higher prices in the consumer money wire transfer services industry since they are the only two companies in the U.S. that offer these services. Under the proposed settlement, the merged company would divest either the Western Union or MoneyGram business to a Commission-approved entity that will operate it in competition with the merged company. [Final on 16 January l996] *First Data Corp*., Docket No. 3635, 5 Trade Reg. Rep. (CCH) ¶ 23 899.

As a condition of the Commission agreeing not to challenge the acquisition by Rite Aid Corp. of several Brooks retail pharmacies in Maine from Maxi Drug, Inc., Rite Aid entered into an agreement with the Commission under which it can proceed with the acquisition but must maintain the viability and marketability of both its own and the Brooks pharmacies in specified areas in Maine until the Commission

investigation is complete. The arrangement preserves the Commission's ability to take whatever action is necessary to restore retail pharmacy competition in those areas under investigation, if the Commission determines that the merger substantially reduces competition in those areas. *Rite Aid Corp*., File No. 951-0120, 5 Trade Reg. Rep. (CCH) ¶ 23 906.

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 agriculture, railroad, electricity, and securities industries, among others. During FY95, the Division continued these efforts by filing comments in:

- Federal Energy Regulatory Commission proceedings involving power pooling arrangements and electric transmission access rules.

- Securities and Exchange Commission proceedings on new rules governing the execution and price improvement of small orders on the NASDAQ stock market.

- Department of Agriculture proceedings relating to the economic effects of marketing orders for tart cherries.

- Interstate Commerce Commission proceedings involving the consolidation of major railroads.

In FY95, the Division reviewed seven applications for new Export Trade Certificates submitted under the Export Trading Company Act and its implementing regulations and concurred in the issuance of seven new certificates. The goods and services covered by the certificates included textiles, fruit, and trade facilitation services.

In May 1995, the Division filed an amicus brief in connection with an agreement between Trans World Airlines and travel agents to settle a private case brought by the American Society of Travel Agents and other travel agents over the issue of commission caps. In response to concerns expressed by the Division, TWA and the travel agents modified their settlement by removing those parts of the settlement that fixed the commission levels TWA would pay all competing travel agents and created a collective incentive among all travel agents to favour TWA over its competitors. The Division then filed a brief noting that it did not object to the modified settlement (however, the Division expressed no position on the merits of the private antitrust action).

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 entry, protecting market power, chilling innovation, limiting competitive response of firms, or

wasting resources. The goal of the advocacy program 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 Bureaux 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 fiscal year 1995, the Commission staff submitted comments or amicus briefs to federal and state entities on competition issues in such areas as telecommunications, broadcasting, transportation, patents, electric power, funeral establishments and cemeteries, motor vehicle brokering and health.

i) Federal Agencies

The staff of the Bureau of Economics filed comments with the Federal Aviation Administration (FAA) on the effectiveness and viability of its High-Density Rule (HDR), which was adopted to help alleviate delays caused by congestion at certain high density airports -- Kennedy and LaGuardia in New York, O'Hare in Chicago, and National in Washington, D.C. Staff supported the FAA's efforts to encourage the use of market-based systems to allocate scarce airport resources, including the use of price-based and quality-based allocation schemes, but suggested that the FAA consider under what conditions the use of quantity-based regulation systems, such as the HDR, may be more efficient than price-based regulation systems. Staff recommended that the FAA consider rescinding the two year prohibition on the sale of slots obtained through a lottery, expanding the HDR to include additional airports that might be prone to congestion and delays due to excess demand for limited capacity during peak time periods, and expanding its slot usage data base to include such information as the size and destination of the airline using a particular slot, the prices at which carriers sell slots to another, and rates at which slots are leased. Staff suggested, that the HDR promotes, rather than limits, new entry because it creates a market in which potential new entrants can obtain operating privileges.

The staff of the Bureau of Economics filed reply comments with the Federal Communications Commission (FCC) in response to an FCC Public Notice concerning AT&T's request to be reclassified as a "nondominant" carrier. A comment filed with the FCC by a National Economic Research Associates (NERA) Study rejected a key assumption of a BE study, filed earlier in this proceeding. Staff suggested that NERA may have inappropriately generated its data using estimates from the BE study, and that had appropriate data been used, the results in the NERA might have been consistent with those of the BE study.

The staff of the Bureau of Economics filed comments with the Federal Communications Commission (FCC) about proposals to eliminate or relax the FCC's Prime Time Access Rule (PTAR), which limits how much network programming major market TV affiliates can broadcast during "prime time." According to the comment, the FCC believed adoption of the rule in 1970 would increase competition in independent production of programs, reduce network control over their affiliates' programming decisions, and increase the diversity of programs available to the public. Staff advised they could not conclude that competitive performance in the market for television programming would be threatened if the PTAR was eliminated. The networks and their affiliates have considerable mutual incentives to televise programming that is attractive to audiences and therefore valuable to advertisers, the major networks are now subject to greater competitive constraints than they were at the time of the rule's adoption, and factors other than PTAR, such as the emergence of cable television systems, are far more important contributors to the current strength of independent broadcasters. Staff concluded that when

assessed under a "public interest" standard, which seeks to promote consumer welfare, justification for the rule's continuance is questionable.

The staff of the Bureau of Economics filed comments with the Federal Energy Regulatory Commission (FERC) supporting its proposed rulemaking to promote competition in the electric power industry. Staff commended FERC for its proposal to uncouple power generation capability from transmission services, but pointed out that their "functional unbundling" approach would leave utilities with both the incentive and the opportunity to exercise market power and that preventing them from doing so would be problematic. Thus, staff suggested that "operational unbundling" could prevent discrimination and achieve the competitive benefits of open access more effectively and efficiently than would an attempt to mandate, regulate and monitor access. Staff also warned that competition problems in concentrated generation markets still must be addressed under open access, and further review is needed. Staff urged FERC to reform its transmission pricing policy at the same time it implements changes in transmission access, noting that pro-competitive reforms will not achieve their objectives, and might even prove counterproductive, unless prices and terms for transmission services also become economically efficient signals about investment and output. Staff recommended that if FERC adopts a program to recover stranded costs, that is, uneconomic costs that a utility already has incurred, it should adopt a method that would minimise price distortions and maintain incentives to innovate.

In comments filed with the Patent and Trademark Office (PTO), FTC staff urged the PTO to proceed cautiously in developing new guidelines in its handling of applications for software patents, to avoid inadvertently granting overly broad patent protection. Staff noted that PTO recognises the need to improve its ability to determine whether software products meet the tests for novelty and non-obviousness. Staff also noted that the dangers of overly broad unwarranted patent protection are especially acute in an industry such as software where the innovative process at issue is characterised by the accumulation of relatively small steps, rather than discrete leaps, and thus runs a greater risk of infringing possibly overbroad prior patents.

ii) States

The staff of the Seattle Regional Office submitted comments to the Alaska State Legislature on a proposal to regulate competition among marine pilots in Alaska. Staff suggested that as long as entry and rates are not artificially constrained by law or by other means, pilots in Alaska should have the usual market-based incentives to compete for customers through lower prices, innovation and increased efficiency. The concern that such competition would compromise safety standards has sometimes been cited as a reason to permit, or even require, pilots to form a cartel insulated from competitive pressure, as well as to prohibit ships from hiring pilots as employees. However, if safety concerns justify requiring all ships to use pilots of proven qualifications, those concerns can be vindicated through discipline against unsafe practices, application of competency-based, pilot-licensing standards, and sanctions against shipowners that fail to obey mandatory piloting requirements. Staff concluded that establishing a monopoly in piloting, by limiting the number of pilots and setting their rates, is likely to result in higher prices or poorer service without assuring increased safety.

The staff of the Bureau of Economics filed comments with the California Public Utilities Commission (CPUC) on proposals that would promote competition in the electric utility industry. Concerning the Federal Energy Regulatory Commission (FERC) proposal to uncouple power generation capability from transmission services using "functional unbundling," staff pointed out that it would leave utilities with both the incentive and the opportunity to exercise market power and that preventing them from doing so would be problematic. Thus, staff suggested "operational unbundling" could prevent

discrimination and achieve the competitive benefits of open access more effectively and efficiently than would an attempt to mandate, regulate and monitor access. Staff warned that competition problems in concentrated generation markets still must be addressed under open access, and further review is needed. Staff emphasized the importance of reforming transmission pricing policy, noting that pro-competitive reforms will not achieve their objectives, and might even prove counterproductive, unless prices and terms for transmission services also become economically efficient signals about investment and output. Staff recommended that if a program to recover stranded costs is adopted, the method should minimise price distortions and maintain incentives to innovate.

The staff of the Bureau of Consumer Protection submitted comments to the Kansas Legislature on a bill to amend Kansas' laws governing optometry. The bill would clarify the restrictions on commercial forms of practice and should make it easier for optometrists to locate in space leased from optical goods stores. Staff concluded that relaxing constraints on commercial practices is consistent with the direction the Commission took in its Eyeglasses II rulemaking and clarifying conditions under which optometrists may lease space from optical goods stores could benefit consumers through greater competition and efficiencies in operation.

The Cleveland Regional Office testified before the Michigan State House of Representatives on proposed legislation that would amend the Michigan statutes regulating the licensing and operation of funeral establishments and cemeteries in Michigan. Staff supported the legislation, concluding that joint ownership or operation of a funeral establishment and a cemetery could make possible new business formats and improvements in efficiency and could encourage entry of new competitors, which could in turn lead to lower prices and improved service to consumers.

The Chicago Regional Office submitted comments to the Minnesota State Senate on a bill to provide for licensing certain motor vehicle brokers that may be provided by individual brokers and by organisations such as credit unions and buying clubs. Staff cautioned that if the bill were applied to discourage or prohibit brokering services paid for directly by consumers, the result would be unfortunate. Staff suggested, instead, that the legislature consider permitting all kinds of broker services to compete effectively, which could benefit Minnesota consumers by saving them money and inconvenience.

The San Francisco Regional Office submitted comments to the State Assembly of Nevada on a bill that would prevent used vehicle dealers from brokering new vehicle sales for consumers. The bill would redefine "new" and "used" vehicles and change the permitted functions of dealers in a way that could discourage the business of acting as a broker to arrange sales or leases of new cars and trucks. Under the bill, vehicle brokering services to consumers could be curtailed, because parties that now offer those services would be prevented from continuing to do so, while those that are still permitted to offer the services may have little incentive to promote them. Thus staff concluded that the bill's effects on alternative methods of arranging new vehicle transactions could reduce competition and deprive consumers of savings that they could realise by using these methods.

The staff of the Bureau of Economics testified before the Joint Committee on the Public Interest in Competitive Practices in Healthcare of the Vermont legislature on a proposal to exempt certain co-operative agreements among providers from antitrust oversight. The proposal would authorise the issuing of a "certificate of public advantage" to applicants who demonstrate that the likely benefits of the agreement outweigh disadvantages attributable to reduction in competition. The testimony suggested that such a proposal runs a risk of encouraging or permitting agreements that could reduce choices of and raise prices for healthcare services. If approved, however, staff recommended adopting effective procedures for reviewing how the agreements are working, and for terminating those that are working to consumers'

detriment. Specifically, staff suggested modifying the proposal so that certificates are issued only for defined, limited terms.

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 Department provides antitrust and other legal advice to U.S. trade negotiators. 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 program 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 programs create long-term co-operative relationships with policy and enforcement officials in the countries involved.

The Division led the interagency group that drafted comments on behalf of the U.S. Government on the Japan Fair Trade Commission's proposed Antimonopoly Act Guidelines concerning the activities of trade associations. The Division urged the JFTC to ensure that trade associations do not engage in anticompetitive exclusionary behaviour that impedes the ability of foreign companies to compete effectively in Japan.

The Division also led the interagency group that drafted comments on behalf of the U.S. Government on the JFTC's proposed revisions to its premiums regulation. The Division urged the JFTC to liberalise further its restrictions on the use of premiums and other sales promotions, which currently inordinately affect the ability of new producers and new providers, both foreign and domestic, to gain a toe-hold in the Japanese market.

The Division co-chairs (with the Office of the U.S. Trade Representative) 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 Japan's antimonopoly law, to make its administrative procedures fair and open, and to accelerate an effective program 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 focused 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 anticompetitive

or unfair practices by industry associations, and revising KFTC regulations and guidelines that may impede procompetitive activities.

V. New Studies Related to Antitrust Policy

Antitrust Division Economic Analysis Group Discussion Papers

The Division issued six Economic Analysis Group Discussion Papers during the period 1 October 1994 through 30 September 1995.

94-1 WERDEN, Gregory J., FROEB, Luke M., and TARDIFF, Timothy J., "The Use of the Logit Model in Applied Industrial Organization, " EAG 94-1, 1 November 1994. Published at 3 *International Journal of Business Economics* 85 (1996).

94-2 GILBERT, Richard J. and SUNSHINE, Steven C., "Incorporating Dynamic Efficiency Concerns in Merger Analysis: The Use of Innovation Markets," EAG 94-1, 2 November 1994. Published at 63 *Antitrust Law Journal* 569 (1995).

94-3 McCABE, Mark J., "Principals, Agents, and the Learning Curve: The Case of Steam-Electric Power Plant Design and Construction," EAG 94-3, 17 November 1994. Forthcoming in *Journal of Industrial Economics*.

95-1 SCHWARTZ, Marius, and WERDEN, Gregory J., "A Quality-Signaling Rationale for Aftermarket Tying," EAG 95-1, 11 September 1995. Published at 64 *Antitrust Law Journal* 387 (1996).

95-2 WERDEN, Gregory J., and FROEB, Luke M., "Simulation as an Alternative to Structural Merger Policy in Differentiated Products Industries," EAG 95-2, 18 September 1995. Forthcoming in Malcolm B. Coate & Andrew N. Kleit, eds., *Competition Policy Enforcement: The Economics of the Antitrust Process*, Kluwer Academic Press, 1996.

95-3 GILLESPIE, William, "Cheap Talk, Price Announcements, and Collusive Coordination, " EAG 95-3, 25 September 1995.

Copies of these reports may be obtained by contacting Janet Ficco at 600 E Street, N.W., Suite 10000, Washington, D.C. 20530 or at (202) 307-3779. Other Division public materials may be obtained through the public information unit of the Division’s Office of Operations. Requests should be directed to Ms. Janie Ingalls, Room 221, Liberty Place Building, 325 7th Street, N.W., Washington, D.C. 20530. Ms. Ingalls may be reached at (202) 514-2481.

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

Michael R. WARD, *Measurements of Market Power in Long Distance Telecommunications*, April 1995. This study assesses empirically the competitiveness of the long distance telephone market. To do so, it estimates firm-specific long-run demand elasticities for AT&T and its rivals for long distance service marketed to households and small businesses during 1988-91.

Working Papers

Oliver GRAWE, Dolly HOWARTH, and Morris MORKRE, *Did Depreciation of the Dollar Render the Steel VRA's Nonbinding?* (WP#208), December 1994.

John SIMPSON, *When Does New Entry Deter Collusion?* (WP#209), December 1994.

EUROPEAN COMMISSION*

(1995)

Executive Summary

It is now widely recognized that competition policy has a key role to play in ensuring that industry remains competitive. It is a vital tool in creating the environment in which business can flourish and in which lasting growth and new jobs can be created. However competition policy is also about consumer protection. Within the European Community the single market must first and foremost serve people. The strict application of the competition rules therefore ensures that consumers have freedom of choice between quality products at competitive prices.

During the year the Commission has continued to take action to prevent the segmentation of the internal market. It has attacked those business practices which block parallel imports or attempt to restrict new entrants to markets. It has also pursued its policy of liberalising and opening up to competition certain sectors traditionally subject to monopoly such as telecommunications, transport, postal services and energy.

In a series of investigations the Commission took action against several firms found to be blocking parallel imports, and in one case imposed heavy fines. The Commission has also investigated several cases relating to abuses of a dominant position and managed to agree appropriate changes in business practices from those involved.

On the legislative side a new group exemption on car distribution was adopted which should ensure that customers are free to import vehicles from other Member States. The Commission´s work on liberalisation also continued with detailed proposals for directives on greater liberalisation in the telecommunications sector and a draft proposal for a directive on competition in the postal sector. The Commission also invoked several infringement proceedings under Article 90(3) against Member States particularly in relation to discriminatory behaviour in the telecommunications sector.

Despite the importance of maintaining the single market the Commission also recognises the benefits of cooperation between firms competing in increasingly dynamic global markets. Such cooperation is often vital in enabling them to remain competitive by improving R&D efforts, reducing costs and developing new products. Therefore whilst accepting that such cooperation must not lead to anti-competitive situations which are incompatible with the Competition rules of the Treaty the Commission has been prepared to consider these factors in approving several joint ventures during the year.

Merger activity continued to increase with activity in 1995 24 percent higher than in 1994. The media sector has provided an increasing number of notifications which reflect the changing patterns of

* The original language of this report is English.

ownership in the sector and the convergence of new technologies. Most have not presented any competition problems but in two cases the Commission prohibited ventures that it felt raised significant competition issues.

Looking to the future the Commission is considering how to make the best use of its limited resources. To this end it is considering possible amendments to the application of the de minimis rules and greater involvement of the national authorities in enforcement. It is also considering ways to simplify and introduce greater transparency into the application of its competition rules. It has adopted a new group exemption covering technology transfer agreements which will replace two regulations on know how and patent licensing. It has also published guidelines on the application of competition rules in certain sectors (eg cross border credit transfers). It has also published a Green Paper on the operation of the merger regulation and a draft of an amendment to this regulation. Finally the Commission has also announced it intends to publish a Green Paper on the treatment of vertical restraints .

The Commission continued to be active in the field of international competition rules. In July 1995 the group of experts convened by Mr Van Miert to discuss the prospects for closer cooperation between competition authorities presented its report. It made a number of recommendations including the dual approach of continuing to strengthen bilateral cooperation between competition authorities whilst at the same time working to develop a plurilateral cooperation framework. Following the accession of Austria, Finland and Sweden on 1 January 1995 the Commission has continued to prepare for the accession of the Countries of Central and Eastern Europe (CEECs) to the Community. It continues to provide training and support to the competition authorities in these countries as they develop their own competition rules. The Commission has also developed its bilateral relations with other countries such as the US and Japan and has continued to take an active role in the work on competition of the OECD, WTO and other international organisations.

Changes to Competition Law and Policy

Antitrust (Articles 85 and 86)

Car Distribution

The Commission adopted a new group exemption relating to the distribution and servicing of motor vehicles in June 1995 (Commission Regulation (EC) No 1475/95). Because motor vehicles are consumer durables which require expert maintenance and repair, manufacturers cooperate with selected dealers and repairers in order to provide specialized distribution and servicing for the product. Such arrangements are likely to enhance efficient distribution of the products concerned and the exclusive and/or selective nature of the distribution system can be regarded as indispensable for attaining rationalisation and efficiency in the motor vehicle industry.

The revised group exemption contains several amendments aimed at intensifying competition in the markets for cars and spare parts and guaranteeing consumers the full benefits of the internal markets. In particular the new regulation secures greater independence for dealers from the car manufacturers. Dealers are now allowed to sell cars of another manufacturer provided this is done on separate premises under separate management and in the form of a single legal entity. Manufacturers and supplier are also not allowed to impede access to the market by independent spare parts producers or distributors, or to restrict a dealer´s right to procure spare parts of equivalent quality from outside the network. The new Regulation also expressly bans any practices designed to prevent parallel trade, between Member States.

Technology Transfer

A revised group exemption for technology transfer agreements came into force on 1 April 1996 (Commission Regulation EC No 240/96). This replaces two previous group exemptions covering Patent and Know How licensing. The new regulation reflects the Commission´s aim of encouraging the dissemination of technical knowledge in the Community and promoting the manufacture of technically more sophisticated products. There was considerable overlap between the two previous regulations and the harmonisation of the new rules therefore reduces the disparities which existed and creates greater legal certainty.

The group exemption continues to permit some territorial restrictions commonly associated with technology transfer agreements, eg the obligation on a licensor not to license other undertakings in the licensed territory. However it also contains a list of restrictions that are not permitted, the ´black´ clauses which include restrictions on the selling price of the licensed product, the quantities to be manufactured or sold and restrictions on exploiting competing technologies.

There is no explicit market share limit in the final Regulation. However the Commission has indicated that where a licensee´s market share exceeds 40 percent it may consider whether it is necessary to withdraw the benefit of the block exemption.

Maritime Transport

A new group exemption covering certain categories of agreements relating to liner shipping companies (consortia) entered into force on 22 April 1995 for a period of five years. The block exemption relates only to international liner shipping services to or from one or more community ports intended exclusively for the carriage of cargo, chiefly by container. The exemption permits a range of coordination activities; exchanges of information; and pooling of equipment such as vessels, containers or port facilities. By the Summer of 1996 four existing consortia had been exempted under this Regulation and a fifth given an individual exemption.

Air Transport

Regulation (EEC) No 1617/93 states that Article 85(3) is applicable to the holding of consultations on tariffs for the carriage of passengers and freight on scheduled airlines between Community airports. However, as it is clear that tariffs established through consultation by airlines are appreciably higher than normal market prices the Commission considers it desirable to amend the Regulation to exclude tariff consultations related to freight. The Commission published a notice in December 1995 giving airlines an other interested parties a chance to comment. It will decide on further action in 1996.

Cross Border Credit Transfers

In September 1995 the Commission adopted a notice on the application of the Community competition rules to cross border credit transfers. The notice is part of a package of measures adopted by the Commission, including a proposal for a directive, with a view to improving the cross border credit transfer services offered by banks.

The notice states that the Commission´s general approach will be to view positively cooperation agreements between banks that enable them to meet the terms of the directive. However this cooperation should not go as far as to eliminate competition between banks.

In order to ensure that smaller banks are not unfairly excluded from systems to which they must belong if they are, in practice, to be able to offer cross border credit transfers the conditions for access to such systems should be objectively justified and applied in a non-discriminatory manner. Banks must also not conclude agreements among themselves that determine the level of customer fees or the way in which they are to charge such fees.

Leniency Programme

Fact finding is accounting for an increasing share of the Commission´s administrative resources for competition law enforcement. In certain cases, the benefit which may accrue to consumers from the detection and prohibition of secret cartels outweighs the interest the Community may have in fining companies. For this reason the Commission is considering granting lenient treatment to companies which cooperate in the preliminary investigation or proceedings in respect of an infringement. It published a notice specifying the conditions under which firms cooperating with the Commission can receive immunity from fines or significant reductions in the fine which would otherwise have been imposed upon them .

Green Paper on Vertical Restraints

The two Group Exemptions covering vertical restraints within the Community relating to exclusive purchasing and exclusive selling expire in 1997. The Group exemption covering franchising expires in 1999. As a preparation for this the Commission has indicated that it will undertake a review of its policy towards vertical restraints in order to ascertain whether Community policy in this field is still appropriate to the distribution and consumer needs of the future.

The review will be in the form of a Green Paper which will set out different alternatives for future policy. The intention is to publish this paper for public consultation towards the end of 1996.

De Minimis Agreements

Agreements whose effects on trade between Member States or on competition are negligible are not caught by Article 85(1). Only those agreements are prohibited which have an appreciable impact on market conditions. The Commission´s notice on agreements of minor importance sets quantative criteria to give guidance as to the meaning of ´appreciablity´ Despite recent increases in thresholds it is believed that a further review of the *de minimis* concept may be justified. The Commission has, therefore, started internal deliberations on this issue with a view to presenting new proposals for consultation during the course of 1996.

Decentralisation

The Commission continues to encourage the national enforcement of Community competition law. It considers that there is not normally a sufficient Community interest in examining a complaint when

the plaintiff is able to secure adequate protection of his rights through national competition authorities or before national courts. An important step forward in the decentralisation effort was the Commission´s notice, published 13 February 1993, on cooperation between national courts and the Commission when applying Articles 85 and 86. The Commission has also now published, for consultation, a draft notice on cooperation between the Commission and national competition authorities, see the Official Journal of 10 September 1996. This envisages that there will be mutual cooperation between Member States' competition authorities and the Commission in cases falling within either Article 85(1) and Article 86. This would be the case whether it is the Commission or a Member State that initiates an investigation.

Trans-European Networks

During 1995 the Commission also examined the relationship between the private financing of Trans-European networks and competition. The Commission proposes to apply the following principal criteria when processing such cases submitted to it. First the opportunity to reserve capacity should be given to all Community operators likely to be interested. Secondly, capacity reserved must be in proportion to either investment in project or likely use. Thirdly not all capacity should be reserved initially, some should remain available to enable other firms to operate competing services. Enterprises must be prepared to relinquish operating rights if they are not used. Finally the duration of agreements reserving rights must be reasonable and adapted to each case.

State Monopolies and Monopoly Rights

Telecommunications

The Commission continued to promote liberalisation in the field of telecommunications. In January 1995 the Commission adopted the second part of a Green paper on the liberalisation of telecommunications infrastructures. After wide consultation the Commission adopted in May a communication listing the key measures necessary to complete moves towards full liberalisation. These include :

- setting the date of 1 January 1998 for the discontinuation of all remaining exclusive and special rights for both public voice telephony and network competition;

- ensuring the financing of a universal service and clarifying the interconnection of access conditions, via further development of the legislative framework ensuring open network provision;

- further development of the regulatory framework at European and national level.

Three Commission proposals for directives under Article 90(3) related to this liberalisation programme were discussed or adopted during the year.

i) Cable TV liberalisation

On 18 October 1995 the Commission adopted a Directive allowing cable TV infrastructure to be used to provide already liberalised telecommunications services.

ii) Mobile Phone Telephony

Following a period of consultation on earlier drafts the Commission formally adopted a Directive on mobile phone liberalisation in January 1996. This seeks to help new entrants gain access to the market and facilitate the interconnection of national networks. It requires Member States to abolish all exclusive or reserved rights in the field of mobile communications and to put in place procedures for the authorization of licences.

iii) Full Competition Directive

The Commission published a draft of an Article 90(3) Directive in October 1995. This envisages full liberalisation of all telecommunications services by 1 January 1998 with transitional periods for some Member States. Restrictions on the use of alternative infrastructures must be lifted by 1996, apart from public voice telephony, which is to be liberalised by 1998. The conditions and rules for the authorization of interconnection must be established by 1997. The Directive also lays down the fundamental principles governing authorization of new entrants to the telecommunications market.

Postal Services

In July 1995 the Commission adopted a package of measures relating to competition in the postal sector. These consisted of a proposal for a European Parliament and Council Directive establishing common rules for the development of postal services and a draft Commission communication on the application of competition rules to the sector. The overall aim of these measures is to guarantee the provision of universal service and at the same time to open up the postal market to greater competition.

Energy

As part of the Community's continuing efforts to liberalise those sectors traditionally dominated by monopolies and exclusive rights the Council adopted, in early 1996, a common position on the proposal for a Directive concerning common rules for the internal market in electricity. This is currently being considered by the European Parliament. Discussions are continuing on a similar Directive in relation to the internal market in gas.

Mergers

The revised Implementing Regulation came into force on 1 March 1995. In addition, four interpretative notices which were published at the end of 1994 were applied for the first time in 1995. They concern the distinction between concentrative and cooperative joint ventures, the notion of a concentration, the notion of undertakings concerned and the calculation of turnover.

These changes in the operation of the Merger Regulation were adopted by the Commission as a result of its 1993 review exercise. A further review exercise was launched during 1995 which involved wide consultation with Member States, Community institutions and the legal and business communities. As a result of this exercise the Commission published, in January 1996, a Green Paper with several options for changes to the Merger Regulation. The most important were a proposed reduction in the turnover thresholds and a proposal to grant the Commission greater competence to deal with mergers,

which would otherwise be subject to more than one national authority. The aim of these was to reduce the need for multiple national filings which increase uncertainty, effort and cost for business and may lead to conflicting decisions.

As a result of comments on this Green Paper the Commission adopted a proposal to amend the Merger Regulation in July 1996. This proposal was officially transmitted to the Council of the European Parliament in September 1996. This proposed that the threshold for the worldwide turnover of all those companies involved should be reduced from ECU five billion to ECU three billion and that for the turnover of individual companies within the Community, should be reduced from ECU 250 million to ECU 150 million. For mergers involving companies with a worldwide turnover of between ECU three and two billion, Community turnover between ECU 150 and 100 million and which qualified for consideration in at least three Member States the Commission would have exclusive competence.

The proposal also contains a wider definition of the concept of concentration under the Merger Regulation to include all full-function joint ventures. This will have the advantage of bringing all full-function joint ventures under the procedures and deadlines of the merger regulation and eliminating the complexities inherent in the distinction between cooperative full-function and concentrative joint ventures. The proposals also include procedural changes to improve cooperation with Member States, amendments to the calculation of turnover for financial institutions and a number of smaller amendments to improve the operation of the Regulation.

International Competition Rules

European Economic Area

After Austria, Finland and Sweden joined the European Union on 1 January 1995, Norway and Iceland were the only remaining EFTA signatories of the Agreement on the European Economic Area (EEA Agreement. On 1 May 1995 they were joined by Liechtenstein.

Central and Eastern Europe, Baltic States, new Independent States and Mediterranean countries

The Commission´s White Paper on the integration of the CEECs into the Community underlined the importance of a viable competition policy for economies in transition. These countries are currently in the process of developing their competition laws, with technical assistance from the Commission. Substantial progress has been made and all but one associated country now has a competition authority. There has also been some progress on agreeing rules for implementing the competition rules in the Europe Agreements to undertakings. One country has agreed to the set of rules and the formal approval process is being launched.

The Free Trade Agreements with the Baltic States came into force on 1 January 1995, although they will soon be replaced by the Europe Agreements signed in June. These countries must now fulfil the same conditions for inclusion in the pre-accession strategy which the EU has set for the CEECs.

Partnership and Cooperation Agreements have also been signed with Russia and other former Soviet Union countries. The competition rules are less stringent than those in the CEEC Agreements, although they do included a clause on the approximation of legislation. The Community has provided technical assistance to these countries under the TACIS programme.

Association agreements have also been signed with Tunisia, Morocco and Israel and are currently being negotiated with Jordan, Egypt and Lebanon. These contain, or are expected to contain, competition rules as provided in the Europe Agreements. The agreement on customs union with Turkey also contains obligations on the approximation of competition law.

North America

The Agreement between the European Community and the United States on the application of their competition laws was approved by the European Council on 10 April. At the same time the Council approved the text of a letter to the United States clarifying the European Community´s interpretation of certain provisions of the agreement. These primarily relate to the handling of confidential information by the respective competition authorities. The biannual high-level meetings between the Commission and the US anti-trust authorities also resumed in November after a break of two years. The discussions concentrated on the effectiveness of current bilateral cooperation and a number of areas were identified for further study. The Commission also began discussion with Canada on a bilateral cooperation agreement. It is expected that the negotiations will be concluded during 1996.

Japan

Contacts between DGIV and the Japanese Fair Trade Commission (JFTC) continued throughout the year. Under the deregulation plan adopted by the Japanese Government DG IV put forward its request for a broader and more rigorous application of Japanese competition rules.

Multinational Organisations and Relations

Throughout the year the Commission continued to take an active part in the discussions of the OECD, the WTO and UNCTAD on a range of competition issues. In July 1995 the group of experts convened by Mr Van Miert to discuss the prospects for closer cooperation between competition authorities presented its report. It made a number of recommendations including the dual approach of continuing to strengthen bilateral cooperation between competition authorities whilst at the same time working to develop a plurilateral cooperation framework. The latter would include all the elements already in bilateral agreements as well as: a set of minimum competition rules; a binding positive comity instrument; and an effective dispute resolution mechanism. At a meeting of the Directors-General of the Member States´ competition authorities in October it was agreed that a working group should be established to consider the technical aspects of some of the group´s recommendations.

Enforcement of competition Law and Policy

European competition policy in 1995 was marked by a sharp increase in the number of cases submitted to the Commission and in the number of decisions taken. A large part of this increase was due to the fact that three new Member States joined the European Union on 1 January 1995. However the figures also show that businesses are increasingly aware of the wider European dimension to their markets.

Articles 85 and 86

During 1995 the Commission registered 559 new cases, of these 368 were notifications 145 complaints and 46 cases opened on the Commission´s own initiative. This represents an increase of 42 percent compared to 1994. Almost half of the increase in new cases, 78, is attributable to the transfer of cases from the EFTA surveillance authority following the accession of Sweden, Finland and Austria to the Union. During the year the Commission closed 433 cases, of which 419 were through an informal procedure and 14 by formal decision.

Restrictions on Parallel Trade

It is a well established principle of Community competition law that producers are forbidden to divide the internal market by private agreements and to maintain price differences by arranging anti-competitive absolute territorial protection. However, such behaviour continues to occur in the market and, where it comes to light the Commission will continue to take action.

BASF/ Accinauto

In a decision of 12 July 1995 the Commission imposed a fine of ECU 2.7 million on the German car refinish paint producer BASF Lacke Farben, a subsidiary of the BASF group, and a fine of ECU 10 000 on BASF´s exclusive distributor in Belgium and Luxembourg, Accinauto S.A. The case originated with a complaint by two English parallel importers of Glasurit car refinish paint products. They alleged that Accinauto, from whom they brought the Glasurit products, had ceased deliveries to them in the summer of 1990 on the instructions of BASF. The Commission carried out investigations on the premises of BASF and Accinauto and found out that Accinauto was bound by a contractual obligation to transfer to BASF all orders from customers from outside its exclusive distribution territory. The Commission concluded that this obligation constituted an unacceptable restriction of competition as it hindered the export by Accinauto of the relevant products from Belgium to the United Kingdom.

Organon

Organon is a British subsidiary of Akzo (Netherlands) which specialises in the manufacture of and marketing of contraceptive pills. In May 1994 Organon changed the price regime applicable to some of its popular brands which held substantial market shares throughout the Community. The new price regime differentiated between those pills to be sold in the UK and those destined for export. The former qualifying for a discount of 12.5 percent. Following several complaints the Commission initiated proceedings against Organon. The Commission took the view that the new price regime constituted a serious infringement of the competition rules in that it gave rise to discrimination in the prices of the products according to their geographical destination. As a result consumers could no longer enjoy the benefits of parallel trade.

Organon ultimately decided to abandon the new pricing regime to which the Commission had objected, and reintroduced the previous price conditions. The Commission therefore suspended its proceedings but reserved the right to examine the forthcoming pricing system which Organon intends to bring in.

Restrictions on Access to the Markets by new Entrants

A truly competitive internal market also implies that companies are free to enter into the market to compete with existing market players. The Commission is therefore particularly keen to keep open markets and has in fact intervened where companies, whether through restrictive agreements, or by unilateral action have impeded access to the market by new entrants.

Unilever/Mars

Unilever is the market leader in most EU Member States in impulse ice cream products, i.e. individually wrapped ice creams for instant consumption. In Ireland it is by far the largest ice cream producer. Unilever´s distribution system in Ireland consisted of providing freezer cabinets to retailers subject to a condition of exclusivity whereby only Unilever products could be stored in the cabinets. Following a complaint from Mars, the Commission examined the distribution arrangements operated by Unilever in Ireland. It found that, where a retailer has only one or more Unilever freezer cabinet in his outlet that outlet is in practice tied exclusively to the sale of Unilever ice cream. As a result the majority of all outlets offering impulse ice cream in Ireland fall into this category. The Unilever agreements had the cumulative effect of appreciably restricting competition by preventing third competitors´access to the market.

Unilever, however, agreed to alter its practices with the aim of freeing up the market, in particular by giving wider choice to retailers. The Commission has accordingly announced that the new arrangements appear to meet the conditions for the granting of an exemption.

Van Marwijk/FNK-SCK

In its decision of 29 November 1995 the Commission imposed fines on FNK and SCK for infringements of Article 85(1) in the Dutch crane-hire market.

FNK is an association of Dutch firms which hire out mobile cranes. SCK was set up on the initiative of FNK in order to guarantee through a certification system, the quality of cranes and equipment used in the crane hire business. Most of the firms which participate in SCK are also members of FNK. They account for between 50 and 80 percent of the Dutch market. Crane hirers themselves hire cranes from other crane hirers on a large scale.

In its Decision the Commission found that FNK had applied a system of recommended prices for nearly twelve years. It also found that SCK was closing off the crane hire market in and around the Netherlands by prohibiting SCK certificate holders from hiring cranes from firms not affiliated to SCK. It considered that the SCK hiring ban was caught by Article 85(1) as the SCK certification system did not fulfil the conditions of openness and acceptance of other equivalent guarantee systems. It concluded that the ban not only restricted the freedom of action of the affiliated firms but also considerably impeded access by third parties to the Dutch market. The Decision required FNK and SCK to end the infringements, in so far as they had not already done so and imposed fines of ECU 11.5 million on FNK and ECU 300 000 on SCK.

ICG/CCI Morlaix

Irish Continental Group (ICG) applied to the Chambre of Commerce et d'Industrie de Morlaix (CCI Morlaix) for access to the port of Roscoff in Brittany in order to start a ferry service between Ireland and Brittany in the Summer of 1995. Brittany Ferries was at that time the only ferry company operating between Ireland and Brittany. An agreement was reached in principle between the parties following which ICG started to make and take bookings for its new ferry service. However, negotiations were suspended in January 1995 and no final agreement could be reached between CCI Morlaix and ICG.

Following a complaint to the Commission by ICG the Commission found that CCI Morlaix, being the operator of the port of Roscoff, which was the only port capable of providing adequate port facilities in France for ferry service between Brittany and Ireland, was *prima facie* in a dominant position. It also found that, by its unjustified refusal to give ICG access to the port facilities of Roscoff, CCI Morlaix had *prima facie* abused its dominant position in violation of Article 86. In May 1995 the Commission ordered interim measures obliging CCI Morlaix to take the necessary steps to allow ICG access to the port of Roscoff until the end of the Summer. The parties subsequently agreed a five year contract for the use of the Roscoff port facility.

Globalisation of Markets

The market for regional aircraft is an example of a sector with a worldwide dimension. The main manufacturers operate in all continents. In June 1995 the aircraft manufacturers Aerospatiale, Alenia and British Aerospace notified to the Commission a joint venture involving their regional aircraft activities. The Commission took the view that the joint venture would not lead to a significant reduction in competition for the consumer. It also represented an important stage in the restructuring of the regional aircraft industry in Europe, which is characterised by over capacity, as it would produce a company with an industrial and financial structure better adapted to the exigencies of the market. The Commission therefore authorised this joint venture by means of a comfort letter in August 1995.

Application of Articles 85 and 86 in the telecommunications sector

The ongoing liberalisation of the telecommunications sector, together with the increasing convergence of telecommunications, information technologies and media, are spurring substantial commercial activity in this sector. Market players are now positioning themselves to take advantage of the new opportunities. This has resulted in a wave of new alliances and partnerships being announced or implemented. The application of the basic competition rules to these alliances has become one of the major challenges for EU competition policy in recent years. One main category of such alliances are strategic alliances between incumbent telecommunications operators moving into global markets.

The Commission has also launched an in depth and comprehensive examination of the newly emerging strategic alliances which are being formed to offer mobile satellite telecommunications services on a worldwide basis. In this sector which has only a few global market players, it is essential that competition is safeguarded in the downstream markets involved, namely local service provision and equipment supply.

Atlas/Phoenix

Atlas is a joint venture between the French and German public telecommunications operators. France Telecom (FT) and Deutsche Telekom (DT). It is also the instrument through which DT and FT will participate in a second joint venture, known as Phoenix, with the US company Sprint Corporation.

Atlas is targeted at the markets for advanced corporate telecommunications services and for standardized low-level packet switched data communication services. Phoenix is aimed at similar markets but also at the market for traveller services and for so-called carrier´s carrier services.

The Atlas and Phoenix arrangements raised a number of competition concerns. In particular with respect to DT and FT´s home markets where they continue to hold dominant positions in a number of telecommunications services and the provision of infrastructure.

In response to the Commission´s concerns the parties to these ventures as well as the French and German governments gave various undertakings relating to non-integration of these joint ventures and nondiscriminatory access to networks. However the most important commitment made by the governments was that the use of alternative telecommunication infrastructure was to be liberalised from July 1996 and full liberalisation, i.e. including basic voice telephony and infrastructure, will be achieved by 1 January 1998.

On this basis the Commission has indicated that it is ready subject to views of third parties to take a favourable view of the Atlas-Phoenix agreements.

Air Transport

Co-operation between airlines can facilitate the healthy restructuring of an air transport in Europe and lead to an improvement in the quality of consumer services and better cost control. However it is important that this restructuring does not involve unnecessary restrictions of competition and does not prevent new competitors from entering the market.

Lufthansa/SAS

In May 1995 Lufthansa and SAS notified the Commission of a general cooperation agreement providing for the setting up of an integrated air transport system between the two airlines. This was to be based on their long term relationships in the commercial and operational fields and involve integration of their worldwide networks. Commercial cooperation would be particularly close on the routes between Scandinavia and Germany where the parties are considering a joint venture.

The Commission stated that although the agreement appreciably restricted competition on the markets in question it intended to issue an exemption provided that certain conditions were met. These were principally that: there should be a freeze on the frequencies operated by the two airlines; they should open up their frequent flier programme to airlines not having such a programme; they should conclude interlining agreements with new entrants; they should terminate certain cooperation agreements with other airlines and give up slots at certain crowded airports to give new entrants access. The Commission adopted a decision granting and exemption on 16 January 1996.

Abuse of Dominant Position in Secondary Product Markets

Several complaints received by the Commission related to the abuse of dominant position in secondary product markets such as for spare parts or maintenance services. These products are used in conjunction with a primary product and have to be technically compatible with it. Thus for many secondary products there may be few or no substitutes other than those parts or services supplied by the primary supplier. This raises many complex issues as to what is dominance in the secondary market and the relationship to the primary market.

Pelikan/Kyocera

In September 1995 the Commission rejected a complaint from Pelikan, a German manufacturer of toner cartridges for printers and photocopiers, against Kyocera a Japanese manufacturer of computer printers. Pelikan manufactures and sells toner cartridges for use with Kyocera´s printers which compete directly with the cartridges produced by Kyocera itself. Pelikan´s complaint alleged a number of practices by Kyocera to drive Pelikan out of the toner market and accused Kyocera of abuse of its dominant position in the secondary market. The Commission found that, with respect to Article 86, Kyocera did not enjoy a dominant position in any relevant market and there was no evidence of any behaviour that could be regarded as abusive. In particular the Commission did not find that Kyocera enjoyed a dominant position in the market for consumables for Kyocera printers despite its high market share. This was because Kyocera was subject to intense competition in the primary market for printers which restrained its actions in the secondary market. Purchasers were well informed as to the prices charged for their product and appeared to take into account the likely cost of replacing toner cartridges in deciding which printer to buy.

State Monopolies and Monopoly Rights Articles 37 and 90

Throughout 1995 and 1996 the Commission has continued to pursue its policy of liberalising and opening up to competition certain sectors traditionally subject to monopoly such as telecommunications, energy, postal services or transport.

Telecommunications

Omnitel Pronto Italia

On 4 October the Commission took a formal decision under Article 90(3) against the Italian Government for discriminating against Omnitel Pronto Italia and in favour of the State Operator Telecom Italia Mobile. The discrimination which strengthened the dominant position of Telecom Italia took the form of a requirement that Omnitel pay an entry fee for a GSM licence without a similar payment being required from Telecom Italia and without compensation for Omnitel in the form of an easing of the regulatory environment. The decision provided that the Italian Government must either require that Telecom Italia make an identical payment or adopt corrective measures equivalent in economic terms.

Vebacom

In April 1995 the Commission received a complaint under Article 90 from Vebacom, the telecommunication subsidiary of VEBA AG a German utilities holding company. Vebacom had madeseveral unsuccessful attempts to obtain a licence for a broadband telecommunications network based on synchronous hierarchy (SDH) technology which would allow the transfer of data between 36 different sites of the German public television broadcaster ARD.

The Commission formed the preliminary view that the complaint was justified, in particular since Vebacom intended to offer a service not offered by Deutsche Telekom the holder of the infrastructure monopoly in Germany. After informal discussions with the Commission the German Ministry of post and Telecommunications agreed to grant a licence for the establishment of an alternative telecommunications network

Deutsche Telekom

Following a complaint in January 1996 from several of Deutsche Telekom´s competitors the Commission launched an investigation into a new system of proposed business customer tariffs from DT. The Commission found that these tariffs would discriminate in favour of business customers, would have ´price squeezing´ effects on competitors and that they represented ¨bundling¨ i.e. the linking of the provision of monopoly and competitive services. The Commission therefore required DT and the German Government to take certain actions to mitigate these effects. These included: a commitment from the German Government to issue at least two new licences for the construction and ownership of alternative infrastructure at the same time as the new tariffs come into force and that appropriate access agreements for connection of competitors to DT´s network are also agreed by this time. As the German Government has agreed to these, and other, conditions the Commission has suspended its investigation. The implementation of these measures is also expected to have important positive effects on the broader competitive structure of the German Telecoms market.

Transport

Brussels National Airport

In June 1995 the Commission adopted a decision under Article 90(3) requesting the Belgian Authorities to end the system of discounts on landing fees charged at Brussels National Airport. British Midland the airline which lodged the complaint considered that the system enabled Sabena, its main competitor on the Brussels London route to benefit from a discount on landing fees, which was not available to other airlines. The Commission concluded that the system constituted a state measure within the meaning of Article 90(1), read in conjunction with Article 86, as it had the effect of applying dissimilar conditions to the airlines for equivalent transactions and hence distorting competition. The Commission considered that such a system could be justified only where there were economies of scale achieved by the airport operator. As this did not apply in the case in question the Commission requested the Belgian authorities to put an end to the system.

Other State Monopolies of a Commercial Character

The adjustment of national monopolies of a commercial character in the new Member States was the subject of extensive discussions between the Commission and the governments concerned. The aim

was to adjust the laws governing such monopolies to comply with Community legislation and in particular to Article 37 of the Treaty. During 1995 the Commission initiated infringement procedures against Austria for two cases relating to its national monopolies for the import of alcohol and tobacco which had not been adequately opened to Competition.

Mergers

During 1995 the Commission received 114 notifications under the Merger Regulation and took 109 final decisions. Activity was over 24 percent higher than in the previous year. A total of seven in-depth (second phase) investigations were completed during the year. As a result of these investigations two proposed operations, both in the media sector, were prohibited. The remaining five operations were all cleared two unconditionally the remaining three with conditions designed to remove the competition problems identified by the Commission. Activity in the first half of 1996 continued to increase with the Commission taking over 80 decisions by the end of July 1996. These included one prohibition, four clearances with conditions attached and the decisions to start four further second phase investigations.

Media Cases

The Commission has received an increasing number of notifications in the media sector which reflect the changing patterns of ownership and the convergence of previously separate technologies. The Commission attaches the highest importance to cases in this sector. Several of these cases involved significant horizontal and vertical effects with new companies being created which could potentially restrict access to TV networks. However, the Commission is willing to see new companies being set up in this sector provided that they do not create or strengthen a dominant position.

Nordic Satellite Distribution

Nordic Satellite Distribution (NSD), was a joint venture between three of the largest media players in the Nordic TV and media market. Norse Telekom A/S is the largest cable operator in Norway, has pay-TV distribution activities in Norway and controls satellite capacity suitable for nordic countries. TeleDanmark A/S (TD) is the dominant cable TV operator in Denmark. Industriforvaltnings AB Kinnevik is a Swedish company with major interests in TV programming, particularly in the Scandinavian cable and satellite markets, as well as in magazines and newspapers. The purpose of the venture was to transmit satellite TV programmes to cable TV operators and households receiving satellite TV via their own dish.

The Commission concluded that NSD would lead to a concentration of the activities of its parents and create too great a degree of vertical integration. The vertically integrated nature of the operation would have meant that the parties would have been able to foreclose the Nordic satellite TV market to competitors. As these markets are currently in a transitional phase the Commission acted to ensure that these future markets would not be foreclosed and declared the joint venture in its current form incompatible with the Common market and the EEA agreement.

RTL/Veronica/Endemol

The case involved a joint venture, Holland Media Group (HMG), between several broadcasters based in the Dutch market, RTL, Veronica and Endemol. The Commission investigated the joint venture as a result of a request from the Dutch Government under Article 22 of the Merger Regulation which allows a Member State to refer a case to the Commission even if it does not have a Community dimension provided that there is an effect on trade between Member States.

Following its investigation, the Commission concluded that the new company would have at least 40 percent of the market for free access TV broadcasting in the Netherlands and more than 60 percent of the TV advertising. In addition Endemol´s position as the largest independent TV producer would be strengthened by its participation in HMG.

The Commission therefore concluded that the joint venture as initially proposed was incompatible with the Common Market. This did not, however, prevent HMG from continuing since there is no suspension for cases under Article 22. The Commission asked the parties to propose appropriate remedies to restore effective competition to the Dutch TV Market.

Following this decision Endemol withdrew from the joint venture, which effectively removed the link between the largest Dutch TV producer and the leading commercial TV broadcaster in the Netherlands. RTL also agreed to change one of its channels RTL5 from a sport to a news channel thus effectively reducing the market share in advertising of HMG. On the basis of these changes the Commission was able to approve the joint venture in July 1996.

Other In depth Investigations

The majority of in-depth investigations completed during 1995 and the first half of 96 have been declared compatible with the common market. The one exception being the proposed merger between Gencor and Lonrho.

Gencor/Lonrho

Gencor and Lonrho had proposed the merger of their respective Platinum producing subsidiaries. This would have left the merged group with approximately 35 percent of the market, the majority of the rest being held by a South African group, Amplats, and Russia. The Commission considered that this would lead to a duopoly dominating the world market for Platinum and Rhodium which would significantly limit competition in the common market. Although these companies have a relatively low market share in the Community, Platinum prices are set at a world market level therefore any effect on this market would be felt directly in the Community. The Commission´s decision was also influenced by the fact that there is virtually no effective substitute for Platinum, purchasers have limited margin for negotiations and no countervailing buying power and approximately 90 percent of world stocks would be controlled by the merged group and Amplat. All of these would tend to reinforce the potential for a dominant duopoly.

Siemens/Italia

In this case Siemens and STET, the holding company for the Italian telecommunications operators, including Italia, intended to put their telecommunication equipment manufacturing subsidiaries to a joint venture. The proposal raised both horizontal and vertical issues. The joint venture would have between 50-60 percent of the Italian market in switching equipment and around 30 percent of overall sales. The joint venture would also be partially owned by its largest customer.

In concluding that the proposed joint venture was compatible with the single market, the Commission took into account: the potential effects of new technologies; the effects of standardisation and public procurement directives in opening up markets, and the further liberalisation of telecommunications markets and infrastructure which will lead to world markets for telecommunications equipment.

Mercedes Benz / Kassbohrer

This involved the proposed acquisition by Mercedes Benz of one of the other German bus and coach manufacturers. Although this would affect the bus market throughout Europe the Commission considered that the principal market affected would be the bus market in Germany. Three distinct markets were identified, with the parties combined share reaching 44 percent in city buses, 54 percent in tourist coaches and 74 percent in intercity buses, with an overall share of 57 percent of the entire bus market.

In clearing this merger the Commission concluded that there would be adequate constraints on Mercedes´ freedom of action as there were two other German competitors as well as potential entrants from elsewhere in Europe. It also took the view that public procurement directives which make Community wide tendering compulsive for the main part of the market for city and inter-city buses were also leading to the development of a wider European market.

ABB / Daimler Benz

In this proposed joint venture ABB and Daimler Benz intended to combine their worldwide activities in the field of rail transportation. In Europe Daimler´s and ABB´s activities would have complemented each other apart from in Germany where there was an overlap. The Commission considered that the market for local trains had remained national in Germany although in other member States the lack of a major national rail transportation industry had led to wider geographic markets. The proposed operation would have led to the creation of a dominant duopoly in the German market for local trains.

The concentration would also have impeded market entry by those firms active in the production of the mechanical parts of a rail vehicle by eliminating independent German suppliers of electrical components. In order to alleviate the Commission´s concerns the parties agreed to the sale of Kiepe Elektrik GmbH, a Daimler Benz subsidiary specialising in electrical supplies for local trains. As a result of this divestiture a competent producer of electrical components independent of the parties remained free in the market.

Orkla/Volvo

The Commission approved this acquisition subject to the divestiture of Orkla´s brewing company Hansa. The parties would otherwise have had a 75 percent share of the Norwegian beer market and neither the retail nor the hotel and catering industries were considered capable of deploying any countervailing purchasing power.

Crown Cork and Seal/Carnaud Metal-Box

The Commission determined that the only market in which the proposed concentration threatened to create a dominant position was the market for tinplate aerosol cans. The combined market share within the EEA of the two operators would have been more than 60 percent. However the parties agreed to divest manufacturing capacity of almost 22 percent of the EEA tinplate market which was sufficient to overcome the Commission´s competition concerns.

Other Major Cases

A number of other major operations were cleared without in-depth investigations within one month of their notification. These included several in the pharmaceutical sector. These appear to be intended to increase the range of products offered by companies, thereby making them more competitive as suppliers to wholesalers, hospitals and pharmacy chains. The operations to date have been largely complementary and have not led to any competition problems. The one exception being the proposed merger between Gehe and Lloyds Chemist. The Commission concluded that this could lead to possible local monopolies in pharmacies in some regions of the UK and, as the activity was limited to the UK market, the Commission referred the case to the competent UK authorities for further investigation.

Swissair/Sabena

In this transaction Swissair intended to acquire a 49.5 percent stake in Sabena. This would have led to a monopoly in air transport between Belgium and Switzerland which, together with other European alliances, would have created an extensive route network carrying 35 percent of passenger traffic within Europe, twice as much as the next largest carrier. In order to clear the operation, the Commission secured undertakings from the two airlines and from the Belgian and Swiss Governments that they would make available the necessary traffic rights and airport slots to enable competitors to operate flights between Belgium and Switzerland. Swissair and Sabena were also required to provide competitors with interlining agreements and with the opportunity to participate in frequent flyer programmes. Swissair was also required to sever its previous links with SAS.

Repola/Kymmene

The Commission approved a full merger between two Finnish companies Repola Corporation and Kymmene Corporation both of which are large international companies active in the field of printing paper and packaging material. Their markets include those for newsprint, magazine paper and paper sacks.

The Commission investigation concluded that there is a separate Finnish market for paper sacks and that as the new company would be virtually the sole supplier of paper sacks to Finnish customers this

would lead to a dominant position in that market. The parties have therefore given commitments to divest some of their paper sack capacity in the Finnish market.

The markets for newsprint and magazine paper are at least Western European in scope and there are several other strong competitors. Therefore although the new company will be the major European player its market share will not exceed 20 percent and the Commission took the view that further remedies were not required.

Telecommunications Cases

Three decisions taken in the first months of 1996 indicate the ongoing restructuring which is taking place in the telecommunications sector. The Commission cleared the acquisition by the American telecommunications company ATT of certain business units of Philips Electronics NV. The Commission also approved the acquisition of a strategic interest in Belgacom by Ameritech International, TeleDanmark and Singapore Telecom. Following liberalisation of Community telecommunications markets in 1998 they will be faced with strong competition from BT, France Telecom and Deutsche Telekom. Finally the Commission cleared the setting up of a joint venture ´Hermes´ to create a pan-European telecommunications network combining the expertise of the American company GTS with the infrastructure of European national Railways.

Judgements of the Community Courts

There were over fifty judgements during 1995 relating to competition law from, the Court of First Instance (COFI) and the Court of Justice (COJ). Many focused on the procedural actions of the Commission in its investigations and decisions. There were also several cases concerning the interaction between Community and Member State competition law, as well as some judgments clarifying further the interpretations of the Community´s competition legislation.

In VIHO Europe BV against the Commission and Parker Pen, the Court stated that Article 85 did not apply to practices between a parent and subsidiary company when they formed a economic unit within which the subsidiary does not determine its course of action on the market autonomously but implements the instructions imposed on it by its parent company.

In several cases during the year including**,** P Rendo NV et al against the Commission, Guerin Automobiles against the Commission and Ladbroke Racing against the Commission the Courts reiterated the decision given in the Automec case. In summary this states that the Commission is at liberty to determine the priority to be given to a complaint in the light of the Community interest. These cases also focused on the relationship between Member State and Community law.

In two cases decided in October 1995, Bayerische Motorenwerke AG v ALD Auto-leasing D GMBH and Bundeskartellamt v Volkswagen AG, VAG Leasing GMBH the Court ruled on the application of the existing group exemption applying to car distribution, which has subsequently been replaced. In its judgment the court argued that provisions in group exemptions should be narrowly construed and should not be extended beyond what is necessary to protect the interests which they are intended to safeguard.

The Role of Competition Authorities in the Formulation and Implementation of Other Policies

Environmental Regulation

In 1995 the Commission once again made clear how it intended to apply competition policy to environmental matters especially voluntary agreements.

Community environmental policy favours the ´Polluter pays´ principle. This can take the form of direct public regulation, taxation, ´voluntary´ agreements and self-regulation. Voluntary agreements are contracts between industry and public administrations which include a number of environmental objectives. The use of voluntary agreements is growing in most OECD countries in parallel with a trend towards deregulation and less intervention by the State.

Voluntary agreements and self-regulation may, however, contain restrictions of competition which fall under Article 85(1) of the Treaty. The Commission is in fact currently examining several complaints on this matter.

The Commission is prepared to regard improving the environment as a factor which contributes to improving production or distribution or to promoting economic or technical progress. However, it intends to remain very firm with regard to the principle of non-closure of national markets to foreign operators. It will also be very vigilant about problems of access by third parties to a system and about agreements which could result in a product being squeezed out of the market.

The Commission also takes a negative view of multilateral price fixing resulting from and agreement on the environment. Whilst its assessment will be on a case by case basis, the aim of environmental protection is not necessarily sufficient to warrant an agreement on prices being regarded as indispensable.

New Reports and Studies on Competition Policy Issues

European Community Competition Policy 1995, (available in 11 languages on request through DG IV´s Cellule Information)

European Community Competition Policy 1994, (available in 11 languages on request through DG IV´s Cellule Information)

XXVth Report on Competition Policy 1995, available in 11 languages through the Office for Official Publications of the European Communitities, 2 rue Mercier, L-2985 Luxembourg, Reference CM-94-96-429-xx-C (xx = language code: ES, DA, DE, GR, EN, FR, IT, NL, PT, FI, SV)

XIVth Report on Competition Policy 1995, available in 11 languages through the Office for Official Publications of the European Communitities, 2 rue Mercier, L-2985 Luxembourg, Reference CM-90-95-283-xx-C (xx = language code: ES, DA, DE, GR, EN, FR, IT, NL, PT, FI, SV)

EC Competition Policy Newsletter: Spring 1995, Summer 1995, Autumn/Winter 1995, Spring 1996 and Summer 1996.

Community Competition Policy in the Telecommunications Sector a compendium prepared by DG IV; it contains Directives under Article 90, Decisions under Regulation 17 and under the Merger Regulation as well as relevant Judgements of the court of Justice. Copies are available through DG IV C-1 (tel 322-2968623, 2968622, fax 322-2969819).

Survey of the Member States national laws governing vertical distribution agreements**.** Available through the Office for Official Publications of the European Communitities, 2 rue Mercier, L-2985 Luxembourg, Reference CM-95-96-996-EN-C

Brochure explicative sur les modalites dápplication du Reglement (CE) No 1475/95 de la Commission concernant certaines categories d'accords de distribution et de service de vente et d'apres-vente de vehicules automobiles**.** Copies available through DG IV F-2. (tel 322-2951880, 2950479, fax 322-2969800)

SLOVAK REPUBLIC*

(1995)

Executive Summary

By the Act No 188/1994 Coll. of Laws on the Protection of the Economic Competition, the Antimonopoly Office of the SR is vested with the power to investigate the cases of violation of economic competition through applying anticompetitive practices by entrepreneurs, to issue administrative rulings in the matters, as well as decisions in the matters of sanction penalties for such conduct. The said Act also defines the concentrations which are subject to the review of the Office, empowers the Office by the supervision over the actions of the state and local public administration bodies in the field of economic competition and entitles the Office to encourage economic competition in the privatisation process.

In 1995, the Office investigated on the whole 178 cases. Of these, 116 were assessments of anticompetitive practices (i.e. cases concerning restrictive business practices agreements and abuse of dominant position). The rest of the cases were evaluations of concentrations and alleged hampering competition by the state and local public administration bodies.

In the field of agreements restricting competition, there were 39 cases scrutinised by the Office as a whole. The number of administrative rulings accounted for six, in 12 cases the administrative proceedings were stopped, ten matters are still pending and 11 cases were handled beyond administrative proceedings. Direct or indirect price fixing, setting minimum prices and agreements on recommended tariffs prevailed.

The number of cases on abuse of dominant position amounted to 77, of these 14 decisions were issued, in 16 cases the administrative ruling was brought into a halt, 13 cases are pending and 34 matters were resolved off the administrative proceedings. Most of the cases on abuse of dominance concerned applying different business conditions put down in contracts.

Evaluation of concentrations represents an extremely complicated and demanding process that requires the solvers to possess broad knowledge of merged subjects, as well as the entire relevant competitive environment. It is also much time-consuming. Twenty-five matters came up before the Office, of these eight administrative rulings on approval of concentration were issued and one conditioned approval. No ban on concentration rose. The rest of cases were judgements on whether the concentration is, or not subject to the surveillance of the Office, or the matters resolved beyond the administrative proceedings. Ten cases are still pending.

The Office also evaluated in total 37 cases of likely impairment of economic competition with respect to actions of state and local public administration bodies. Of these, in 19 cases these bodies were asked for remedies, three cases were deemed to fall within the purview of other state public administration bodies, two cases are still pending and in four cases no infringement of economic competition was found.

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* The original language of this report is English

Typically, the most frequent ways of anticompetitive actions of the state and local public administration bodies were the measures taken that lead to creation of dissimilar conditions for some participants in a market contrary to the others, as well as developing entry barriers to a market.

I. Activities of the Antimonopoly Office in the Field of Passive Legislation

In the period under review of 1995, within the framework of its legislative activities, the Office gave its opinions to about 200 drafts of bills, eventually other legal regulations, proposed either by the Cabinet, or by the Parliament. The opinions related to the coverage and scope of the Office accounted for about one third of the total amount mentioned above.

The long-term effort of the Office focused against the anchoring of obligatory membership in the legal regulations on professional chambers and associations resulted in breaking new grounds in the approach to this scope of problems and reflected in the amendment of the Act on the Chamber of Commerce and Industries which cannot more count on the mandatory membership of entrepreneurs. Based on the previous experiences, it is obvious that the principal goal of establishing professional chambers and associations on account of the indispensable consumer protection from the bad quality supply of services, is simultaneously misused for enforcement of group professional interests focused, for instance, on the limitation of entry of new subjects to a market, division of the market, price fixing of previously liberalised prices and the like.

In its opinions concerning the amendment of the telecommunication law the Office required in particular the separation of the operator's function from the function of the regulator, separated book-keeping of the operator and of the rest of the business activities of the subject, namely due to the better transparency of the financial flows and in order to achieve juster price regulation and definition of the equivalent conditions of the access to the network to prevent from discrimination and the like.

Generally, the amended Act on prices assumes to exercise the regulation of natural monopolies, namely as far as the price regulation is concerned, including specification of reasonable profit, justifiable costs and the scope of investments that could be included into prices, as well as with respect to definition of conditions and the sales of production of the natural monopolies. It is necessary to say though that there are some other laws which vest with other state public administration bodies with power to define these conditions as well, and therefore the Office still considers the said amendment of the Act on prices dissatisfactory because of being confused from the competence sharing point of view. The Act on prices was heavily challenged by the Office. The principal observations concerned the wide powers of the state to intervene into liberalised prices. The amendment of the Act on prices counts on the opinion of the Office prior to launching price regulation related to threats to a market because of underdeveloped competitive environment.

In insurance a number of legal amendments have been adopted, in particular in the realm of the health insurance. The essential comments of the Office concerned the drafts of the legal restrictions in business transactions of insurance companies with the financial means of their own and the exclusivity by law for a selected bank, which, in this way, will be given the sole rights to keep the financial accounts of the individual insurance companies. Doing this, a distortion of competition among banks may happen.

In its standpoint to the draft on the amendment to the bill on investment companies and investment funds the Office strongly disagreed with the provisions under which the mentioned subjects, while trading in securities, are only allowed to use the exchange rate laid down in the exchange rate note

which is valid on the day when the trade is consummated. The Office pushed the principal that even in the sphere of securities competition should exist, instead of the mentioned regulation.

Legal entry barriers to the market for potential competitors and non-transparent conditions in awarding permissions for business in the field of production and distribution of spirits were the subjects of criticism of the Office's comments on the draft of the bill on production and distribution of spirits. Upon the consummated negotiations, one can anticipate that the proposer will withdraw the initial arrangement and comfort to the opinion of the Office.

The Office draw up a draft of the bill on granting licences via auctions. The draft of the law aimed at formulation of general rules which, in a binding and transparent manner, would have governed the line of actions where legal regulations prescribe awarding an official permission, accord, or authorisation for carrying out certain business activities. Despite of the fact that the Government of the SR did not identify with this proposal, it recommended to the sectors concerned to take into account the principles of the suggested arrangement, where, upon their considerations, auction way of licensing could be used.

II. Enforcement of Competition Laws and Policies

Action by the Antimonopoly Office of the SR against Anticompetitive Practices

In 1995 the Office tackled with 116 new cases of anticompetitive practices, of these there were 39 matters (34 per cent) of judgement of agreements that could restrict competition and 77 cases (66 per cent) concerned suspicion to abuse of dominant position. As a whole, 20 administrative proceedings were issued, of these six in the field of agreements restricting competition and 14 in the sphere of abuse of dominant position. In 28 matters the proceedings were brought into a stop, of these 12 cases on agreements restricting competition and 16 cases on abuse of dominant position. Twenty-three cases are still pending, of these ten in the realm of agreements restricting competition and 13 in the field of abuse of dominant position. Forty-five cases were dealt beyond administrative proceedings, out of these 11 in the sphere of agreements restricting competition and 34 in the field of abuse of dominant position. When compared with 1994, in 1995 the Office investigated by 16 per cent less cases on anticompetitive practices than in 1994, while, as a matter of fact, the entire decrease in cases took place in the realm of agreements restricting competition.

Second-Step Decision Procedures

The party to proceedings holds the right to appeal against the decision of any administrative body, unless the law stipulates otherwise, or the party to proceedings gives up the appeal verbally, or in written (¡ 53 of the Act No 71/1967 Coll. of Laws on Administrative Proceedings).

In 1995, in total nine appeals (applications for second-step decisions) against the first-step decisions issued by executive departments, or regional subsidiaries of the Office in Banská Bystrica and Ko¿ice came up before the Chairman of the Antimonopoly Office of the SR.

In three cases the Chairman of the Office dismissed the lodged appeals and upheld the first-step decisions to the full extent, in two matters amended the first-step decisions, in one case he decided to discontinue the proceedings, in one case to bring the proceedings into a halt and in two matters he revoked the first-step decision and returned the case back for launching new proceedings.

Proceedings before the Supreme Court of the SR

Each party to proceedings holds the right to ask the Supreme Court for the judicial review of any decision issued by the Antimonopoly Office of the SR. In 1995 not a single application for judicial review of any administrative ruling of the Antimonopoly Office of the SR was filed to the Supreme Court.

Selected Cases Handled by the Antimonopoly Office of the SR

Horizontal Agreements

Administrative Ruling of the Association of Entrepreneurs - Measures to Encouragement and Management of the Agricultural Market (Market Orders)

In 1995, in administrative proceedings the Antimonopoly Office of the SR decided that the Measures to Encouragement and Management of the Agricultural Markets for Grapes and Wine, Oil Seeds and Potatoes (Market Orders) authorised by a resolution of the Board of Directors of the Slovak Chamber of Agriculture and Food represented, as a matter of fact, a decision of the association of entrepreneurs which are prohibited and void under Article 3 of the Act No 188/1994 Coll. of Laws.

The market orders aimed at a certain regulation of the market and creation of new economic environment changing existing market conditions in favour of making farmland more stable and giving reasonable earnings to primary agricultural producers. One of the pivotal provisions of the market orders was to establish an uniform minimum purchase price of the said commodities and division of the production and purchase quotas. On the basis of the market orders, the Slovak Chamber of Agriculture and Food announced the recommended minimum purchase prices. In principle, any minimum price which is applied national-wide, adversely affects operators in the market from the competition point of view, since processors and other consumers are not able to exert an influence on contractual conditions among the primary producers on the horizontal level. Upon assessing the present situation on the individual products' markets, the Office drew the conclusion that the market orders did not fall within such measures which simultaneously comply with the conditions of Article 5, par. 1 of the Act No 188/1994 Coll. of Laws, i.e. conditions of exemptions from the ban on prohibition. Therefore, the Antimonopoly Office made the decision that the market orders were void. With respect to the fact that the Slovak Chamber of Agriculture and Food had implemented the market orders on the ground of the Report on the State of Affairs in the Agricultural and Food Sector passed by the Parliament, the Antimonopoly Office of the SR did not levy any fine on the Chamber.

The Dumping Ground Rajec

The representatives of 21 municipalities and legal entities established the Association named The Dumping Ground Rajec. The subject-matter of activities of the Association has covered handling refuse: collection, sorting out, depositing and dumping of municipal rubbish produced by the members of this pool, as well as by other producers of trash. The parties to contract agreed that the membership in the Association was linked with the input. According to the magnitude of the input which was derived from the amount of disposed refuse per year, the number of votes was assigned for the individual members of this Association. On this ground the town of Rajec obtained 35 per cent of the total votes.

The supreme body of the Association is the meeting of members. The meeting of members decides by the majority of two-thirds of the votes present. The Statutes of the Association states the

obligation to dispose refuse solely through the company Technické sluæby mesta Rajec, or via an association, eventually other entity which, however, must be approved by the meeting of members. As can be seen from the mechanism of taking votes, it is impossible to approve some other entity for refuse disposal without the accord of the town of Rajec. This means that the members of the Association are virtually bound to use the services of Technické sluæby mesta Rajec regardless of having or not some disposal capacities of their own, or better offers from other entities with the right to dispose refuse in the given region. In the eyes of the Office, approval of these Statutes is equalled to the confirmation of finished negotiations, which was qualified by the Office as an agreement restricting competition.

The company Technické sluæby mesta Rajec took the advantage of artificially maintained position of having no rivals and set the price for the refuse disposal by about 50 per cent higher than that offered by other firms. Some of the individual municipalities concluded contracts with a competing company without any prior approval by the Association, however, consequently, the town of Rajec, being the major co-owner of the dumping ground, prohibited that company from the refuse disposal in the collective dumping ground on the basis of the adopted Statutes. Moreover, the town of Rajec refused to take a vote for any amendments of the Statutes in this respect.

The agreement was viewed as an agreement of restrictive nature which led to elimination of options and avoidance of competitive pressure. The Office imposed the obligation to refrain from fulfilment of the commitment "to dispose refuse solely via the company Technické sluæby mesta Rajec, or an association, eventually other entity, which, however, must be granted a prior approval by the meeting of members". Upon this administrative decision, new entrants to the relevant regional market are allowed and the restraints on competition were lifted. The Office did not impose any fine taking into consideration that no intention to restrict competition was proved. The parties to proceeding appealed against this decision and the case has been still investigating.

ÇESMAD Slovakia - International Automobile Transporters Association

The ÇESMAD Slovakia is a legal entity, association of entrepreneurs-transporters, dealing with economic activities. The ÇESMAD Slovakia is a national guarantee association entrusted by the International Road Transport Union (IRU) with issuing TIR carnets. The TIR carnet represents an administrative basis of TIR transit system realised on the Customs Agreement on International Transport of Goods. The TIR carnet is a document, internationally recognised, representing a check document in a country of despatch, transit and destination of goods.

Economic activities, according to the Act on Protection of the Economic Competition are any activities focused on production and circulation of goods, unless they serve solely for satisfaction of personal needs. The Act stipulates that it also applies to associations of entrepreneurs. In this mentioned case, economic activities rested in awarding of TIR carnets to both members and non-members of the Association.

A complainer accused the ÇESMAD Slovakia of assessment of unreasonable conditions when issuing the TIR carnets as the TIR carnets were issued on condition of giving a guarantee in amount of USD 5 000 for its members and USD 50 000 for non-members.

After reviewing the case, the Antimonopoly Office of the SR found out that already the decision of Presidium of the ÇESMAD Slovakia Association, involved in the document "Amendment on giving guarantees by transporters of the ÇESMAD Slovakia Association", in the part concerning non-members of the ÇESMAD Slovakia Association provided different conditions when obtaining the same fulfilment, i.e.

the TIR carnet and according to the Act on Protection of the Economic Competition the assessment of different conditions is prohibited and void. Under the Act, the ÇESMAD Slovakia Association is required to refrain from the fulfilment of the decision in question as the agreement restricting competition.

The Antimonopoly Office of the Slovak Republic imposed a fine of SK 300 000 to the ÇESMAD Slovakia Association.

Vertical Agreements

Cartel Agreement Between Producer and Wholesale Buyers of Colour Television Sets

When investigating a case of the cartel agreement concluded between a producer of colour television sets, OTF, and wholesale buyers of colour TV sets, firms Drukos and TV spol., and assessing provisions of purchasing contracts, the clauses requiring from other buyer a minimum sale prices maintenance of colour TV sets under menace of suspending supplies of colour TV sets by OTF to the wholesale buyers, the firms Drukos and TV spol., were found in the contracts. The producer of colour TV sets, OTF, tried to restore its lost position in the market through this provision.

In spite of the fact that the direct implementation of the settled clauses of the mentioned contracts failed to be evidenced - firms Drukos and TV spol. did not maintain the settled sale prices to the full extent and OTF had to lower the prices in the own distribution network - the Office came to the conclusion that the mentioned clauses of the purchasing contracts fulfilled all the characteristics of the merits of Article 3 of the Act on Protection of the Economic Competition with respect to their form and contents. This Article considers the agreements and other forms of mutual understanding concluded among entrepreneurs that lead or may lead due to their nature to exclusion or restriction of economic competition through affecting conditions of production or circulation in the market of goods, prohibited. In parallel, the Act stipulates that agreements, in particular, eventually their parts, involving direct or indirect price fixing are prohibited. Although, any direct decrease of competition effect did not occurred, the possible restriction of competition was clearly evidenced. Therefore, the parties to the proceedings were fined.

Abuse of Dominant Position

Abuse of Dominant Position by Cemeteries and Crematory Administration

In the market of providing funeral services - ceremonies in the city of Bratislava, six firms participated in the following rate: the firm Marianum had the rate of funerals arranged in a crematorium and at cemeteries 24.7 per cent and 40.4 per cent, respectively, the firm Pieta had these rates 45.6 per cent and 33.6 per cent, respectively. There were other smaller firms in number of four in this market and their total shares in the services in the crematorium and the cemeteries were 29.7 per cent and 26.9 per cent, respectively. Marianum administered 21 cemeteries of the total of 22 cemeteries of Bratislava. Pieta accused Marianum of abuse of dominant position.

When investigating the case, the Antimonopoly Office of the Slovak Republic found out that Marianum hired ceremonial rooms in both the crematorium and burial grounds to Pieta and other firms. In parallel, Marianum put pressure on Pieta to buy other supplementary services of a ceremony, e.g. arranging of flower presents, wreaths, under the menace of refusal to hire a room and the ceremony itself. Marianum even invoiced these complementary services to Pieta, even if Pieta provided them itself.

On the grounds of the results of the investigation the Antimonopoly Office of the Slovak Republic confirmed the complaint on the abuse of dominant position of Marianum as justified. However, the proceedings was suspended as the firm Marianum refrained from the abuse of its dominant position after intervention of the Office.

Applying Different Conditions among Buyers when Providing Quantity Discount

The Matador Púchov, a.s., the only inland producer of tires in Slovakia, when taking to account all interchangeable import products from the Czech Republic and Poland, has got as the purchaser the following shares in the markets: 96.4 per cent in the market of inner tubes, 79.7 per cent in the market of car outer tubes and 56.8 per cent in the market of truck outer tubes, i.e. the Matador Púchov, a.s., has a dominant position.

When investigating a complaint from the Pneu Centrum Æilina, s.r.o., the Antimonopoly Office of the Slovak Republic found out the abuse of a dominant position of the Matador Púchov, a.s., against the Pneu Centrum Æilina in the local relevant market through applying the different conditions among buyers when providing quantity discount that is discriminatory and prohibited according to the Act on Protection of the Economic Competition. The Office imposed to Matador Púchov, a.s., a fine in amount of SK 1 000 000 for the infringement of the Act.

Assessment of Concentrations

Slovnaft - Benzinol

The National Property Fund of the Slovak Republic as the only shareholder of Benzinol Bratislava, a.s., and the majority shareholder of Slovnaft Bratislava, a.s., decided on the direct sale of 51 per cent of shares of Benzinol to Slovnaft Bratislava by its decision No. 4/1995.

On the basis of notification of the concentration, the Antimonopoly Office of the Slovak Republic approved the concentration under the following conditions:

i) Slovnaft is required to manage construction of those new petrol stations which it owns and controls under Article 8 of the Act No. 188/19994 Coll. of Laws on Protection of the Economic Competition in such a way that their number till 31 December 2000 would not be higher than 50 per cent of all petrol stations in the territory of the SR. Moreover, within this period Slovnaft is required not to increase the present share of number of the petrol stations in the market of the SR which it owns and controls under Article 8 of the Act No. 188/1994 Coll. of Laws on Protection of the Economic Competition;

ii) Slovnaft is required to apply the equal trade conditions on supplies of fuel into its own network of the petrol stations, controlled under Article 8 of the Act No. 188/1994 Coll. of Laws, as well as into network of its competitors' petrol stations.

Slovnaft acquired more than 80 per cent of the total number of the petrol stations in the SR. In parallel, Slovnaft gained the possibility to dispose with all pipelines and constructed whole-sale depots of fuel and pipelines in the area of the SR. From the perspective of the economic competition, the concentration significantly strengthened the dominant position of Slovnaft.

When making approval of the concentration, the Office took into consideration specifics of the economic activity in which the concentration occurred, regional configuration of refineries in surroundings of the Slovak market, conditions of competition in foreign markets, state of economic competition in the market of distribution of refinery products in the territory of the SR and perspectives of its development. To be able to develop in the future and compete with both international and national refineries, Slovnaft must process petroleum at the level of five million ton a year at least that corresponds to economically effective capacity of particular production units and it must sell refinery products within a radius of 500 kilometres from the refinery. At present, significant part of fuel production is sold in foreign markets. Through acquiring Benzinol's network of petrol stations Slovnaft will ensure itself the sale in its own network and this will provide it the next development. Till 2000, Slovnaft prepares realisation of projects that allow it to evaluate processing raw material in better way when simultaneously cutting requirements for import of petrol, improve the production and solve requirements for the protection of environment. Costs of the program of development and investments represent several billions of SK. When considering sweeping economic context, by realisation of its investment intentions lying in the technological innovation, Slovnaft will increase its competitiveness against foreign refineries in its neighbourhood in future and cut down environmental burden in the SR. These are overall economic advantages of the concentration. Slovnaft has got the advantageous geographic position with respect to export possibilities. On the other hand, Slovnaft is located in the lot with a certain overplus of refinery capacities and so it deals in a strong competitive market. If the concentration were not realised, deterioration of economic outcomes of Slovnaft, cut down of its dispensable resources with impact on realisation of development and investment measures and decrease of employment in Slovnaft and related organisations, could have occurred. In particular, this non-realisation could incur raise of debiting state foreign exchange balance and decrease incomes of the state budget.

The market of petrol stations in Slovakia is developing. There is a real presumption that significant competitors will enter or plan to enter this dynamically developing market. Therefore, the main target is, also in connection with the development of the domestic refinery, to create conditions for effective competition in this market in reasonable period of time. In the time horizon of 2000, i.e. the reasonable period of time from the perspective of the nature of entrepreneurial activities, the competitive environment is created by the fact that 50 per cent of petrol stations in the market of the SR will be in the hands of entrepreneurs other than Slovnaft. The sale of the remaining share of Benzinol's stocks to a foreign competitor can significantly increase the creation of competitive environment, as it was stated by the National Property Fund of the SR in the letter of 16 May 1995, when selling 51 per cent of Slovnaft's shares.

Assessment of Actions of State and Local Public Administration Bodies with Respect to the Economic Competition Protection

Export Subsidy of the Supply of Danish Filters on Request of the Ministry of Environment of the SR

This is for the first time when a matter of this kind came up before the Antimonopoly Office of the SR and the Office had to handle the problem of imports of goods from a country of the European Union, where the price of goods was subsidised by the government of a producer (Denmark). The recent investigation and the standpoint of representatives of the EU resulted in the fact that the Danish government granted export subsidies for the supply of filters of the firm Moldow for the wood-processing industry in Slovakia. This enabled the exporting firm to offer its products in the market of the SR at a price almost half of the market one. In doing so, conditions for driving out domestic producers were created.

The exporting firm has reached the governmental subsidy on the ground of the request from the Ministry of Environment of the SR. The Office suggests this occurred especially due to the fact that no monitoring authority has been established yet (as it arises from the international commitments of the SR, in particular to the EU) and no relevant legal regulations on review of awarding state aid and control of subsidised products have been adopted in the Slovak Republic.

III. The Role of the Antimonopoly Office of the Slovak Republic in the Formulation of other Policies: Privatisation

The Antimonopoly Office of the SR considers the ongoing process of privatization as one of the most significant tools of deconcentration and demonopolization, giving the unique chance to create effectively functioning competitive environment.

The legal framework of the participation of the Office in the process of privatization is stipulated by the Act No l. 188/1994 Coll. of Laws on Protection of the Economic Competition and the Act No. 92/1991 Coll. of Laws on Conditions of Transfer of State Property to Other Persons as amended.

When transferring state property to other persons state organisations and state administrative bodies are required to proceed in the way that secures appropriate de-concentration of privatised enterprises and the Office is obliged to advance its view to the drafts of privatisation projects. In the period under review the privatisation process was appreciably accelerated.

In the evaluated period the Office worked out 230 views to privatization drafts, drafts of decisions on the way of privatisation, or to drafts of transfer of state property under the Act on Conditions of Transfer of State Property to Other Persons.

Of the said number, there were 174 comments with agreement, 40 cases giving warning of the possibility of arising concentration, 12 cases, where the Office suggested other way of privatisation (in the majority of the cases applying public bidding was proposed instead of direct sales) and four comments with disagreement in principle.

IV. Other Activities of the Antimonopoly Office of the Slovak Republic Relevant to Competition Policy

In 1995, within the framework of the competition policy promotion and publicity campaign, the Antimonopoly Office of the SR released case decisions, published interesting cases in daily newspapers and made statements in electronic media. Officers of the Authority published articles on economic competition theory and competition policy in specialised journals. The Office closely co-operated with the Economic University in Bratislava and the Law Faculty of Commenius University in Bratislava. Professional contacts with business community and the staff of central state administrative bodies and municipalities, as well as with students were also kept through seminars. Annually, the Office issues the Annual Report summarising the activities of the Office in the respective year in both Slovak and English versions.