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## **COMPETITION POLICY IN OECD COUNTRIES**

**1996-1997**

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## FOREWORD

This General Distribution document contains reports by OECD Member countries presented to the Committee on Competition Law and Policy in 1997. Depending on the countries, these reports cover the period 1996, 1997 or both, and for each, the review period is clarified in a footnote. In addition, the annual reports for the Slovak Republic and the Russian Federation are 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.

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## TABLE OF CONTENTS

MAIN DEVELOPMENTS IN COMPETITION POLICY IN 1996-97 .....	7
AUSTRALIA.....	21
AUSTRIA .....	41
CANADA .....	51
CZECH REPUBLIC .....	71
DENMARK .....	83
FINLAND.....	93
FRANCE .....	101
GERMANY .....	123
GREECE.....	139
HUNGARY .....	145
IRELAND.....	155
ITALY .....	165
JAPAN.....	185
KOREA .....	205
LUXEMBOURG .....	215
MEXICO .....	217
NETHERLANDS .....	233
NEW ZEALAND .....	259
NORWAY .....	265
POLAND .....	277
PORTUGAL.....	287
SPAIN.....	297
SWEDEN.....	311
SWITZERLAND .....	325
TURKEY .....	361
UNITED KINGDOM .....	367
UNITED STATES .....	385
EUROPEAN COMMISSION .....	407
RUSSIAN FEDERATION .....	425
SLOVAK REPUBLIC.....	441
INDEX.....	456



## MAIN DEVELOPMENTS IN COMPETITION POLICY IN 1996 AND 1997

### 1. Summary

Twenty-seven Member countries, along with the European Union, the Russian Federation and the Slovak Republic, submitted reports on their activities for the years 1996 and 1997<sup>1</sup>. All these reports were presented to the Committee on Competition Law and Policy in 1997. There were initiatives leading to the adoption or entry into force of new competition-related legislation in Hungary, Italy and Switzerland; major amendments were made to existing laws in the Czech Republic, France, Ireland, Japan, Korea, New Zealand, Spain, the United Kingdom and Russia. Two countries—Canada and Sweden—envisaged changes to their competition law. To facilitate compliance with its legislation, the United States published guidelines to foster innovation in the health care sector. In addition, the European Commission published four interpretative notices on the distinction between concentrative and co-operative joint ventures, the concepts of concentration and undertakings concerned, and the calculation of turnover.

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 or vertical restraints on competition. Supervision over mergers which might have anticompetitive effects continued.

### 2. Changes to competition laws and policies adopted or envisaged

In **Australia**, the main changes to competition law having already been made (see the OECD report covering 1995-96), only secondary amendments were introduced, to: *i*) specify powers and enforcement procedures for competition law; *ii*) extend the scope of application of competition law to the entire business sector; *iii*) enact provisions relating to boycotts; and *iv*) supplement the guidelines for mergers. In addition, improvements were made to the national access regime under the Trade Practices Act.

In **Austria**, no amendments to competition law were made during the period under review.

In **Canada**, a bill was presented to the House of Commons on 7 November 1996 to update the Competition Act, in order to reflect new market trends and enforcement requirements. The main changes involved the settlement of cases involving misleading advertising or deceptive marketing practices, remedies for deceptive telemarketing practices, and the administrative processing of prior notifications of mergers.

The **Czech Republic**, in November 1996, instituted the Office for the Protection of Economic Competition (the "Office"), which assumed the responsibilities of the former Ministry of Competition. During the period under review, while there were no changes to national competition law, an important step was taken towards harmonisation with EU legislation. The rules for the application of competition-related provisions of the Europe Agreement by the Council of the Association of the Czech Republic and the European Union were adopted on 30 January 1996.

In **Denmark**, policy discussions continued in 1996 over the contents of the new Competition Act. No final proposal was introduced in Parliament during the period (see the report on the previous period for

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1. For some countries, however, the period under review was limited to 1996, whereas for others it covered only 1997. The relevant period is therefore indicated at the beginning of each national report.

a description of the proposals contained in the August 1995 report of a committee appointed by the Minister for Trade and Industry).

During the reference period, the working party set up in December 1995 by the Ministry of Trade and Industry of **Finland** gave its report on January 1997 on the need to amend the existing competition law. In its report of January 1997, the group proposed a number of different amendments, the most important of which would concerned merger control and the division of tasks between the Office of Free Competition and the Competition Council. Consideration was also given to provisions for introducing compensation for damages, negative clearance applications and a provision affording the possibility to speedily lift cases involving restraints of minor importance.

In **France**, the Ordinance of 1986 was amended in 1996. The reform of Title III of the Ordinance was aiming at improving the balance in business relationships between suppliers and distributors of mass-market consumer goods, so as to prevent abuses of dominant purchasing power, and also to simplify and clarify invoicing rules, restoring a decisive role to contractual agreement between the parties.

In **Germany**, neither the Act against Restraints of Competition (ARC) nor the Unfair Competition Act (UCA) was amended during the period under review, although a number of amendments were under consideration. Of the bills cited in the previous report, only the draft Telecommunications Act was actually finalised. The new law, which entered into force on 1 August 1996, provided *inter alia* for an end to the monopoly of Deutsche Telekom AG as of 1 January 1998, the interconnection of networks and creation of an independent regulatory agency.

In **Greece**, no amendments were made to the Competition Act 703/77 during the period under review.

In **Hungary**, a new competition law (Act No. LVII/1996 on the Prohibition of Unfair and Restrictive Trade Practices) entered into force on 1 January 1997. Its main innovations were: *i*) a new definition of "economic activity", extending the scope, for example, to investment activities, which had not been covered by the previous law, and, in respect of anticompetitive practices, to business conducted by foreign firms; *ii*) an extension of the types of prohibited agreements to any vertical agreement (Article 11); *iii*) an entirely new concept for the definition of dominant positions (Article 22); *iv*) a blanket prohibition on abuses (Article 21), incorporating further practices such as tied sales, refusal to sell, discrimination and predatory pricing. Criteria for assessing mergers and acquisitions were overhauled (Article 30), in terms that, while stated differently, were in strict compliance with European Union regulations on concentrations. The new law changed the notification thresholds, eliminating market share as a threshold; the definition of concentration was revised; lastly, the new law explicitly excluded temporary acquisitions by financial institutions from the scope of merger and acquisition control (Article 25).

In **Ireland**, the Competition Act of 1991 was amended in July 1996. The amending legislation empowered the Competition Authority to conduct investigations and file civil or criminal lawsuits. It introduced fines and prison sentences for corporate officers.

In **Italy**, with the adoption of Act No. 52/96 in February 1996, the Antitrust Authority was empowered to enforce Articles 85(1) and 86 of the Treaty of Rome directly.

In **Japan**, the Antimonopoly Act was amended, in June 1996, in order to strengthen the structure of the Fair Trade Commission. In addition, it was decided that by the end of 1998, 33 exemptions from the Antimonopoly Act would be either abolished or amended, the scope of application of four regimes would be limited, and ten regimes would be monitored.

In **Korea**, the role of the Fair Trade Commission (FTC) was strengthened in March 1996 with the elevation of its chairman to ministerial rank. The chairman was also appointed head of the Economic



Deregulation Committee, giving the FTC a direct role in fostering competition throughout the economy. Apart from the amendments to the Fair Trade Act outlined in the previous report, a number of further improvements were made during the reference period. In particular, the Commission strengthened its ability to rectify anticompetitive provisions (concerning, in particular, merger control and the financial sector, in which financial establishments and insurance companies could now be examined in cases of anticompetitive mergers); it also stiffened penalties for unjustified agreements and unfair practices.

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

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

In the **Netherlands**, during the year under review, important measures were taken in order to adopt new competition legislation which was to enter into force on 1 January 1998<sup>2</sup>. The innovations involved: a system of prohibitions very similar to the one set up by Articles 85 and 86 of the EC Treaty; a system of preventive control of concentrations modelled on that of the European Community; and creation of a Netherlands Competition Authority (NMa), similar to the German *Bundeskartellamt*.

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

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

In **Poland**, following the Act of 8 August 1996 overhauling various laws regulating the economy and public administration (Dz.U. Nr. 196, poz. 496), a number of changes took effect. They dealt primarily with the competition authority, which would henceforth be known as the Office for the Protection of Competition and Consumers, its area of authority and powers of litigation. Other important laws in the area of competition included: the Act of 30 August 1996 on the sale and privatisation of public enterprises (Dz.U. Nr. 118, poz. 561), which stipulated the rules for converting public enterprises into companies, and the Act of 29 March 1996 amending the Foreign Companies Act (Dz.U. Nr. 45, poz. 199), which brought Polish legislation in this area closer in line with that of the European Union by significantly reducing the differential treatment of foreign-owned firms and sectoral limitations on the purchase or acquisition of shares in companies doing business in regulated industries. Another major piece of sectoral legislation was the Act of 14 June 1996 on the merger or association of certain banks in the form of joint-stock companies (Dz.U. Nr. 90, poz. 407). This law set the merger or association rules applicable to banks owned directly or indirectly by the Ministry of Finance and, in such cases, limited application of the Antimonopoly Act's provisions on merger control.

In **Portugal**, the most significant change to take place during the period under review was the entry into force of Decree-Law No. 222/96 of 25 November. This legislation abolished the former Directorate General for Competition and Prices and created a new entity—the Directorate General for Trade and Competition. His/her powers and authority would cover the protection and fostering of competition, pricing policy and trade; henceforth, it would also be the official Portuguese authority with regard to trade-related matters.

In **Spain**, during the reviewed period, Competition Act No. 16/1989, which had been amended in 1996 by Royal Decree No. 7/1996, was given a new *de minimis* rule. At the same time, an amendment to Article 2(1) expressly stated that competition legislation would be applicable to the acts of public administrations. Regarding mergers, a further amendment to Article 15 authorised the Service for the Protection of Competition (SPC) to issue opinions on whether notified operations should be considered mergers or co-operation agreements.

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2. It did in fact enter into force on 1 January 1998.

In **Sweden**, during the period under review, the government gave its opinion on amendments to Swedish regulations on group exemptions. In addition, the competition authority proposed amendments to its general guidelines on co-operation between small and medium-sized trucking and taxi firms, which were not covered by the Competition Act (KKVFS 1993:6), following a judgement of the Market Court. Lastly, the Competition Act was under review by a government committee, which was to present its final report at the end of February 1997. Nevertheless, a proposal on merger control had already been established, with a view to amending notification requirements.

In **Switzerland**, the new Federal Act of 6 October 1995 on cartels and other restraints on competition (“LCart”) came into force, on 1 July 1996. While showing greater severity vis-à-vis cartels and other agreements, the Act also introduced preventive merger control and featured institutional and procedural improvements, *inter alia* by investing the Competition Commission, which succeeded the Cartels Commission, with genuine decision-making power.

In **Turkey**, no amendment was made to the Turkish Competition Act (Act No. 4054), which entered into force on 13 December 1994. The Act regulates the markets for goods and services so as to maintain “viable competition”, ensuring freedom of trade, free market access and effective competition.

In **the United Kingdom**, four orders involving procedures under the 1976 Restrictive Trade Practices Act took effect in March 1996. The 1996 Restrictive Trade Practices Orders on non-notifiable agreements (respectively on EC exemptions by category and turnover thresholds) cut the number of agreements requiring notification under the Act. Deregulation orders were issued in 1996 to amend the 1976 Restrictive Trade Practices Act in respect of the regulations governing certain exempt agreements and extending to three months the deadline for reporting all agreements to the Office of Fair Trading (OFT).

In **the United States**, the fiscal year 1996 (1 October 1995 through 30 September 1996) saw the entry into force of the Telecommunications Act of 1996. The Antitrust Division of the Department of Justice and the Federal Trade Commission (FTC) announced changes affecting networks of health care providers. The new guidelines, which stipulated that the most flexible analysis based on the “rule of reason” would be applied to all networks controlled by health care providers, sought to foster innovation in the sector, but without loosening antitrust controls over anticompetitive agreements. These agencies also adopted new rules amending pre-merger notification requirements and exempting certain categories of operations unlikely to raise concerns over competition. In May, the FTC published a report on the findings of the autumn 1995 hearings on global competition, which had been held to explore whether changes in market competition required amendments to United States legislation or policy in that area. The report presented a number of proposals, such as to consider efficiency and the innovation market analysis approach when reviewing mergers. In September, the Commission changed its rules on administrative disputes in order to shorten deadlines and streamline procedures.

In the **European Union**, the Commission adopted a new group exemption relating to the distribution and servicing of motor vehicles in June 1995, the object being to intensify competition in the markets for cars and spare parts, and to allow consumers the benefits of the internal market. A revised group exemption for technology transfer agreements came into force on 1 April 1996, adding a list of restrictions that were not permitted, “black” clauses that included restrictions on the selling prices of licensed products and 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 concerned the distinction between concentrative and co-operative joint ventures, the concepts of concentration and undertakings concerned, and the calculation of turnover.

In **Russia**, amendments to the Russian Act “on Competition and Restrictions on Monopolistic Activities in Commodity Markets” entered into force on 25 May 1995. They affected almost all sections of the law as it stood, including, *i*) the concept of anti-monopoly legislation; *ii*) the scope of application of the Act; *iii*) the definitions of a commodity market and of a firm’s dominant position; *iv*) concepts such as monopoly pricing and enterprise groups; and *v*) terminology relating to unfair competition in the area of intellectual property. But the most important substantive changes were to: Section 17 of the Act, on the prevention of monopolistic mergers and associations; Section 18 on anti-monopoly oversight of acquisitions of shares or corporate equity; and Article 19 on the mandatory break-up of business enterprises.

The **Slovak Republic** reported no development in this area.

### 3. Enforcement of competition laws and policies

In **Australia**, the Commission considered 167 proposed mergers (compared with 149 in the previous period) against the concentration thresholds set out in its revised merger guidelines. It did not oppose any merger where there was substantial import competition, recognising the increased exposure of Australian businesses to global markets. Apart from mergers in the sugar refining and pay television sectors, the Commission focused its attention primarily on mergers in the banking sector. On 9 April 1997 the government decided to discontinue its “six pillars” policy, which had banned mergers between the country’s four largest banks and two largest insurance companies. It also decided that mergers between the four banks would not be authorised as long as there was no certainty of competition from new entrants or those already present in the financial sector, such as in the market for loans to small businesses. During the period under review, the Commission took a number of cases (not involving mergers) to court, resulting in fines; 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 authorisations and cases involving notification of exclusive dealing.

In **Austria**, 316 merger cases were announced or registered in 1996, as were 176 others between January and September 1997.

In **Canada**, the main criminal cases involved price fixing practices (as well as conspiracy and price maintenance), along with market sharing. The highest fine—C\$5.8 million—was imposed on four firms in the ready-mixed concrete sector. With regard to selling practices, the emphasis was placed on complaints over telemarketing, direct mailing campaigns and telecommunications. Mergers continued to increase significantly, rising from 228 the previous year to 319. The ruling of the Supreme Court of Canada in the Southam case (on 20 March 1997) was an important milestone, because it reinforced the principle that any proposed remedies must reverse the anticompetitive effects of a merger or practice subject to review, even if its scope were substantial.

In the **Czech Republic**, the Competition Office initiated action on 24 infringements of bans on anticompetitive agreements, and in 13 cases it deemed that the law had been broken and therefore imposed fines totalling 16 470 000 Czech crowns. Also, in 25 cases, administrative procedures were initiated, and in 15 of them it was found that there was an abuse of dominant position, leading to aggregate fines of 31 125 000 Czech crowns, primarily in the gas and insurance industries. Out of 73 applications for merger authorisations, only one was rejected. For the most part, these transactions involved one company’s taking control of another.

In **Denmark**, 16 cases were taken before the Competition Appeals Tribunal in 1996 (versus 19 in 1995), and the Competition Council resolved 48 cases involving horizontal agreements in the professions, unfair practices and vertical agreements concerning rights to broadcast football matches.

In **Finland**, 293 new cases involving restraints on competition were opened at the Office of Free Competition in 1996 (up from 269 in 1995). Of these, 67 per cent involved requests for intervention, three per cent applications for exemption and 13 per cent other, minor requests, while seven per cent of the procedures were initiated by the Office spontaneously. The Office resolved 315 competition restraint issues and made two proposals to the Competition Council. The proposals by the Office and the two decisions given by the Competition Council concerned the abuse of dominant position in the wholesale of motor fuels, the national market of liquid dairy products and the collective administering of copyrights.

In **France**, the Directorate General for Consumer Affairs, Competition and Product Safety/Quality (DGCCRF) undertook 242 enquiries in 1996, and the Ministry made 36 referrals to the Competition Council. As in the previous period, these referrals focused primarily on conspiracy involving government procurement contracts and abuse of dominant position, in some cases by undertakings invested with legal monopolies. The Competition Council, whose scope of activity was expanded under the Act of 1 July 1996 on predatory pricing, dealt with 142 cases in 1996. Several of these involved government contracts in the construction/public works and health care sectors. The volume of mergers continued to decline, whereas a greater number of operations (27 in 1996) were notified to the Directorate General, most likely because of legal security concerns. The industries with the highest numbers of mergers were communications, distribution and services, whereas there was a clear slowdown in manufacturing mergers, except in the agri-food sector.

In **Germany**, during the review period, the *Bundeskartellamt* launched a number of proceedings against especially solid agreements involving price fixing and market sharing, primarily amongst electric cable manufacturers, makers of traffic signals and telematic systems, and milling firms. The *Bundeskartellamt's* investigations (266 agreements were still in force in 1996) focused mainly on existing agreements or their renewal. A decline in the overall number of completed mergers (to 1 434 in 1996, from 1 530 in 1995) was recorded. The largest number still involved horizontal mergers: 12 projects were rejected before a formal procedure was initiated; five were amended to reflect concerns about competition, and four mergers were prohibited.

In **Greece**, during the review period, 90 cases were notified to the Competition Committee's Secretariat. Of these, 73 were processed and final decisions taken in respect of 18. Of the 90 cases, 62 involved mergers; the Competition Committee issued decisions in respect of seven of them, none of which was unfavourable.

In **Hungary**, during the review period, two in-depth examinations were initiated in respect of anticompetitive agreements in the beer market. The Competition Council deemed that provisions prohibiting retailers from selling beer for less than a specified price constituted a violation of the ban on cartels. Over the period in question, two applications for exemption from this ban were received. In one case the Competition Council denied the exemption, while in the other the agreement was found to be in no way restrictive. The Competition Council issued 69 rulings in respect of abuse of dominant positions. In twelve cases it found against the defendants, and proceedings were discontinued in seven cases. In 50 cases the Competition Council found either that no violation existed—because of a lack of dominant position, which by definition precluded any abuse thereof—or that a dominant position did exist but that there was no proof of abuse. The Competition Council ruled on 30 mergers; it authorised 22 and held that no authorisation was required in the other cases.

In **Ireland**, 35 agreements were notified to the Competition Authority in 1996, bringing the total number of notifications since the law entered into force to 1 347. The Authority filed 90 notifications and made 19 decisions in 1996. The Ministry received notification of 171 mergers under the Merger Act; two cases were referred to the Competition Authority for investigation, but no merger was prohibited in 1996.

In **Italy**, the Antitrust Authority ruled on 27 agreements, ten abuse of dominant position cases and 425 mergers in 1996. The Authority also issued 66 opinions to the Bank of Italy and the Broadcasting and Publishing Authority; in addition, it conducted a general survey on the vehicle fuel pricing mechanism.

In **Japan**, the Fair Trade Commission investigated 210 alleged violations of the Antimonopoly Act in 1996. Of these, 78 had been brought forward from the previous year, while 132 were initiated during this period. Out of the 144 cases for which the Commission completed its investigations, 30 resulted in cease and desist orders; in 26 cases recommendations were issued, and in the four remaining cases orders to pay surtaxes were issued with no prior recommendation. In addition, warnings were issued in 22 cases of presumed but unproven violations of the Antimonopoly Act. In 1996 the Commission received notification of 2 420 proposed mergers, none of which resulted in action by the Commission.

In **Korea**, the number of unfair practices denounced by the Commission rose significantly in 1996, increasing by 72.4 percent over the previous period. These practices concerned abuses of dominant position (29.9 percent of cases), deceptive presentations and advertising (11.5 percent, misleading prize offers (11.5 percent) and refusals of sale (11 percent). The number of mergers increased significantly in 1996 due to a lessening of the obstacles to private-sector participation in SOC projects, including electric power generation and road building, and to the licensing of providers of mobile telecommunications services.

In **Luxembourg**, the Ministry of the Economy made a referral to the Restrictive Trade Practices Commission in 1996 following a complaint over an alleged abuse of dominant position in the market for the collection and disposal of hazardous or special waste produced by small and medium-sized enterprises. The Ministry accepted the Commission's finding that there could be no dominant position insofar as market shares were insufficient, and that the services rendered by the firm in question necessarily contributed to better environmental protection.

In **Mexico**, the number of cases on which rulings were made (38) was up significantly from the previous period. In particular, the number of discontinuations dropped, new cases were more diversified, and monopolistic practices not expressly covered by the federal Economic Competition Act were noted. In addition, measures were enacted to combat obstacles to interstate trade, and it was recommended that the authorities eliminate certain administrative procedures that affected competition. Out of the 310 new merger cases analysed, 272 were settled.

In **the Netherlands**, 58 applications for derogation from the price fixing decree were submitted: 15 were under study and 43 ruled upon, three favourably. Fifteen applications for derogation from the bid-rigging decree were submitted: nine were under study, and six were ruled upon. While there was no merger control pursuant to the applicable legislation during the period under review, in two cases the Netherlands Government invoked the so-called "Dutch clause" of the EEC regulation on concentrations (Article 22 of the WEM)

In **New Zealand**, over the review period from September 1996 through June 1997 the Commission received 976 complaints, and 52 investigations were actually undertaken. The Commission also approved the filing of criminal charges with the High Court in respect of two cases, involving price fixing and abuse of dominant position respectively. There were 41 merger applications under the licensing procedure and one under the authorisation procedure.

In **Norway**, most violations involved the bans on price-fixing and resale price maintenance. The competition authority recorded a total of 696 mergers and acquisitions in 1996. Of these, 46 mergers were examined closely, and ten cases were still pending at the end of the year. In one case, the authority decided to intervene.

In **Poland**, out of 69 appeals of the Anti-Monopoly Office's rulings on cases of anticompetitive practices, the Tribunal examined 39: 19 were thrown out; in four cases, the original decisions were amended; in six, the procedures were discontinued following withdrawals; in eight, the appeals were disavowed; and two cases were still pending. In addition, 324 opinions were issued regarding mergers.

In **Portugal**, 98 cases were investigated by the Directorate General for Competition and Prices (DGCP), many (40) of which had originated from complaints. During that period, 51 preliminary investigations were concluded. Nine of them resulted in official procedures for violation of the Competition Act (four other procedures were initiated in 1995), 38 were concluded or dismissed for various reasons, such as compliance with competition rules or withdrawal, and the others were referred to other competent authorities because of their specific nature. Over the same year (1996), three cases were referred to the Competition Council for final decision, concerning: abusive behaviour on the market for broadcasting football matches, a combination of pharmaceutical firms, and abuse of dominant position in the tobacco market. In 1996 the DGCP reviewed 30 merger operations and concluded 26 cases, of which 21 received favourable opinions and were authorised, while the other five were abandoned. The firms involved in these mergers did business in the following industries: manufacturing or distribution (seven); wholesaling or retailing (eight); communications services (one); miscellaneous services (four); and construction (one).

In **Spain**, the number of procedures undertaken rose considerably in 1996 (to 180), and with increasing frequency they were prompted by complaints, in most cases involving services. Most of the cases concerned prohibited behaviour or abuse of dominant position. Most of the exemptions granted by the Tribunal for the Protection of Competition (TPC) involved the establishment of registers of late-paying customers and, in some cases, vertical restrictions such as franchising contracts or exclusive distribution agreements. In all, the TPC made 51 decisions on competition matters. Most of the violations concerned horizontal agreements. The Tribunal found against defendants in 13 cases, imposing fines totalling Ptas. 323 375 000.

In **Sweden**, 526 cases were pending at year-end 1996. Some 200 cases (complaints, mergers, agreements) were notified to the authority in order to obtain negative clearance or exemptions during the transitional period (notifications during that period totalled around 800). In 1996, a total of 26 decisions by the competition authority were appealed to the Stockholm City Court (a court of first instance), of which 16 were judged. At the end of the year, a total of 25 cases were still pending before the court, and in six of these cases the authority enjoined the firms in question to cease their violations. Most of the initial rulings of the Stockholm City Court in respect of applications for negative clearance or exemption were appealed to the Market Court. Over this period, the Market Court ruled on four appeals. The Swedish competition authority ruled in 1996 on 301 proposed mergers, eleven of which had prompted extensive inquiries following the initial 30-day review period (in 1995, the authority had ruled on 252 cases, 17 of which had required further investigation).

In **Switzerland**, insofar as the new law did not enter into force until 1 July 1996 and provided for a six-month adjustment period for competition agreements, the Competition Commission took only a limited number of decisions applicable to business enterprises. Between 1 July 1996 and 30 June 1997 the Commission secretariat initiated preliminary investigations in a variety of areas, such as parallel vehicle imports, sporting equipment, property management software, heat pumps, porcelain, waste recycling and disposal, etc. Between 1 January 1996 and 30 June 1997 a number of civil suits for infringement of competition were filed with civil courts; they dealt with the behaviour of certain health insurance funds vis-à-vis private clinics, first-aid doctors and pharmacies. Although the Cartels Commission (which was replaced by the new Competition Commission) could have made recommendations regarding business concentration operations under the old legislation, it did not exercise this right during the first half of 1996, when that legislation was still in force.

In **Turkey**, in 1995 and 1996, the Directorate General for the Protection of Consumers and Competition completed the investigation of a number of cases involving various sectors of the economy: cement manufacturing and the mixing of concrete, road transport, bakeries, poultry, corrugated cardboard and the distribution of periodicals.

In the **United Kingdom**, details of 1 819 agreements were sent to the OFT in 1996, compared with 1 393 in 1995. In 1996, 699 agreements were added to the register (practically the same number as in 1995), for a grand total of 13 535 entries since the register was created in 1956. The Director General of Fair Trading (DGFT) advised the Minister that 653 agreements did not contain significant restrictions on competition. However, 44 new investigations were started, Section 36 notices were issued in respect of ten investigations, and a number of less formal letters of enquiry were also sent. In 1996, the OFT received 185 complaints alleging contravention of the Resale Price Maintenance Act, compared to 63 in 1995. In six cases, the DGFT obtained written assurances from suppliers that they would not seek to impose minimum prices at which dealers could resell their goods. In 1996, the DGFT also referred three monopolies, two of which were related, to the Monopolies and Mergers Commission (MMC).

The number of merger cases considered by the OFT continued to increase considerably in 1996, rising from 473 in 1995 to 531 in 1996, a year-on-year rise of around 12 percent following a roughly 24 percent increase in 1995. The total value of assets acquired or bid for in the merger situations examined by the OFT in 1996 was £149 billion (versus £178 billion in 1995). Horizontal mergers accounted for 92 percent of the total number of qualifying cases examined in 1996 (versus 91 percent in 1995).

In the **United States**, in fiscal 1996, the Antitrust Division opened 347 investigations and filed 71 antitrust cases, both civil and criminal, in federal courts. The Division initiated 42 criminal cases against 41 corporations and 22 individuals. Thirty-one corporations and 16 individuals were fined a total of \$26.8 million, and five defendants were sentenced to combined prison terms of 2 431 days. Eight other individual defendants were sentenced to various forms of deprivation of liberty for a combined total of 1 148 days. In October 1996, the Division obtained the highest fines ever imposed in criminal antitrust actions, following an investigation into the lysin and citric acid markets. The \$100 million fine, paid by the Archer Daniels Midland Company, was the largest ever in a competition-related criminal case. The Division opened 331 civil investigations, both merger and non-merger, and issued 1 878 civil investigative demands (a form of compulsory process). It filed 20 civil complaints not involving mergers.

In the non-merger area, the FTC prosecuted various types of practices, including horizontal restraints, exclusive dealing and resale price maintenance, involving services rendered by pharmaceutical networks, truck-mounted fire-fighting pumps, athletic footwear manufacturing and articles made of speciality woods. Six consent agreements were accepted, and one administrative complaint was lodged against Toys "R" Us, citing that company for, *inter alia*, abusing its market power to keep prices high. An initial ruling was made by a judge specialising in administrative law in the International Association of Conference Interpreters case, confirming a complaint filed by the Commission in 1995 alleging price fixing and other restraints of competition in the supply of interpretation services in the United States. The Commission also issued a final ruling barring the California Dental Association from imposing a variety of restraints on its members' sincere and non-deceptive practices involving advertising and solicitation.

The two agencies examined 3 087 transactions reported pursuant to provisions of the Hart-Scott-Rodino ("HSR") Act on prior notification of mergers. A wide range of industries were involved, including national defence, medical equipment, industrial gases, supermarkets, pharmaceuticals, chemicals, computer software, cable television, funeral services, radio stations, paper products, ski resorts and legal publications. The Division investigated 186 transactions, requesting additional information in 102 cases, and it conducted inquiries in 49 cases outside the scope of the HSR Act. The FTC investigated 36 transactions, requesting additional information. These investigations culminated in 23 consent agreements, four withdrawals and authorisation to seek preliminary injunctions to block three proposed mergers, two of which were later abandoned by the parties. The FTC's most highly publicised merger investigation was of

Time Warner's \$7.5 billion acquisition of Turner Broadcasting, which was authorised on the condition that a consent agreement involving a set of structural and non-structural measures be adopted. In addition, the FTC recovered an exceptional \$7.8 million in civil fines in HSR Act cases against firms that had violated their obligations with regard to prior notification of mergers or observance of the waiting period before proceeding with mergers notified under the Act.

In the **European Union**, the Commission registered 471 new cases, of which 209 were notifications, 168 were complaints and 94 were case files opened on the Commission's own initiative. While the number of new cases was lower than in 1995, it was more than 10 percent higher than the average volume of new cases over the preceding nine years. During the year the Commission closed a total of 386 cases, 365 of which through informal procedures and 21 by formal decisions. The Commission displayed particular vigilance vis-à-vis practices whereby firms in dominant positions attempted to eliminate the competition, such as exclusion techniques aimed at existing competitors or at keeping new ones from entering the market. In 1996, the Commission paid particular attention to problems stemming from restrictive practices in sectors about to be liberalised, such as telecommunications, transport and energy. On mergers, the Commission received 131 notifications and took 125 final decisions. Activity in 1996 was about 15 percent higher than in the previous year.

In 1996, the regional offices of the Anti-Monopoly Committee (AMC) of **Russia** received 1 862 complaints of abuse of dominant market positions (in the distribution of water, gas, electricity and heat, transport and communications, and maritime and air transport services), versus 1 859 in 1995. Of these cases, 731 were settled out of court, 565 led to prosecution, and in 343 cases (61 percent), a cessation of the infringement was either ordered or recommended.

In 1996, the regional offices of Russia's AMC investigated 50 complaints regarding inter-firm agreements in restraint of competition (primarily impediments to market access and refusals to deal with certain vendors or buyers), versus 67 in 1995. Twenty-seven cases went to court. Over the period 1995-96, the State Anti-Monopoly Committee and its regional offices examined more than 5 500 applications regarding the creation or re-organisation of businesses or associations of businesses, or major share purchases. One-fifteenth of the applications regarding economic concentration were rejected by the anti-monopoly authorities. More than two billion roubles in fines for violations of anti-monopoly laws were transferred to the federal budget.

In the **Slovak Republic**, the Antimonopoly Office dealt with 128 cases in 1996. In all, 70 initial and appellate decisions were handed down; nine decisions were appealed, and two complaints were lodged with the Supreme Court of the Slovak Republic challenging the legality of the decisions rendered. Of the 40 merger cases dealt with in 1996, 13 resulted in unconditional authorisation. Eleven of these involved horizontal concentration and one vertical, while the remaining case involved a merger in the form of a conglomerate.

#### **4. Deregulation, privatisation and competition policy**

In **Australia**, the national competition policy package proclaims the principles of systematic legislative review, competitive neutrality, access to infrastructure and structural reform of public monopolies. The reform package developed in 1995 is an important element in an ongoing reform programme covering the utility (electricity, gas), communications (postal services, broadcasting, telecommunications) and transport (inland waterway and ocean shipping, airports, aviation, road and rail) sectors, as well as the professions. Under the package, the Commonwealth has agreed to provide the states and territories with financial resources to foster competition, in return for their adherence to the reform. The National Competition Council is responsible for assessing compliance with the plan. It was shortly to report to the government on restraints on competition in postal services.



In **Austria**, a proposed amendment to the law regulating the professions constituted an important step towards liberalisation in that area. In addition, the new Telecommunications Act, which took effect on 1 August 1997, reflects a strengthening of competition in the industry.

In **Canada**, the Bureau was highly active in the telecommunications sector, as it was in others, such as energy (electricity and gas) and financial services.

In the **Czech Republic**, the Office for the Protection of Economic Competition examined competition issues arising from the existence of natural monopolies, primarily in the distribution of gas and electricity. It also played a role in major privatisation projects.

In **Denmark**, no new development was reported in this area.

In **Finland**, the Office of Free Competition focused in 1996 on influencing the regulation of communications and administrative practices vis-à-vis that industry in order to preserve the ability of new firms to enter the market. It also intervened in the health care sector, contributing to deregulation of the drug and pharmacy sector, and with regard to postal services.

In **France**, private monopolies continued to be opened to competition, involving air transport, telecommunications and the railways in particular. In addition, preparations were made during the reference period to introduce competition into the electricity and gas sectors.

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

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

In **Hungary**, the regulation of public services hardly changed in 1996. Actual operation of regulatory mechanisms confirmed the concerns and doubts the OEC had voiced at the time those mechanisms were formulated.

In **Ireland**, the Telecommunications Act entered into force in 1996, providing *inter alia* for the sale of 20 percent of the shares of the public enterprise that operates telephone services. However, there were no measures liberalising the electricity market or other utilities.

In **Italy**, in 1996 and early 1997, the Antitrust Authority issued 26 reports and opinions to Parliament and the government aimed at promoting competition in a number of sectors, including transport and allied services, telecommunications, food and energy.

In **Japan**, the government's announced that the derogations regime to the Antimonopoly Act would be scrapped by 1998. In addition, it was decided in the revised Deregulation Action Programme adopted in March 1996 that the Ministries concerned would take the Commission's opinion fully into account and would organise prior consultations with the Commission, as needed, so that anticompetitive administrative orientations would not be substituted for government regulations.

In **Korea**, as part of its regulatory reform mission, the Commission defined 28 tasks in eight sectors that required urgent reforms. In particular, it relaxed restrictions on access to the energy market, primarily in respect of electricity and gas; in addition, it proposed to consolidate numerous regulatory impact assessments, in particular with regard to the environment, transport, the population, disasters and the countryside, and to unify them within a single assessment.

In **Mexico**, in 1995-96 the Commission took part in the government's efforts to enlist private sector participation in the supply of public services and the exploitation of nationally owned resources. It

also helped to restructure economic activities in the public sector. Of particular note were studies of the regulatory frameworks applicable to airports and natural gas distribution, the policy for concessionary allocation of broadcasting frequencies and formulation of a strategy for privatising public enterprises in a variety of sectors.

In the **Netherlands**, the projects carried out as part of the MDW operation (a regulatory reform programme initiated in December 1994 to enhance the competitiveness of the Netherlands economy) were successfully completed in June 1997. They dealt with competition and pricing in the following areas: health care, accountants, bailiffs, building sector regulations, issuance of authorisations in application of the law on the pollution of surface waters, and legislation concerning products.

In **New Zealand**, special attention was focused on the telecommunications, electricity and postal services sectors.

In **Norway**, the competition authority concluded co-operation and co-ordination agreements with the Norwegian Telecommunications Administration in 1995, and with the Banking, Insurance and Securities Commission, and the Norwegian Hydraulic and Energy Resources Administration, in 1996. To a certain extent, the authority and the regulatory bodies of certain industries have overlapping jurisdiction with regard to competition policy.

In **Poland**, the Office helped draft in 1996 a proposed energy bill that, *inter alia*, would set up an Office of Energy Regulation with responsibility for the activities of energy firms and suppliers of energy and fuel, and a proposed law on banking services.

In **Portugal**, in March 1996, following general elections on 1 October 1995, the new government approved a privatisation plan for 1996-97, stipulating goals and criteria and setting priorities for each sector. Among the companies to be sold during that period, the most significant cases involved cement, banking, insurance, telecommunications, tobacco manufacturing and chemicals.

In **Spain**, the Spanish Government adopted a series of Royal Decrees in June 1996, including economic measures designed to liberalise economic activities in the following sectors: telecommunications, professional associations, energy, water, road transport and railways, pharmaceuticals, etc. In so doing, the competition authorities played a very active role in defending competition by preparing the necessary studies and reports.

In **Sweden**, the competition authority submitted a report to the government in 1996 outlining its views on trends in the six markets in which regulations had been either repealed or reformed: taxis, telecommunications, postal services, airlines, railways and electricity.

In **Switzerland**, the Competition Commission and its predecessor, the Cartels Commission, took positions on a number of proposed laws in the telecommunications, health care and environment sectors, among others.

In **Turkey**, no new development was reported in this area.

In the **United Kingdom**, no new regulatory development was reported.

In the **United States**, the Antitrust Division of the Department of Justice continued its efforts to promote competition by filing comments on: *i*) Federal Communications Commission procedures involving revision of the rules and policies applicable to live satellite broadcasting services; *ii*) procedures involving the Department of Transportation—computerised reservations systems (CRS); *iii*) the Union Pacific/Southern Pacific merger; and *iv*) procedures involving the Federal Energy Regulatory Commission

concerning the policies and methods applied in examining utility mergers under the Federal Power Act. 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, copyright systems and the professions.

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

In the **Slovak Republic**, the Antimonopoly Office took part in the activities of the standing working committees that dealt with price and rate regulation, focusing on natural monopolies. It looked primarily at the prices of electricity, gas and heating, heating oil and petrol, fees for water distribution and wastewater removal, telecommunications and postal rates and other regulated activities.



## AUSTRALIA\*

(July 1996-June 1997)

### Executive Summary

As described in previous reports, 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).

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 Commission. Throughout 1996-97 the Commission continued to scrutinise significant mergers in line with its revised Merger Guidelines, published in July 1996. The issue of mergers in the financial sector was examined by the Financial System Inquiry, which was established by the Commonwealth Government in June 1996 to conduct a wide ranging review of the financial sector. The Inquiry reported in March 1997 and made several recommendations relating to mergers, including supporting the continued application of the merger provisions of the *Trade Practices Act* to the financial system as to other sectors.

On 9 April 1997 the Government decided to end the so-called 'six pillars' policy, which separately imposed a prohibition on mergers among the four largest banks and two largest life offices. The Government further decided that mergers among the four major banks would not be permitted until it is satisfied that competition from new and established participants in the financial industry, particularly in respect of small business lending, has increased sufficiently.

Microeconomic reform processes are continuing in the electricity, gas, telecommunications and transport sectors of the economy. A new deregulated telecommunications market commenced on 1 July 1997. The first stage of the National Electricity Market began on 4 May 1997, and a National Access Code for natural gas pipelines is expected to be in place later in 1997.

As foreshadowed in the previous annual report, the Government has implemented major labour market reforms, with amendments to the Commonwealth industrial relations legislation coming into effect in January 1997.

### 1. Changes to competition laws and policies

The major legislative changes to competition laws to implement the National Competition Policy are now in place. However, minor amendments were made during 1996-97 as part of the evolution of the national competition policy package. Legislative changes relating to the telecommunications sector have been enacted recently, and legislation pertaining to the gas and electricity industries is expected in the near future.

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\* The original language of this report is English.

### ***1.1 Administrative arrangements***

Responsibility for competition policy and law enforcement lies within the Treasury portfolio. Policy and enforcement functions are split between the following bodies:

- 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;
- the Australian Competition and Consumer Commission (the Commission) is the Government's independent competition enforcement body. Its functions also include adjudicating on authorisation and notification issues, prices oversight and the enforcement of consumer protection laws. The Commission also exercises functions under the legislated access regime;
- 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' from the Commonwealth;
- the Australian Competition Tribunal (the Tribunal) 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;
- the Federal Court of Australia determines whether the Trade Practices Act has been contravened and determines the appropriate remedy<sup>1</sup>. It is also responsible for enforcing access arrangements determined under the Trade Practices Act.

### ***1.2 Competitive Conduct Rules***

#### ***1.2.1 Extended Cover of the Competitive Conduct Rules to all Business Activity***

The competitive conduct rules in Part IV of the Trade Practices Act now apply to the unincorporated sector and to State and Territory government business activities which were previously outside the coverage of the Act. Since 21 July 1996 these rules have applied to all businesses irrespective of their legal form or whether they are public or private owned.

Both Commonwealth and State/Territory legislation was necessary to implement the rules, owing to the division of constitutional powers between different levels of government in the Australian Federal system. The competitive conduct rules are found in:

- 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;
- 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.

The Commission administers both the Commonwealth and State/Territory laws.

### *1.2.2 Amendments to the Competitive Conduct Rules*

#### *i) Boycott Laws*

As foreshadowed in the previous annual report, the Workplace Relations and Other Legislation Amendment Act 1996, so far as it amended the competitive conduct rules, came into force on 17 January 1997. The Act includes provisions that reinstate, and in some respects extend, former sections 45D and 45E of the Trade Practices Act, as they existed prior to 30 March 1994. The new provisions prohibit:

- secondary boycotts which have the purpose of causing a substantial lessening of competition (covered by the existing section 45D);
- secondary boycotts which have the purpose and effect of causing substantial loss or damage to the target of the boycott conduct;
- 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
- 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 engaged in by employees in relation to the terms and conditions of employment affecting their workplace are exempted from the new provisions, as is direct industrial action taken by employees against their employer during 'bargaining periods'.

#### *ii) Revised Merger Guidelines*

Previous annual report explained the Commission's revised merger guidelines, which were issued in July 1996. They replaced the draft guidelines released in 1992. The Commission is preparing a supplement to its guidelines to outline to the business community the thinking behind, and approaches taken to, mergers and acquisitions where exports and international competitiveness are relevant. To be published in late 1997, the supplement will address a number of issues relating to the operation of the Trade Practices Act and its implications for business in developing export markets.

### *1.3 National Access Regime*

The national access regime, set out in Part IIIA of the Trade Practices Act, has been in place since November 1995. In April 1997 amendments to Part IIIA were enacted, designed to streamline the process by which the Commission can approve industry codes in 'network industries', such as electricity. In such industries, codes are being developed to govern access arrangements within the industry, and to form the basis of access undertakings to the Commission by individual service providers. Prior to the amendments, the Trade Practices Act required the Commission to undertake multiple public consultation processes in relation to such codes - one in relation to the access code, if it was necessary to authorise the code, and others in relation to the access undertakings of individual access providers. The amendments introduce a single industry-wide access code approval process.

### *1.4 Principles for Future Reforms*

To establish and guide future reforms, the inter-governmental Competition Principles Agreement sets out principles agreed to by the Commonwealth, State and Territory governments. Over the past year,

considerable progress was made towards achieving a national approach to the implementation of those principles, which are set out below.

#### *1.4.1 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 ten years.

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

- the benefits of the restriction to the community as a whole outweigh the costs; and
- the objectives of the legislation can *only* be achieved by restricting competition.

Each government will ensure that proposals for new legislation that restricts competition are accompanied by evidence that the legislation is consistent with the above principle, and will publish an annual report on progress towards achieving its timetable for review.

#### *1.4.2 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 apply user charges for services that are contestable.

In order to neutralise the net competitive advantage arising from public sector ownership, the agreement sets out a number of measures - corporatisation, commercial rate of return requirements, imposition of full taxes (or tax equivalents), debt guarantee fees, and imposition of regulation on an equivalent basis to the private sector. In some instances, pricing principles can be used instead of these measures. Each government will also publish an annual report on the implementation of this principle.

#### *1.4.3 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.



## 2. Enforcement of competition laws

This Part covers the administration of the competitive conduct rules in the Trade Practices Act and the Competition Code, and also deals with the infrastructure access regime in Part IIIA of the Trade Practices Act, along with the prices oversight functions of the Commission.

### 2.1 *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 legal proceedings 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 1996-97, including those reviewed by the Tribunal, appear later in Table 3.

#### 2.1.1 *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<sup>2</sup>. Whilst only the Commission 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.

1996-97 saw 169 proposed mergers considered by the Commission, compared with 149 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 revised Merger Guidelines (issued in July 1996) in order to determine whether it should undertake more detailed investigation. Under these thresholds, the Commission will consider mergers where:

- the merger would result in the merged entity having 40 per cent or more of the market; and
- the merger would result in the four largest firms having more than 75 per cent of the market and the merged entity more than 15 per cent of the market;

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.

**Table 1: Types of acquisitions and mergers considered**

	96-97	95-96
Horizontal	155	96
Vertical	21	28
Changed shareholding	12	5
New entry to market	13	27
Privatisation/Asset sale	27	n/a

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. Table 2 shows the number of mergers considered and their outcome.

**Table 2: Result of mergers considered**

	96-97	95-96
New mergers referred to the Commission	169	149
Considered by the Commission and Foreign Investment Review Board	37	30
Not proceeded with or amended following Commission concern	7	11
Court action	0	2
Authorisation sought	0	3

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<sup>3</sup>. The Commission's preference is for 'structural' undertakings as opposed to ongoing behavioural undertakings, such as price, quality and service guarantees.

#### 2.1.1.1 Significant Mergers and Acquisitions

##### i) Retail Banking

On 3 April 1997 Westpac Banking Corporation (Westpac) and the Bank of Melbourne announced their proposal to merge. The Commission received a confidential joint submission from the two parties requesting an informal clearance for the merger on 15 April, shortly after the release of the Financial System Inquiry (FSI) Report. Once the submission was received the Commission undertook extensive market inquiries and sought comment from more than 100 organisations.

In defining the product and geographic dimensions of the banking market, the Commission adopted a multi-product analysis in light of the increased propensity for consumers to unbundle their banking needs in response to the activities of non-bank providers of home loans such as mortgage originators. Such an analysis is broadly consistent with the trends in consumer behaviour and market analysis provided by the FSI Report.

After completing its market inquiries the Commission was concerned that the merger would be likely to result in a substantial lessening of competition in the transaction accounts market in Victoria. Westpac offered undertakings to the Commission to address its concerns. The undertakings created rights

of access — for the first time in the Australian banking sector — for new and small players in Victoria to utilise a major bank's electronic networks.

The undertakings also provide for considerable autonomy of the State management of the merged Victorian operations under the Bank of Melbourne brand to preserve and enhance its existing efficiency and customer goodwill to help the merged operation compete more effectively against the three other major banks. They also preserve the rights of existing BML transaction account and debit card customers to certain account keeping and transaction fee exemptions.

*ii) Sugar Refining Industry*

CSR Ltd and Mackay Refined Sugars Pty Limited (MRS) approached the Commission with a proposal to enter into a joint venture which would combine their refining, distribution and marketing operations in Australia and New Zealand. CSR and MRS are the two largest sugar refiners in Australia, in terms of both capacity and market share.

The parties submitted that the joint venture addressed certain structural problems in the refined sugar industry, an industry characterised by a high fixed cost structure, significant economies of scale and highly corrupted international markets.

In 1993 refined sugar imports were not considered by the then Trade Practices Commission (TPC) to be an effective competitive constraint on domestic refiners. A tariff of A\$55 per tonne on raw and refined sugar imports, together with high freight costs, placed imports at a substantial competitive disadvantage. In that year the TPC refused to authorise a proposed joint venture between CSR and MRS because it was not satisfied that it would result in a public benefit substantial enough to outweigh its anti-competitive effect.

The Commission identified a number of changes that have occurred in the sugar refining industry since 1993, which have led to a significant increase in the likely effectiveness of imports as a competitive constraint on domestic refiners. These changes included the removal of the \$55 per tonne sugar tariff; a substantial reduction in freight rates which, in association with the removal of the tariff, reduces the import parity price, increasing the competitiveness of imported refined sugar; a significant increase in world and regional refining capacity; and continuing excess capacity in the domestic sugar refining industry.

Despite these changes the Commission was still concerned about the competitive effects of certain aspects of the joint venture, particularly in regard to Western Australia. To address these concerns the parties offered to provide an undertaking under s. 87B of the Trade Practices Act. The undertaking provides that the joint venture parties will make their import facilities in Western Australia available to any person wishing to import sugar into Western Australia. The Commission concluded in July 1997 that the undertaking would address its concerns and the joint venture was able to proceed without any further examination.

*iii) Pay TV*

Under a proposed joint venture Australis and Optus Vision would share satellite programming infrastructure for the distribution of their pay TV programs from 1 July 1997.

The joint venture was considered in the context of a deed that was previously entered into between Australis and a subsidiary of Publishing and Broadcasting Limited (PBL) as a result of PBL providing certain funding guarantees as part of Australis' recapitalisation plans. Under the deed PBL was granted certain rights of first and last refusal over certain Australis programming assets and a right to consent to certain modifications of Australis' programming agreements. Australis was required to use its best endeavours to enter into a joint venture in relation to satellite infrastructure services. The joint venture and the PBL deed raised a number of issues for the Commission to consider because PBL had interests in two competing pay TV operators.

After careful consideration of the matter the Commission decided not to intervene. This decision was supported by the advice of senior counsel. The Commission will continue to closely monitor the implementation of the joint venture.

The Commission noted that under the joint venture Australis and Optus Vision would share satellite infrastructure but would continue to compete in terms of pricing, marketing and program content. While the joint venture envisaged a combined programming package in the future, both Optus Vision and Australis have confirmed in writing that they will not take any steps to provide any combined programming to subscribers without first obtaining the Commission's approval.

The joint venture differed in a number of ways from the proposed merger between Australis and Foxtel which the Commission rejected in early 1996. The joint venture:

- is an infrastructure sharing agreement only;
- does not lead to the disappearance of one of the three metropolitan pay TV operators;
- has little or no impact on telephony;
- would not be implemented until mid-1997 when the market was opened to all potential entrants, whereas the proposed Foxtel/Australis merger would have given the merged group a substantial 'first mover' advantage — the merged entity would have been able to access all households via cable, satellite and MDS while its competitor, Optus Vision, would have had access only to cable distribution until July 1997;
- does not give Optus Vision a greater market penetration than would occur in the absence of the joint venture. Without the joint venture, Optus Vision could supply pay TV services via satellite as well as cable; and
- does not give Optus Vision a significant advantage over Foxtel in securing new programming (unlike the proposed Australis/Foxtel merger).

### 2.1.2 *Anti-competitive behaviour*

#### 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 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 been used widely.

In December 1995 the Commission instituted proceedings against the Commonwealth Bureau of Meteorology, alleging that the Bureau had taken advantage of its market power to prevent competition in the market for specialised weather services. In particular, the Commission alleged that the Bureau had refused to provide information to the Meteorological Service of New Zealand Limited (MetService).

In addition to providing national meteorological services to the New Zealand Government, MetService provides specialised commercial services to other users, including computer-generated graphical presentations of its weather maps and forecasts to newspapers for their weather pages.

In 1994 MetService introduced its service to the Australian print media and sought data direct from the Bureau to enable it to produce its specialised media package. At the time the Bureau was charging a number of media outlets for similar specialised services. Under the *Meteorology Act 1955*, the Bureau is required to provide a basic weather warning and forecast service to the public free of charge. However, it is able under the Act and its policies to charge for specialised services specifically tailored to a particular client's needs, including some specially formatted weather presentations for the media.

The Bureau asserted that it acted as it did in the belief that its action was in accordance with its international obligations under the Convention and Resolutions of the World Meteorological Organisation which aim to facilitate the free and open exchange of meteorological information.

The Commission asserted that the refusal to supply direct access to MetService and the changed practice of free specialised services was done to disadvantage a potential rival.

On 22 May 1997, following discussions and court-sponsored mediation, the Commission and the Bureau of Meteorology announced a settlement which both parties believe promotes the public interest. The Bureau agreed to a consent court order to provide direct access to an Australian registered subsidiary of MetService. Under the settlement the Bureau also agreed to publish a policy document detailing the basis and rights of access to information it holds, and further agreed to use a model licence agreement setting out conditions for access to, and use of, information it holds; providing for dispute resolution; specifying termination grounds and rights of parties; and providing for other parties to offer forecasting elements to the media in addition to the Bureau's basic service whilst maintaining comprehensive forecasting to the public through the free-to-air and print media.

In August 1996, after an extensive Commission investigation, a number of Tasmania's major frozen food service industry wholesalers were penalised more than A\$1.54 million in total for their respective roles in long-running price fixing in the frozen food service industry in that State.

The Commission noted that the companies involved assisted with its investigation, thereby avoiding the expense of a protracted investigation and a subsequent contested litigation. This cooperation

ultimately led to a joint penalty submission by all parties which argued, in part, that the cooperation warranted a substantial decrease in the penalty that the Court would otherwise impose.

The Court accepted the penalty packages submitted in respect of all respondents except one. In its decision the Court, for the first time, rejected a penalty jointly put forward and substituted a significantly more severe penalty.

The respondent appealed the decision and during the subsequent proceedings the Commission lent its broad support to the case advanced by the appellant. The Full Court upheld the appeal, noting that when corporations acknowledge contraventions, very lengthy and complex litigation is frequently avoided, freeing the courts and Commission officers to deal with other matters. The Full Court also noted that negotiated settlements allow for the inclusion of measures designed to promote, for the future, vigorous competition in the particular market concerned. The Full Court concluded that these beneficial consequences would be jeopardised if corporations were to conclude that proper settlements were clouded by unpredictable risks.

In upholding the appeal the Full Court noted that a proper penalty figure was one within the permissible range in all the circumstances, and that the Court would not depart from an agreed figure merely because it might be disposed to select some other figure, or except in a clear case. The Full Court also accepted as being relevant the views of the Commission in connection with penalty factors such as whether a proposed penalty would be sufficient to deter anti-competitive behaviour.

In June and August 1997, penalties totalling A\$1.54 million and costs of A\$175 000 were ordered against a number of car rental companies in Alice Springs and their management for engaging in a price fixing arrangement in breach of s. 45 of the Trade Practices Act. The Court handed down orders and injunctions against four corporate respondents and five individual respondents.

The Court found that from late 1994 until around April 1995, the Alice Springs offices of the companies stopped offering tourists travelling in the Central Australian region car rental discounts after the companies reached an understanding with their competitors that they would also stop offering these specials. The corporate respondents gave undertakings to implement a trade practices compliance program for their employees and to compensate all affected customers.

### *2.1.3 Authorisation decisions and Notifications*

The Commission's workload in this area is increasing following the adoption of the national competition policy package, which has extended the reach of the Act into previously exempt areas. In particular, a number of authorisation applications were received in 1996-97 relating to the National Electricity Market.

**Table 3 Adjudication action - 1996-97 and 1995-96**

	<b>Tribunal Reviews</b>		<b>Authorisations</b>		<b>Notifications</b>	
	1996-97	1995-96	1996-97	1995-96	1996-97	1995-96
Previously under consideration	3	1	26	17	18	1
New applications/notices	0	3	34	33	82	38
Withdrawn	1	0	0	2	0	0
Decided	1	1	8	22	80	21
Unresolved at 30 June	1	3	52	26	20	18

Noteworthy authorisation matters include the following:

*i) National Electricity Market (NEM)*

On 15 November 1996 the Commission received applications for authorisation of the National Electricity Market Code. The applications were submitted by the National Electricity Market Management Company and the National Electricity Code Administrator. The Commission has undertaken extensive public consultation and also engaged consultants to assist its assessment of the code. The Commission recently issued a draft determination outlining its views on the application.

In order to facilitate the transition to the NEM, on 23 December 1996 the Commission received an application from NSW, Victoria and the ACT to initiate the harmonisation of the NSW and Victorian wholesale electricity markets. These arrangements have been referred to as NEM1 and are to be developed in two stages.

The Commission granted interim authorisation to the NEM1 Stage 1 arrangements on 5 March 1997. The harmonised NSW and Victorian wholesale market began operating on 4 May 1997.

*ii) Payments System*

The Commission is considering applications for authorisation by the Australian Payments Clearing Association in respect of proposed rules for the Consumer Electronic Clearing System (CECS), and the High Value Clearing System.

The CECS proposals relate to clearing and settlement interchange arrangements for debit card transactions generated within the automatic teller machine (ATM) and electronic funds transfer at point of sale (EFTPOS) networks. The Commission has concluded that the proposed CECS rules are substantially incomplete in terms of the standards and procedures necessary to facilitate effective operation of ATM and EFTPOS interchange, and require substantial amendment and expansion before the Commission would be satisfied that it should grant authorisation in respect of the arrangements. The Commission intends to issue a position paper outlining its concerns in respect of these applications for authorisation.

## **2.2 Access to Infrastructure Services**

The notion underlying the regime set out in Part IIIA of the Trade Practices Act is that third party access to certain infrastructure facilities of national importance 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. The regime provides both voluntary and mandatory mechanisms for third party access. Further detail was provided in Australia's 1994-5 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.

From 1 July 1996 to the date of this report, applications for access declarations were received by the Council in relation to airport cargo handling services, rail networks and gas pipelines. In addition, applications by State Governments to have access regimes certified as 'effective' were made in relation to shipping channels, rail networks and gas pipelines.

Of these applications, the Commonwealth Treasurer declared certain cargo handling services at Sydney and Melbourne International Airports, and the Premiers of NSW and Queensland declined to declare rail networks in those States. Requests for review of each of these decisions have been lodged with the Tribunal. State regimes covering shipping channels in Victoria and gas pipelines in NSW have been certified as effective.

## **2.3 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. 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 number of firms subject to price surveillance continued to decline throughout 1996-97.

Under 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.

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. The Commonwealth surveillance regime may apply to State and Territory government businesses, where:

- the State or Territory concerned has agreed; or
- the Council has, on the request of an Australian government (Commonwealth, State or Territory), recommended declaration of the business on the basis that the business is not



subject to effective oversight and the Commonwealth has consulted the relevant Minister of the State or Territory concerned.

### **3. Implementation of competition policy principles**

The national competition policy package settled in April 1995 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.

#### **3.1 Postal Services**

On 2 June 1997, the Commonwealth Government referred a review of the remaining restrictions on competition with Australia Post to the Council. The Council will be examining the continued need for a statutory protection to Australia Post for the exclusive right to carry letters, and the implications of a reduction or removal of that reservation in the context of the Government's commitment to the provision of a standard letter service to all Australians at a uniform price. The Council has not been asked to address the issue of ownership. The Council will release an options paper shortly, before providing a final report to the Government in February 1998.

#### **3.2 Broadcasting**

The *Broadcasting Services Act 1992* contains a range of licensing and regulatory requirements for broadcasting services in Australia. 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 (ABA).

Along with its licensing responsibilities, the ABA is also vested with responsibility for content regulation of broadcasting services. During 1996-97 the ABA completed inquiries into several areas, including the future use of the sixth television channel (for non-commercial purposes); the regulation of the content of on-line services; and Australian content on Pay TV services.

The end of the year saw the expiry of regulatory prohibitions on the allocation of additional satellite pay TV licences, advertising on pay TV and the cross ownership/control restrictions between satellite pay TV licence A and large circulation newspapers, commercial television licences, telecommunications carriers and satellite pay TV licence B. The expiry of these prohibitions provides for a more competitive pay TV environment.

The Government recently announced that it will defer making any decisions on changes to the existing media ownership rules.

#### **3.3 Telecommunications**

The Government finalised the regulatory regime to apply to telecommunications from 1 July 1997 through the passage of a package of legislation in March 1997. The centrepiece of the new legislation is the *Telecommunications Act 1997* which deals with licensing, carrier and service provider rules, numbering, universal service arrangements and technical regulation. The Act establishes open market access for both telecommunications infrastructure providers and service providers. Restrictions on the installation of telecommunications infrastructure under the previous legislation have been removed and

carrier licences are required only for persons wishing to use certain infrastructure to provide services to the public.

Carrier licences are available on application to the new industry regulator, the Australian Communications Authority, which was formed by a merger of the previous telecommunications regulator, AUSTEL, and the radiocommunications regulator, the Spectrum Management Agency. There are no limits on the number of carriers, and carrier licences are not technology specific. The Act also promotes the greatest practicable use of industry self-regulation, and changes the universal service arrangements to ensure their effective operation in an open licensing environment, as well as clarifying and extending the universal service obligation, and enhancing the efficiency of its delivery.

Amendments to the Trade Practices Act bring the regulation of competition in the telecommunications sector more closely into line with general trade practices law. The Commission assumes responsibility for competition regulation, administering a special regime for regulating anti-competitive conduct in the industry, which applies in addition to general restrictive trade practices legislation, and a special telecommunications access regime.

The Commission has powers to issue competition notices (with strict offence provisions) to firms engaging in anti-competitive conduct, with the aim of preventing carriers or carriage service providers with substantial market power from taking advantage of that power to stifle competition. The Commission also has extensive information gathering powers, eg in relation to tariff filing, and is able to make record keeping rules for specified industry participants. The operation of these industry specific competition rules will be reviewed by 1 July 2000, to assess whether they are still needed.

The new telecommunications access regime provides a framework for regulated access rights to be established for specific carriage services and related services, and establishes mechanisms within which the terms and conditions of access can be determined. The access regime reduces the power of those owning or controlling important infrastructure or services which are necessary for competitive services to be supplied to users.

### **3.4 Electricity**

In June 1993, the Council of Australian Governments (CoAG) agreed to the establishment of a competitive electricity market in South-East Australia.

The new arrangements are based on the separation of industry sectors to allow for competition at the generation and retail levels, a wholesale electricity spot market with competitive merit order dispatch of generation, non-discriminatory access to the interconnected networks, eligible customers to choose who supplies their electricity, and the availability of financial instruments which will allow market participants to manage their risk exposure to spot prices.

The operation of the market is set out in an industry code of conduct, the National Electricity Code. The Code will be underpinned by State and Territory legislation and access undertakings of grid operators. The National Electricity Market Management Company has been established to run the market and power system, while the National Electricity Code Administrator will administer the Code and regulate the market and access regime. The draft Code was submitted to the Commission in November 1996 for approval and authorisation which is expected in late 1997.

The first stage of the National Electricity Market commenced on 4 May 1997 with the harmonisation, or alignment, of the existing Victorian and combined NSW/ACT electricity markets. The market will evolve through a number of transitional stages to the scheduled operation of a fully competitive market in 2001. The market is currently operating under existing state Codes which provide for 'national' dispatch, inter-regional price hedging and the introduction of competitive trade across state

borders. Initially, the level of electricity flows between the two regions was constrained, but this has now been removed. South Australia also participates in the market, but only as a buyer of wholesale electricity from Victoria to supplement its state-based supply.

Full implementation of the National Electricity Market systems and arrangements as specified in the Code is due to commence in the second quarter of 1998 at which time South Australia will also become a full participant in the market. It is expected both Queensland and Tasmania will become participants in the interconnected integrated market following grid interconnection early next century.

The NSW, Victorian and Commonwealth Governments which jointly operate the Snowy Mountains Hydro-electric Scheme are co-operating to progress the corporatisation of the Scheme to allow it to operate as an independent entity in the National Electricity Market.

Competition is being increased with the progressive lowering of the electricity consumption threshold which determines the eligibility of customers to participate in the market. From July 1997 sites in NSW and Victoria using more than 750MWh pa were contestable. By July 2001 all customers in these States will have the freedom to choose their electricity supplier.

Further significant structural reforms continue to be implemented to a number of the former vertically integrated State and Territory based electricity utilities. Competitive corporatised generation and distribution sectors have emerged. Victoria has subsequently privatised distribution and most of its generation businesses, with the remainder of its electricity industry scheduled to be privatised by mid 1998. A number of other States are also examining opportunities for increased levels of private sector involvement in the electricity supply industry.

### 3.5 *Gas*

In February 1994, the CoAG agreed to implement a package of reforms for the natural gas industry to bring about free and fair trade in gas. The package included the removal of legislative and regulatory barriers to trade, aimed at stimulating a more competitive framework for the industry, and a national framework for third party access to natural gas pipelines. Reforms in the natural gas industry include the separation of contestable and non-contestable components of vertically integrated companies, and the regulation of non-contestable businesses.

A timetable has been agreed for the implementation of national gas reform that will see South Australia pass 'lead' legislation to enact the National Access Code for natural gas pipelines by the end of 1997. Other jurisdictions, including the Commonwealth, will then apply the South Australian legislation in their jurisdictions.

As an interim measure, New South Wales has implemented a third party access regime for natural gas distribution pipelines to promote competition in the distribution sector. Victoria has also developed an interim access regime, to be enacted in November 1997. Both the NSW and Victorian interim access regimes are based on the national framework for third party access to natural gas pipelines, and will be replaced by the National Access Code.

There has also been significant industry restructuring and infrastructure development within the natural gas industry which will promote the integration of Australia's gas pipelines, enhancing the possibility of increased inter-basin competition between gas producers. New pipeline developments include the construction of a link between the gas networks of NSW and Victoria, a new gas pipeline from the South West of Queensland to the mineral prospective Mt Isa region, and the possibility of a new pipeline being constructed between Gladstone in Queensland and the Kutubu gas fields of Papua New Guinea.

In Victoria, Government-owned distribution and retail operations have been separated, and the distribution businesses are to be privatised. The distribution pipeline businesses will then be regulated by the rules established in the third party access regime. A further change is the proposed privatisation of the Dampier to Bunbury pipeline in Western Australia.

### **3.6 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 ending the union labour monopoly and encouraging enterprise bargaining.

### **3.7 Shipping**

The Government gave an election commitment to wind back current cabotage restrictions and examine the appropriateness of alternative shipping register arrangements. These and other issues are addressed in a report by the industry-based Shipping Reform Group (SRG). It is expected the Government will consider the SRG's recommendations in the near future.

### **3.8 Airports**

The airports owned by the Commonwealth are to be privatised through the sale of long term leases. The first tranche of airports was privatised in 1996-97 and included Melbourne, Brisbane and Perth. A further 15 airports are to be privatised in 1997-98. The privatisation of the Sydney airports is to await the resolution of noise problems at Kingsford-Smith Airport and the completion of an environmental impact statement at two possible sites for the second Sydney airport.

### **3.9 Aviation**

A single aviation market with New Zealand took effect from 1 November 1996. Restrictions placed on international aviation by the current system of air service agreements will be reviewed in 1997-98.

### **3.10 Rail**

With the exception of interstate track, the Government is to sell the businesses of the Australian National Railway Commission (AN) and the Commonwealth's interest in the National Rail Corporation (NR). The Government's decision follows a review into the commercial performance of AN and NR and a scoping study by the Office of Asset Sales. AN is a Commonwealth authority which operates intrastate rail freight operations in South Australia and Tasmania, interstate passenger services, mechanical engineering workshops, interstate mainline rail network and track maintenance business units. NR was established in 1991-92 to operate an interstate rail freight business in Australia. Its shareholders are the Commonwealth, New South Wales and Victoria.

On 28 August 1997, the Government announced that the AN businesses based in South Australia and Tasmania are to be sold to three consortia which plan significant expansion of services and injections of capital into the businesses. The agreements with the consortia result in combined payments to the Commonwealth of A\$95.4 million, with the consortia contracted to spend a further A\$97 million on capital expenditure for the businesses over the next four to six years. The Government has decided, in principle, to sell its shareholding in NR by 1998.

On 10 September 1997, the Government announced it had reached agreement with the mainland States on interstate rail reform. As a first step, the Commonwealth and Victoria will place their interstate track (from Wodonga and Broken Hill to Kalgoorlie) under single management by 1 July 1998. A plan

will be considered in November 1997 for the extension of this network to Perth. Under the agreement, operators will be able to access the interstate network through a single point of entry providing seamless access and operations across the network.

The Commonwealth will make A\$250 million available over four years from 1998-99 for investment in the interstate track. This funding is conditional on satisfactory access arrangements and plans for investment and harmonisation of regulatory and operational requirements being in place.

#### **4. Studies**

##### **4.1 *Australian Competition and Consumer Commission's Report of its Inquiry into the Petroleum Products Declaration* - August 1996**

This report was the last in a series of inquiries into prices surveillance declarations to determine whether the maintenance of prices surveillance is warranted for declared goods and services

The Commission recommended that the prices surveillance declaration of petrol and distillate supplied by the four major oil producers be revoked during the course of 1997, subject to some changes in market conditions. Principally, the Commission proposed that revocation not occur until there is a further rationalisation of country retail sites, an opening of access to oil terminals, and evidence of a strengthened presence of independent operators in the industry.

##### **4.2 *Benefits of Private Sector Involvement in Road Provision: A Look At the Evidence* - Bureau of Transport and Communications Economics Working Paper 33, June 1997**

This report focuses on the evidence for the economic case for private involvement in "public" road infrastructure (ie, contracted work on public roads and private toll roads). The paper notes that private contractors already perform a fair amount of design, construction and maintenance of Australia's publicly owned roads, and that there would be benefits from further contracting out of road work.

##### **4.3 *Competition in the Supply of Roadworks to Government* - Department of Transport and Regional Development Information Paper, June 1997**

This paper provides a study of recent practices regarding the extent and nature of competition to supply roadworks to Australian governments. The report uses the results of a survey of roadworks expenditure by Commonwealth, State and Local governments. It considers the extent to which different roadworks suppliers have the opportunity to compete for government roadworks contracts, the extent to which they are successful in winning these contracts, constraints on the competition process, and reforms being adopted to improve competition.

**4.4 A Framework for Reform of Australian Shipping - A Report by the Shipping Reform Group 1997**

The Shipping Reform Group (SRG) was given the task by the Minister for Transport and Regional Development to report to the Government on the reform of Australia's shipping industry. The recommendations of the SRG provide for a package of reforms that comprise:

- labour market reforms;
- exposure to international competition through the wind back and ultimate removal of cabotage;
- the establishment of an Australian Second Register which delivers fiscal concessions, conditional upon the implementation of labour reforms.

The Government will make a decision on the SRG's recommendations following a period of public consultation with stakeholders.

**4.5 The Economic Impact of International Airline Alliances - Industry Commission Information Paper 1997**

The IC report examines the effect of airline alliances on competition in the international airline industry and assesses the potential benefits for passengers and airlines of such alliances. Overall the Commission presented a rather positive view of airline alliances and code sharing, illustrating the potential benefits that can be achieved for passengers and airlines of such alliances. However, the Commission does express concerns about the potential market power available to airlines which engage in alliances, particularly when there are barriers to entry. At present, these barriers include restrictions contained in air service agreements on ownership and control of airlines and on capacity, and restricted access to airport infrastructure such as landing and take-off slots.

**5. Resources of competition authorities**

The Australian Competition and Consumer Commission ('the Commission') is the national competition authority in Australia. It has offices throughout the country.

**5.1 Overall Resources**

- Annual Budget for the Commission 1996/97    \$A34 149 000 (\$US 25 164 00) (person years 306)  
     of \$A1 069 000 over 1995/96 - nil increase in numbers)
- Number of employees (person years)
 

- economists	71
- lawyers	79
- other professionals	76
- support staff	<u>80</u>
	306*

\* includes six full-time Public Office Holders - Chairman, Deputy Chairman and four Commissioners.

*Human Resources (person years):*

Resources were allocated by the Commission to four discreet programs of activity in 1996/97:

Program 1: Compliance with the Trade Practices Act 1974

Objective: to secure compliance with the *Trade Practices Act 1974* by responding to complaints and inquiries and observing market conduct and initiating actions where necessary.

Activity includes:	Person years
-- investigation and enforcement	
- restrictive trade practices	50
- mergers enforcement	23
- consumer protection	42
-- adjudication	<u>15</u>
	130

Program 2: Improvement in Market Conduct

Objective: to secure improvement in market conduct by developing and implementing regulatory frameworks which maximise the potential for promotion of competition and efficient outcomes; assisting access to essential facilities; liaising widely with key stakeholders; and reviewing price notifications from declared companies and monitoring processes as required under the *Prices Surveillance Act*. To contribute at the international level to competition and consumer protection issues.

Activity includes:	Person years
-- market studies and research	
- competition issues (includes telecommunications, electricity, gas etc)	40
- consumer issues	13
- Government directions	3
-- prices surveillance and inquiries	1
-- self regulation (codes of conduct)	1
-- liaison and co-ordination	
- competition issues	11
- consumer issues	<u>7</u>
	76

Program 3: Education and Information

**Objective:** To inform the community at large about the *Trade Practices Act* and *Prices Surveillance Act* and their implications for business and consumers.

Person years

16

Program 4: Corporate Planning and Management

**Objective:** to maintain high levels of management efficiency and cost effective resource utilisation at both national and regional office levels.

Person years

84

**Total person years**

**306**

**NOTES**

1. Cross-vesting legislation allows actions under the Trade Practices Act to be heard by State and Territory superior courts in restricted circumstances.
2. The dominance test was used from 1977 - 1993. From 1974-1977 the substantial lessening of competition test was in force..
3. Undertakings should be distinguished from the authorisation process. The object of statutory undertakings 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.



## AUSTRIA\*

(1996-1997)

### Introduction

In the period under review, legislation on competition was not changed; however, a new Telecom Law as well as amendments of individual other laws were passed which have had considerable repercussions on competition. Among them are the Trade Regulation Act as well as the new Stock Exchange Law.

In the period under review, significant merger activities were recorded, which were reflected in 316 registered and notified mergers in 1996 and more than 177 registered and notified mergers in the period from January to early September 1997. The sector most affected was the building industry.

### 1. Changes of the regulatory framework

#### 1.1 *Amendment of the Trade Regulation Act*

Numerous professions and trades were governed by the Trade Regulation Act, which inter alia contains provisions on market access, examinations of market participants, etc. The recently enforced amendment was a significant step towards liberalisation within practicable limits since the number of trades was reduced from 155 to 84 and thus almost cut by half. At the same time, the rights of trade owners were strengthened so that they may now engage in a wider range of activities.

Preparatory work is undertaken to liberalise legislation on business start-ups.

#### 1.2 *Telecommunications*

The new Telecommunications Law (Official Gazette 100/1997) became effective on 1 August 1997 which in accordance with § 1 is to guarantee "the supply of the population and economy with reliable, inexpensive, high-quality and innovative telecommunications services by the promotion of competition in the field of telecommunications". The provision of mobile telephone services, public voice telephony services as well as of leased circuits is subject to licensing, however the license shall be granted in accordance with § 15 provided that the party has the technical qualifications and is able to provide the required services. Notwithstanding, a license may be limited to specific supply areas or telecommunications services. Furthermore, the law provides for the supervisory authority to monitor the general terms and conditions as well as the fees of market-dominating Telecom suppliers. Market-dominating enterprises (with a market share of more than 25 per cent in the functionally and locally relevant markets) are inter alia obliged to grant network access to their infrastructure.

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\* The original language of this document is English..

The private limited company Telekom Control GmbH has been established (§ 108) as the regulatory authority. It is wholly owned by the Federal Government and is controlled by the Federal Ministry for Science and Transport. In addition to its competence to issue instructions under company law as the owner, the Federal Ministry for Transport may also issue written instructions in accordance with § 117. The Telekom Control Commission, which is independent of instructions and is formed by a judge and two persons appointed by the Federal Ministry for Science and Transport, is responsible for the following tasks: the granting of licenses, the approval of terms and conditions and fees, the determination of the financial compensation for the Universal Services Fund, the identification of market-dominating enterprises, the establishment of the non-observance of the cross-subsidisation prohibition and, in the case of dispute, laying down the conditions governing the interconnection of networks.

The Italian telephone operator STET acquired a 25 per cent minority participation of Mobilkom, the biggest Austrian mobile telephone operator.

A third licence for a mobile telephone operator in the 1800 Mhz range was granted for ATS 2.3 billion by tendering procedure to the consortium of operators Connect Austria (RHI Telekom Gesellschaft (Vienna), Telenor (Oslo), Tele Danmark (Arhus), VIAG (Germany), Constantia (Austria), Orange Overseas Holding (GB).

In April 1997, the second GSM operator Max Mobil realised that the mobile telephone operator Mobilkom (a subsidiary of Post und Telekom AG) was using former frequencies of the former D mobile telephone network for the GSM network. As a result of a complaint by Max Mobil, this enterprise was granted 13 former D network frequencies - even though with considerable delay.

Several competitors in the field of fixed networks are already planning to offer their services to consumers as soon as liberalisation takes effect on 1 January 1998. These enterprises have now concluded co-operation agreements with other international operators of fixed networks even before engaging in operative activities.

## 2. Enforcement of Competition laws

### 2.1 Mergers

In 1996, 316 mergers were notified or registered (+ 18 per cent as compared to 1995), in the period from January to September 1997, 176 mergers were notified or registered.

	1996	1997
Industry and trades	138	79
construction, building materials, real estate, waste management	61	24
energy	13	9
co-operatives	8	2
media	17	15
trade and commerce	28	15
banks	8	9
insurance, various services	38	17
hotels, tourism	5	6
<b>total</b>	<b>316</b>	<b>176</b>

(As from 1997, the merger statistics has been evaluated and re-calculated on the basis of the NACE code, which implies structural statistical changes)

### 2.1.1 *Decision of the Supreme Cartel Court*

In its decision 16Ok1/95 of 12/96 on the merger case A.S.A/(TIRU S.A)/Dekonta/Wiblinger, the Supreme Cartel Court declared that for judging whether a merger was to be notified or required application for registration only the domestic turnover proceeds of the participating enterprises were decisive. Owing to this decision, the ratio of cases to be notified/cases requiring application for notification changed considerably (shift in favour of cases notified allowing no review).

#### i) Merger of Energieversorgung Niederösterreich (EVN)/Burgenland Holding:

Based on a request for review of the official party Federal Chamber of Labour, the Cartel Court requested the Joint Committee on Cartel Matters to review the underlying registered merger (acquisition of a majority share in Burgenland Holding by EVN). Since the Burgenland Holding transfers to its majority owner control of significant minority shares in the public utilities BEWAG (49 per cent) and BEGAS (48.1 per cent) in Burgenland, the Joint Committee examined the repercussions of the merger on the following relevant markets:

- electricity market;
- gas market.

#### Electricity market

In accordance with the 2. Nationalisation Act, the utilities of the individual States are responsible for the electricity supply in the respective Federal States.

The Joint Committee declared that as a result of the merger EVN had not obtained decisive control of the Burgenland electricity utility (BEWAG) (the majority holding remains with the State); therefore no tightening of the market structure worth prohibiting could be identified in the electricity sector.

#### Gas market

Both EVN and BEGAS (48.1 per cent held by Burgenland Holding; the majority holding remains with municipalities) act as regional distribution companies in their supply areas in accordance with the Energy Industry Law. The merger gives EVN only limited control of the activities of BEGAS; therefore no tightening of the market structure worth prohibiting could be identified in this case.

In general, the merger was considered a step towards improved chances of survival and increased competitiveness of the participating enterprises in a partially liberalised European market, contributing at the same time to secure the supply to private and commercial customers.

The underlying merger was not prohibited by the Cartel Court based on the opinion of the Joint Committee on Cartel Matters.

In the period under review, the Austrian economic setting was marked by a significant merger:

ii) *Bank Austria/Creditanstalt*

The European Commission examined the acquisition of the large Austrian bank Creditanstalt by Bank Austria since the turnover thresholds of the European merger control were considerably exceeded and since slightly less than two thirds of the turnover was made in Austria. Bank Austria acquired 70 per cent of the voting rights of Creditanstalt subject to privatisation. The majority holding of Bank Austria is owned by the Anteilsverwaltung Zentralsparkasse (AVZ), whose majority in turn is held by the City of Vienna.

Bank Austria and Creditanstalt are universal banks mainly active in Austria, engaging in all major banking activities directly or through subsidiaries. Moreover, they hold a great number of shares in enterprises of various other economic sectors, in particular the building industry, the real estate sector and the insurance business.

After the merger, the two enterprises are not only the undisputed leaders in supplying banking services in Austria but also constitute the only banking group with significant market shares active in all relevant product segments.

Both in Austrian retail banking and in wholesale banking, the parties participating in the merger and the associated GiroCredit achieve significant market shares in respect of some product segments (such as lending business, security deposit business, deposit-taking business), which considerably exceed those of the next biggest competitor. In addition, the Austrian banking markets are characterised by great consumer loyalty, a closely woven network of branches and other barriers to market access so that there has been a danger of creating or strengthening a market-dominating position. Further competitive concerns resulted from the concentration of shares in the special banks operating in the public interest, Österreichische Kontrollbank (OeKB) and Österreichische Investkredit, held by Bank Austria and Creditanstalt.

The European Commission approved this merger only after the applicants concerned were prepared to make far-reaching commitments. Bank Austria and AVZ agreed to sell their holding of the commercial bank GiroCredit as well as to reduce their shares in Österreichische Kontrollbank and the special bank Investkredit. GiroCredit has meanwhile been acquired by the Erste Österreichische Sparkasse, which now represents the second biggest banking group with a balance sheet total of ATS 670 billion, 360 branches and 7,700 employees.

Competitive concerns were raised in the building sector due to the significant industrial holdings of the two banks. Bank Austria has been interlaced with several big Austrian building companies which have a strong position on the Austrian building markets, especially in the civil engineering sector. By acquiring Creditanstalt it would also obtain a majority holding of the big Austrian building company Universale. Therefore, Bank Austria had to agree to sell either its holding of Universale or its holding of STUAG, another major Austrian building company. So far, this has not been done.

iii) *Merger Stuaag/Strabag/Innerebner*

According to the merger registration, STUAG AG will acquire control of the major part of the building company Innerebner und Maier GmbH primarily active in Tyrol. Stuaag AG has been held jointly by Strabag and Bank Austria since 1996.

The STUAG group (owner 50 per cent Strabag Österreich, which in turn forms part of the German Strabag group, 49.9 per cent Bank Austria) intended to acquire 75 per cent of the core operations of the Innerebner building group in tyrol. the remaining 25 per cent are still held by the Innerebner group.

the Innerebner group thus spins off operations with an annual turnover totalling approximately 597 million, however in the remaining fields it continues its activities with a turnover of about 700 million a year. In addition, the Bank Austria group holds a share in the Porr group (about 15 billion total turnover) as well as in the Wibeba group (turnover approximately 3 billion) and now also controls the Universale group due to its domination of the Ca group (turnover ATS 7.5 billion).

Competitive problems arise for example in the context of road construction as seven out of ten asphalt mixers are in the control of the group of buyers. In this context it should be mentioned that the asphalt mixture has to be supplied hot and can therefore be delivered only within a radius of 25 km from the building site. Innerebner itself does not own any asphalt mixers but it was doubtful whether this strong market position would be enhanced by acquiring the civil engineering segment of the Innerebner group and to which extent a parallel behaviour by the parent companies seems likely. According to preliminary internal investigations, the new group is significantly larger than the next biggest group.

The sectors of building construction, civil engineering and other building services, classified according to a building volume of above and below ATS 50 million, and in terms of geographical distribution the market of Tyrol were defined as relevant markets. In addition, the markets for intermediate services, in particular asphalt mixers, concrete mixers and quarries/gravel pits were analysed which could represent serious barriers to market access. In respect of building projects exceeding ATS 50 million, a complete list of building projects was drawn up, which showed that the market share of about 35 per cent held by the Stuaag/Strabag/Innerebner group was smaller than originally envisaged since individual enterprises associated with the applicants were hardly active on the local market.

In general, the market for civil engineering services was declining in Tyrol, last but not least due to curbed public sector spending on building services. As a result of the merger, Stuaag intends to discontinue the civil engineering segment of Innerebner (about 40 to 60 per cent of the turnover volume) and to become active in the sector of building construction via Innerebner. Customer interviews supported this assumption.

The Innerebner group argues that its operations are exposed to a severe risk of becoming insolvent unless they obtain a guaranty undertaking by the Stuaag group. Moreover, they stated that no co-ordination of business activities would be realised through the joint parent company.

The request for examination was withdrawn owing to the differing operations, the actually effected market exit of the Innerebner group from the civil engineering segment as well as the announced withdrawal of Bank Austria from the Stuaag group.

#### *iv) Porr/Terrag Asdag Tunnelbau*

The take-over of the tunnel construction segment of Terrag Asdag by Porr Technobau AG as well as Porr Tunnelbau AG was the subject of another merger proceeding. The proceeding focused on questions of market definition and market access barriers in respect of tunnel constructions. In Austria there are about 10 to 15 enterprises with the technical and economic capacity for tunnel construction. Tunnels are either blasted or excavated by tunnel-driving machines and then lined directly. Galleries (for power plants) are dug with tunnel dredgers requiring considerable investment and which can be used efficiently only if the tunnel is of a specific minimum length. More costly technical methods (e.g. icing of the soil) may be needed for tunnelling in the course of underground construction below residential housing, which cause additional investments. The basic technical equipment for tunnel construction projects may be bought (used) for ATS 100 to 150 million. Major building projects are put out for tender internationally and international bidders participate in the tenders. The recruitment of qualified personnel is of great importance but blasters and tunnel masters can be hired on the market.

At first, considerable market access barriers were assumed due to the complex technology and equipment so that the market share of more than 25 per cent - with a clear edge over other competitors - appeared critical.

Due to the high volume of individual projects, the market shares in the building sector are extremely volatile so that market share changes of 25 per cent plus or minus within a year are quite usual.

For this reason no considerable restraints of competition were identified and the request for examination was withdrawn.

## **2.2 *Vertical restraints***

This year's activities focused on the review of vehicle contracts which had to be revised due to the new Block Exemption Regulation (No 1475/95 EEC of 28 June 1995) on motor vehicle distribution and servicing agreements and which had to be notified again to the Cartel Court. At first, those enterprises were requested to notify their new contracts that had not done so in the past. Subsequently, the contents of the contracts was reviewed for conformity with the Block Exemption Regulation. This review showed that the importers or producers have been trying to restrain the freedom of their authorised dealers to use spare parts of other suppliers. On the one hand, special quality controls are imposed on them, on the other hand the retailers are obliged to advise their customers that they lose their right to assert warranty claims if they use external spare parts. In accordance with the Block Exemption Regulation, the retailer shall have the right to sell rival products in a certain way. This right may be exercised by participation in a rival company. Most agreements provide that retailers may hold shares of another company but that on the other hand a participation of a third-party in the company of the retailer is subject to the approval of the producer/importer. Given the uniform and customary nature of these contracts, the opportunity of participation in a rival enterprise is de facto limited.

Sample reviews of other vertical restraints were made. Particularly in the field of franchising, a great number of contracts was notified. On the one hand, conformity with the relevant EU Block Exemption Regulation was examined, on the other hand it was reviewed if individual provisions inequitably restrained the freedom of decision of the franchisees by exceeding the required scope of restraints to competition. As a result, contracts of this type shall also consider the interests of the consumers.

Basically, there is a tendency to notify horizontal agreements under the guise of "vertical restraints" since an authorisation in accordance with the Cartel Act requires lengthy proceedings, a detailed review of the contract and thus considerably higher expenditure. On the other hand, it must be stated that also resale price maintenance is provided for in this kind of distribution contracts which would not be approved if they were filed as a cartel.

## **2.3 *Nonbinding recommendations by associations***

Currently about 80 recommendations by associations are registered at the Austrian Cartel Court. The majority are concrete price recommendations and price increase rates rather than general cost estimate sheets. As explained by the associations, this is due to the fact that the members of associations of smaller trades need concrete guidelines since usually they are not trained in cost accounting.

Recommendations by associations are increasingly viewed as a means to impede ruinous competition. However, prices should be listed that a prudent business man would achieve in the respective sector.

At present, it is the current practice of the Austrian Cartel Court to verify if at least the formal criteria of the Cartel Act are met and that the non-binding character of prices is expressed in a clear form to

the addressees of the recommendation. So far it has been a practice in Austria to include a cross-reference in small print to § 31 of the Cartel Act at the beginning of the recommendation, however, the schedule of fees, remunerations and tariffs used to list fixed prices without any reference to their non-binding character.

The official parties will have to examine more closely if recommendations by associations trigger price-boosting effects.

Currently, three proceedings examining the justification for the national economy are pending. The recommendations concern the transportation of goods, occasional bus transport and fee schedules of the building constructors.

#### **2.4 Abuse of a market-dominating position**

In the period under review (October 1996 to September 1997), the Cartel Courts were faced with a total of 12 proceedings on account of the possible abuse of a market-dominating position.

<b>Pending proceedings</b>	9
Among them newly opened	7
withdrawal of application by the applicant	2
<b>Expert opinions of the Joint Committee on Cartel Matters</b>	2
<b>Decisions of the Cartel Court (I. instance)</b>	3
Among them interim decisions	3
Among them final decisions	0
<b>Decisions of the Supreme Cartel Court (II. instance)</b>	4
Among them interim decisions	3
Among them final decisions	1

The four proceedings on abusive practices concern the media sector and in particular deal with the questions of possible price undercutting in the field of advertisements and to which extent economic pressure is exerted on a business partner to break off business relations with a competitor of the market-dominating enterprise by accelerating the maturity of a claim.

Five other proceedings result from complaints against (former) public companies. Two of these proceedings were mentioned in the report of last year (salt monopoly, Federal railways). The remaining cases deal once more with the question if unreasonable requirements were stipulated in a request for bid concerning the compilation of an Austrian-wide telephone directory. In another proceeding one of Austria's biggest electronics sales chain complains about the boycott measures of a mobile telephone operator as a result of certain advertising efforts of the sales chain. Finally, a bookshop opened proceedings on abusive practices against the tobacco monopoly administration now privatised on account of its refusal to license the bookshop for tobacco retail trade.

In a trend-setting decision, the Supreme Court acting as the Supreme Cartel Court rejected the appeal of a market-dominating enterprise against a decision of the State High Court Vienna as Cartel Court for seeking an advance determination in conformity with Art. 177 EC Treaty. The supreme Court thus endorses the prevailing opinion in Germany according to which decisions of submission by a court that is not a court of last instance shall always be considered unappealable.

## 2.5 *Horizontal restraints of competition*

As has been the experience of Cartel Courts in the past, proceedings are clearly prevailing that have been notified to the Cartel Court in the framework of an application for authorisation by the (potential) members of the cartel as opposed to genuine complaint proceedings.

<b>Applications for authorisation of a cartel</b>	11
Among them applications for extension	7
<b>New registrations</b>	4
<b>Application for a declaratory decision (§8a Cartel Act)</b>	3
<b>Contradictory proceedings</b>	2
Among them prohibition of implementation of a cartel (§25 Cartel Act)	0
<b>Application for declaratory decision (§ 8a Cartel Act)</b>	2
<b>Opinion of the Joint Committee on Cartel Matters</b>	16
<b>Decisions of the Cartel Court (I. instance):</b>	17
Among them authorisations (after modification of the contracts)	13
<b>Declaratory decisions</b>	4
Among them declaration of a cartel	3
<b>Decisions of the Supreme Cartel Court (II. instance):</b>	5

As regards the carbon dioxide industry, the horizontal co-operation among the producers of carbon dioxide active in Austria was withdrawn its economic justification by the Joint Committee on Cartel Matters. Furthermore, an existing cartel for installation services in the field of electronic secondary installations was forbidden to continue using uniform price lists.

An agreement between the legal interest groups of film producers and cinema operators was authorised by the Cartel authorities. It laid down the pro-rata share of film companies in the box office returns of the cinemas as a distribution fee on an individual basis. Consumer prices are not affected by the agreement.

The majority of mineral oil companies active in Austria submitted a co-operation agreement on the shut-down of petrol stations. The mineral oil companies established a fund endowed with a fixed amount which allows the applying petrol station operators to shift the major part of the disposal and environmental rehabilitation costs incurred by a shut-down to the fund. Before filing their application for registration as a cartel, the members of the cartel were advised and requested to eliminate specific clauses restraining competition from their agreement both by the Commission and the Joint Committee on Cartel Matters.

The Cartel Court decided in a declaratory decision in accordance with § 8a Cartel Act that the formation of a co-operative association by certain waste disposal enterprises is a co-operative privilege constituting an exemption from the scope of application of the Cartel Act and thus the establishment of the co-operative association is not subject to control in accordance with the Cartel Act. In particular this shall be valid as long as the participating enterprises are not market leaders in their line of business.

The Cartel Court decided that the consortium agreement concluded between two large pension funds to offer employers jointly their services of effecting pension fund transactions at identical prices and terms and a pro-rate basis was a cartel.

The cartels remaining are characterised without exception as cartels with low intensity and in the agreements mainly clauses of the general terms and conditions, delivery or payment terms as well as market information procedures are concerned.



### 3. Organisation of the competition authorities

The Cartel Court is the court of first instance. Decisions are taken by a panel; the "social partners" are represented in those panels by one assessor each.

The Supreme Cartel Court ("Kartellobergericht")<sup>1)</sup> has appellate jurisdiction.

The Joint Committee ("Paritätischer Ausschuß") - consisting of representatives of the "social partners" - is responsible for giving expert advice, especially in respect of the economic justification of a cartel, the abuse of a dominant position as well as the competitive situation in various fields of the economy. In the performance of their duties, the member are not bound by instructions.

The Republic of Austria and the "social partners" have the status of official parties in the proceedings even if they are not applicants. Applications may be filed by enterprises affected by a restraint of competition and employers' associations as well.

The official parties (Federal Chamber of Labour, Austrian Federal Economic Chamber, the Republic of Austria represented by the Federal Law Office as the attorney of the Federal government acting by order of the Department for Competition at the Federal Ministry for Economic Affairs, Presidential Conference of the Austrian Chambers of Agriculture) employ about 10 persons who are directly responsible for tasks related to competition (= anti-trust) policy and if required additional human resources of these institutions may be - and are in fact - called in for support. The Joint Committee on Cartel Matters employs eight persons preparing expert opinions for the Cartel Court.

There are three panels at the Cartel Court with a chairman and two lay judges as assessors. The panel of the Supreme Cartel Court consists of one chairman representing the judicial profession and four lay judges as assessors. In Austria slightly more than 30 persons are entrusted with tasks related to the enforcement of the Cartel Act, they are supported by clerical staff.

### 4. Recent publications:

KOPPENSTEINER:

Österreichisches und Europäisches Kartellrecht, third edition  
Vienna 1997

BARFUß/WOLLMANN/TAHEDL

Österreichisches Kartellrecht  
Vienna 1996

Kartellrechtlicher Kontrahierungszwang für marktbeherrschende  
Telekommunikationsunternehmen

Dr. Rainer TAHEDL

Österreichische Blätter für gewerblichen Rechtsschutz und Urheberrecht 1997, 107 ÖBl 1997,  
107.

Aufgriffsschwellen der Fusionskontrolle:

Einbeziehung von Auslandsumsätzen?  
Dr. Karin WESSELY, Vienna

Österr. Recht der Wirtschaft 1997, 123

Hanno WOLLMANN

DAFFE/CLP(99)23

Paradigmenwechsel in der Fusionskontrolle  
ecolox-Memo  
Vienna, December 1996

Tätigkeitsbericht des Obersten Gerichtshofes in Kartellrechtssachen für das Jahr 1994 und 1995,  
Amtsblatt der Justizverwaltung  
Vienna 1996

#### **NOTE**

1. Strictly speaking: Supreme Court ("Oberster Gerichtshof") acting as the Supreme Cartel Court.

## CANADA\*

(1st April 1996-31 March 1997)

### 1. Executive Summary

Following extensive consultation with affected stakeholders, proposed legislation to amend the *Competition Act* was introduced in the House of Commons on 7 November 1996. The aim of the amendments was to modernize the Act to keep pace with emerging business trends and enforcement requirements, improve enforcement efficiency and clarify the law.

The evolution of many business sectors from a regulated to a competitive environment continued, primarily in the Telecommunications, Energy and Financial industries. The Bureau's telecommunications activity has been centred on submissions to the proceedings of the Canadian Radio-television and Telecommunications Commission (CRTC), applications brought before the Competition Tribunal and participation in hearings before regulatory bodies. In the energy sector, we participated in activity aimed at restructuring the electricity systems in Ontario and British Columbia, and the Director intervened in hearings of the National Energy Board related to natural gas pipelines.

Criminal proceedings were undertaken in many cases where companies and individuals were accused of contravening sections of the *Competition Act*.

The Marketing Practices Branch focussed on complaints involving telemarketing, direct mail and the telecommunications industry.

Merger activity in Canada continued to increase for the third consecutive year. As well, merger activity before the Competition Tribunal and the Courts is at an all time high. The total number of merger examinations commenced during the 1996-1997 fiscal year increased by 40 per cent from 228 to 319.

We continued our international involvement with the OECD, NAFTA, the WTO, UNCTAD and others. We encouraged cooperation in cross border enforcement activities, and other interactions with foreign competition authorities.

Our compliance and education activities increased in prominence with increased participation in national seminars and trade shows, and with the preparation of several new publications on competition issues.

### 2. Amending the Competition Act

On 7 November 1996, Bill C-67, amendments to the *Competition Act* and the *Competition Tribunal Act* received First Reading in Canada's House of Commons. The purpose was to modernize the Act to keep pace with emerging business trends and enforcement requirements, improve enforcement efficiency and clarify the law. The amendments were intended to:

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\* The original language of this document is English.

- provide quicker and more effective resolution of instances of misleading advertising and deceptive marketing practices by introducing civil administrative remedies which include temporary orders, cease and desist orders, information notices, administrative monetary penalties and consent orders;
- address the recent proliferation of deceptive telemarketing practices that prey upon consumers and erode the value of telemarketing as a legitimate marketing tool by requiring telemarketers to make fair disclosure of prescribed information, and by providing for new offences in relation to telemarketing;
- improve the administration of the merger prenotification process, while reducing the regulatory burden for business;
- revise and clarify the law regarding ordinary price claims;
- expand the tools available to the courts to address criminal conduct through consent resolutions and directive orders following conviction;
- make several miscellaneous amendments which have been identified as being desirable; and
- generally modernize the language of the *Act* in those provisions which are otherwise being amended.

These amendments were developed in close consultation with stakeholders. Their views were sought through the circulation of a discussion paper and the creation of a consultative panel.<sup>1</sup>

### **3. Industries in Transition - A Continuing Priority**

In last year's Report, we commented on the continuing evolution from regulation to competition. As part of this transition, the Bureau has a unique opportunity to play an important role in the development of competition policy in this area. The Bureau continues to be very active in the telecommunications sector, but with the broadening of deregulation activity into other areas, such as energy and finance, we've had a role to play there as well.

#### **3.1 Telecommunications**

The focus of the Bureau's telecommunications activity has been centered on submissions to the proceedings of the Canadian Radio-television and Telecommunications Commission (CRTC), applications brought before the Competition Tribunal and participation in hearings before regulatory bodies.

##### *3.1.1 Teleglobe Mandate Review*

As noted in last year's Annual Report, the Bureau made a submission to the Government in December 1995, with respect to its review of Teleglobe Canada's monopoly mandate for international telecommunications services. The Bureau advocated the removal of Teleglobe's monopoly and relaxation of foreign ownership and by-pass restrictions. As part of the World Trade Organization's Basic Telecommunications Agreement concluded in February 1997, Canada has agreed to:

- end Teleglobe Canada's monopoly on overseas traffic on 1 October 1998,

- end Teleglobe's special ownership restrictions which prohibit investment by foreign telecommunications carriers and limit the investment by Stentor,
- allow 100 per cent foreign ownership and control in the resale sector,
- allow 100 per cent foreign ownership and control of international submarine cable landings in Canada, as of 1 October 1998,
- remove all restrictions on the use of foreign-owned and controlled global mobile satellites providing services to Canadians as of 1 October 1998,
- end the Telesat monopoly on fixed satellite services effective 1 March 2000,
- allow the use of any foreign satellite to provide services (other than DTH/DBS) to Canadians, as of 1 March 2000,
- remove traffic routing rules for all international services and all satellite services by 1 March 2000,
- maintain its open, competitive market and existing transparent regulatory regime,
- remove routing restrictions for most international services as of 31 December 1999.

### *3.1.2 Local Telecommunications Competition (CRTC 95-36)*

As indicated in last year's Annual Report, the Bureau intervened in the CRTC proceeding on opening local telecommunications markets to competition (Telecom Public Notice CRTC 95-36). The Bureau participated in the CRTC's public hearing process in August 1996, and in October filed a detailed written final argument. The Bureau advocated the adoption by the Commission of the following five principles in opening this sector of the market to competition: 1) maximize reliance on competition and market forces; 2) adopt market-based pricing and new mechanisms to address social policy objectives; 3) establish clear rules governing the obligations of the Stentor companies to provide access and appropriate pricing principles to induce efficient competition; 4) define parameters for network access negotiations and establish timely and effective dispute resolution mechanisms; and 5) minimize regulation.<sup>2</sup>

### *3.1.3 Regulatory Forbearance on Long Distance Services (CRTC 96-26)*

In November, 1996, the Director intervened in a proceeding established by the CRTC to determine if the market for long distance telephone services was sufficiently competitive to warrant forbearance from regulation by the CRTC of the services provided by dominant carriers, principally the members of the Stentor Alliance (Telecom Public Notice CRTC 96-26). Under section 34 of the *Telecommunications Act*, the CRTC is required to forbear from regulation where it finds that a service or class of service is sufficiently competitive to protect the interests of users and forbearance would not unduly impair the development of a competitive market. In written submissions filed in November 1996, and in March 1997<sup>3</sup>, the Bureau submitted that the market for long distance services was sufficiently competitive to warrant broad forbearance of the services of the Stentor companies. With the exception of ensuring that access to the transmission capacity of the Stentor companies be made available for resale and sharing for a period of two more years, the Bureau advocated full deregulation of long distance services. The Commission's decision is expected in the fall of 1997.

#### *3.1.4 Local Service Pricing Options (CRTC 95-49)*

In February 1996, the Bureau intervened in a proceeding established by the CRTC to examine the question of affordability of Canadian telecommunications services during a transition to cost-based rates or rate rebalancing in which cross-subsidies to basic local service are being reduced and local rates are increased over time (Telecom Public Notices CRTC 95-49). In written submissions filed in February, March and June 1996 the Bureau urged the Commission to continue its process of rate rebalancing in order to both eliminate the inefficiencies to the economy arising from distortions in the rate structure and to remove a major obstacle to the development of competition in local telephone service. The Bureau argued that if the Commission were to find that, based on declining penetration rates, there was an affordability problem, from a competition and efficiency standpoint, such problems should be addressed by providing assistance directly to qualified subscribers. In November 1996, the Commission rendered a decision in which it found that generally affordability of basic local service is not a significant problem in Canada (Telecom Decision CRTC 96-10). The Commission found that for some subscribers lump sum service and security charges and toll service bills were a problem in terms of affordability. The Commission directed the telephone companies to implement a series of bill management tools to assist subscribers in these areas and ordered the companies to establish a program to monitor penetration rates on a going forward basis.

#### *3.1.5 Tele-Direct*

On 26 February 1997, the Competition Tribunal rendered its decision in the Tele-Direct matter. The application had been filed on 22 December 1994.

The application alleged that Tele-Direct (Publications) Inc. and Tele-Direct (Services) Inc. (Tele-Direct) had tied the sale of advertising services to advertising space in the Yellow Pages. Under the abuse provision of the *Competition Act* (section 79), the tie as well as a number of other acts were alleged as anti-competitive acts which had an exclusionary effect on advertising agencies, advertising consultants and competing telephone directory publishers.

The Tribunal found that there was a tie of advertising space and services with respect to large local and regional advertisers. As a remedy they ordered that Tele-Direct had to pay a commission on, or sell space and services separately for Yellow Pages advertisements that covered a province-wide region of six markets or more. With respect to advertising consultants, the Tribunal prohibited Tele-Direct from engaging in discriminatory acts with respect to the consultants or their customers. The other allegations against Tele-Direct relating to agencies, consultants and competing publishers were dismissed.

#### *3.1.6 Tariff Review (CRTC 95-3)*

In January 1994, the CRTC issued a public notice with respect to the provision of directory database information. At issue was whether the telephone companies under CRTC jurisdiction should be required to make available non-confidential residential and non-residential information in an unbundled form, and what the appropriate rates and other terms and conditions for access to the database should be. The Director filed for and received intervenor status.

In March 1995, the CRTC issued Decision 95-3, in which it required the telephone companies to provide non-confidential residential and non-residential listing information in an unbundled form. However, there was a provision in the CRTC decision that subscribers could have their name and number withdrawn from the database supplied to independent telephone companies. The independent publishing companies felt this would make their directories less complete than the telco-related publishers and therefore less valuable. They asked the CRTC to vary the decision, which it refused to do (Decision 95-14).

Subsequently, the independent publishers appealed to the Governor-in-Council to vary CRTC Decision 95-3 with respect to the opting out provision. The Director supported this application. The Cabinet ordered the CRTC decision to be varied in June 1996.

### 3.1.7 *CANYPS Order Variation*

On 18 November 1994, the Competition Tribunal issued a consent order with respect to national advertising by members of the Canadian Yellow Pages Service (CANYPS), the industry association of publishers of Yellow Pages directories in Canada under the abuse of dominance provisions of the *Competition Act*. AGT Directory Limited (AGT) and Edmonton Telephones Corporation (Edtel) were among the respondents to the order. Subsequently, TELUS Corporation, the parent of AGT acquired Edtel.

On 15 January 1997, AGT and Edtel filed an application with the Competition Tribunal, under section 106(a) of the *Competition Act* for an order to vary four provisions of the CANYPS order so that the two companies could operate jointly in certain areas which were prohibited by the provisions of the order. On 14 February 1997, the Director filed a response to the application arguing that there had not been a change in circumstances as alleged by the applicants.

At year end, the parties were awaiting the Tribunal hearing and settlement discussions were ongoing.<sup>4</sup>

### 3.1.8 *Broadcast Distribution (CRTC 1996-69)*

In May 1996, the CRTC issued a Public Notice calling for submissions on a number of proposed revisions to the regulations relating to the distribution of television broadcasting. This review was necessary as a result of the development of new means of distribution in competition with cable operators. These include direct-to-home ("DTH") satellites, local multipoint communications systems ("LMCS" or "wireless cable") and telephone companies.

The Director filed a submission in mid-July and a second stage submission in mid-August. The Director's submissions supported the elimination of the exclusive licensing policy and endorsed certain pro-competitive proposals by the Commission. The submission also recommended the adoption of criteria for assessing actual competitive entry before price deregulation of the cable companies. Also, it was submitted that new entrants should have access to Canadian specialty and pay television services on non-discriminatory terms and conditions and that the Commission should consider whether exclusive long term contracts with condominiums and apartment buildings raised significant barriers to entry. The second submission also addressed possible predatory pricing and cross subsidization by incumbent cable operators.

The Commission announced its new regulatory framework on 11 March 1997. The new policies address a transition from a monopoly to a competitive environment for broadcasting distribution and aim to establish rules that treat all distributors fairly.

## 3.2 *Energy Sector*

### 3.2.1 *Electricity*

During the past year, the Competition Bureau furthered its participation in restructuring of the electricity systems in British Columbia and Ontario. Previously, Bureau submissions and evidence were provided to the 1996 review by the Advisory Committee on Competition in Ontario's Electricity System (the "MacDonald Committee") and the 1995 Electricity Market Structure Review by the British Columbia Utilities Commission (BCUC). The submissions made the case for major market-opening reforms to the generation and retailing segments of these provinces' electricity systems as the most effective means for ensuring the efficient and low-priced long-term supply of electricity. They also proposed that key market structure elements be put in place in order to ensure the development of effective and efficient competition.

On 10 March 1997, as a follow-up to the Bureau's participation in the BCUC Market Structure Review, a submission as well as expert evidence were provided to the Commission's 1997 Hearing into the Issue of Retail Access and Unbundled Tariffs. The submission and evidence dealt specifically with the potential benefits from, and structural requirements for effective and efficient retail competition in the electricity sector. Expert evidence was prepared on behalf of the Bureau by Dr. Larry Ruff, a world-renowned expert on electricity industry reforms.<sup>5</sup>

### 3.2.2 *Natural Gas: National Energy Board/Transportation of Natural Gas Liquids*

During November 1996, the National Energy Board ("NEB") held a hearing to consider the application of PanCanadian Petroleum Limited for an order requiring Interprovincial Pipe Lines Inc. ("IPL") to transport PanCanadian's natural gas liquids ("NGL"). Although IPL is a common carrier pipeline regulated by the NEB, Amoco Canada Petroleum Company Limited controls facilities required to transport NGL on the IPL and is the only NGL shipper on the IPL.

Pursuant to section 125 of the *Competition Act*, the Director intervened in the NEB hearing, arguing in favour of open access to common carrier pipelines. The Director urged the Board to consider whether restrictions on access were limiting competition in NGL markets.

In the Director's view, the order sought held out the possibility of competitive benefits in the form of higher prices for producers and lower prices for consumers of NGL. Moreover, the Director argued that measures to provide for more open access, over and above the order sought by PanCanadian, would be in the public interest should the Board conclude that restrictions on access were limiting competition in NGL markets.

In its decision released on 6 February 1997, the Board granted PanCanadian's request for an order requiring IPL to transport PanCanadian's NGL east from Alberta. In addition, the Board instructed IPL to consult with industry participants and report back to the Board by 2 September 1997, on commercial solutions to provide for open access for all potential NGL shippers. If the Board is not satisfied with the outcome of IPL's consultations, it has undertaken to consider regulatory measures to provide an appropriate solution.

In its decision the Board emphasized that it considers open public access to oil pipelines under its jurisdiction to be of overriding importance. The Board also noted that while the order sought would alleviate the obstacles faced by PanCanadian, it must also consider the needs of other potential shippers that could compete effectively in NGL markets.

In summary, the Board's decision holds out the prospect of increased competition in NGL markets with ensuing benefits for both producers and consumers of NGL.



### **3.3 *Financial Institutions***

#### **3.3.1 *Interac***

On 26 April 1996, hearings concluded before the Competition Tribunal in respect of an application under section 79 of the Act that was filed by the Director on 14 December 1995. The application for the Tribunal to issue a consent order under section 105 alleged that Interac's Charter members created the dominant shared electronic services network in Canada and abused their market power in several ways, resulting in a substantial lessening of competition:

- they put in place a structure and membership criteria that discriminated against non-financial institutions, including third-party processors and retailers, and against non-Charter members;
- they imposed excessively high fees for new members wanting to join Interac; and
- they unnecessarily limited the services that could be provided over the Interac network, thereby depriving consumers of the benefits of innovation.

Four parties were granted leave to intervene and argued that the requested consent order was not sufficient to restore competition.

On 25 June 1996, the Tribunal issued the consent order requested by the Director. The order required Interac to change its by-laws in a number of ways for the purposes of overcoming the anti-competitive acts identified in the Director's application and restoring competition. Interac revised its by-laws to give effect to the Tribunal's order and has, as a consequence, had non-financial institutions join as new members.

### **3.4 *Other Interventions***

#### **3.4.1 *Canada Post Mandate Review***

In April 1996, members of the Director's staff made a presentation at public hearings conducted by the Mandate Review in Ottawa. The presentation followed a written submission made to the Review in February 1996 in which the Director recommended that a study be undertaken to determine whether the current regulatory framework is consistent with the objective of providing cost-effective, quality postal services. He suggested that abating or relinquishing Canada Post's exclusive privilege over first class mail delivery, in order to allow competition where feasible, is the most appropriate means of obtaining these objectives. The Review's report was released on 8 October 1996. It recommended that Canada Post's activities be restricted to mail delivery.

#### **3.4.2 *Beer Intervention, Quebec***

In July 1996, the Director intervened before the Régie des Alcools du Québec in the application by Lakeport Breweries for a permit to distribute private label beer in the IGA grocery chain in the province of Quebec. This application was opposed by the major brewers, Labatt and Molson Co's.

The Director took the position that it would be in the public interest to grant this permit as it would lead to an increase in competition and to lower prices in the Quebec beer market. The Régie after hearing the evidence reserved its findings until the Supreme Court of Canada rendered a judgment with respect to an earlier decision made by the Régie relating to an application by Lakeport Breweries in 1994 to distribute private label beer in the Metro grocery chain in the province of Quebec, a matter in which the

Director had also intervened. The decision to grant a permit to Lakeport had been appealed to the Supreme Court of Canada by the major breweries.

In February of 1997 after the Supreme Court of Canada ruled that the permit granted in 1994 was valid, the Régie incorporated this decision as well as the Director's evidence of 1994 and 1996 and granted Lakeport Breweries its permit to distribute private label beer in IGA stores in the province of Quebec.

The Director's position was cited in a total of seven court proceedings and was a motivating factor in the granting of both permits.

### 3.4.3 *Review of the Special Import Measures Act (SIMA)*

The Competition Bureau made a submission to and appeared before the House of Commons' Joint Sub-Committee of the Standing Committees on Finance and on Foreign Affairs and International Trade ("the Committee"). On 27 November 1996, the Competition Bureau argued for a better balance between: *a*) providing protection to Canadian producers against injurious dumped or subsidized imports; and *b*) the need to ensure that trade remedy actions (anti-dumping and countervail actions) do not unnecessarily limit competition in Canada or raise prices for consumers and downstream industries which must compete in both Canadian and foreign markets.

The Competition Bureau urged that the public interest provision be made effective by defining a list of factors for consideration, including competition. The Bureau also advocated the explicit adoption of a lesser duty test which would require duties no greater than what is necessary to remove injury done to domestic industry from dumped or subsidized imports. A lesser duty rule is used by many of our trading partners, including the European Union, Mexico, Australia and New Zealand.

The Committee's Report endorsed the approach of the Government to work toward the elimination of antidumping remedies in the context of free trade areas. The Committee recommended improvements to the public interest provision and the introduction of a lesser duty rule. In coming to its conclusion, the Committee stated that it found "this question has been addressed compellingly by the Competition Bureau, as follows: "The Canadian approach to remedies should reflect the differences between Canadian and U.S. economic realities, viz: *i*) trade accounts for a much greater percentage of our national income and, therefore, disruptions of trade flows are likely to be far more costly to Canadian consumers and industrial users than in the U.S.; *ii*) Canada has more concentrated production structures and as a consequence, duties are more likely to permit protected producers to exercise market power and raise prices and profits beyond costs with implications for both efficiency and fairness; and, *iii*) the high foreign ownership of many Canadian industries implies that the benefits of protectionist actions often accrue to foreign shareholders while the costs are incurred by Canadian consumers and participants in user industries."<sup>6</sup>

## 4. Activities and significant cases

### 4.1 Criminal Matters

#### 4.1.1 Land Surveyors

On 10 March 1997, La Fédération des arpenteurs-géomètres du Québec pleaded guilty to a charge of price maintenance pursuant to section 61(1)(a) of the Act. The Quebec Superior Court imposed a fine of \$50 000 on the Fédération as well as a prohibition order, as provided for in section 34(1) of the Act, which prohibits the continuation or repetition of the offence. The offence related to an agreement between the members of the Fédération des arpenteurs-géomètres du Québec to maintain the level, or prevent a reduction in fees in the regions of Quebec, Trois-Rivières and the south shore of Montreal. This was the first time in Canada that a professional association pleaded guilty of having an agreement to raise, maintain or prevent a reduction in the professional fees charged by their members.

#### 4.1.2 Commercial Waste Industry

On 29 January 1997, Mr. Pierre Paré, a former senior official with Gestion des Rebutis DMP Inc. in Quebec's Mauricie Region, pleaded guilty to one count of conspiracy to unduly lessen competition, and must pay a record fine of \$550 000 under the *Competition Act*. The Court also imposed a one year jail sentence to be served in the community on Mr. Serge Brière and Mr. Robert Caron, both formerly with Gestion des Rebutis DMP Inc.

This matter follows the guilty plea by Gestion des Rebutis DMP Inc., in April 1996 for a related conspiracy offence; the company was fined \$1 950 000. The offence involved an agreement between competitors to share the market for the hauling and disposal of commercial waste in the Mauricie region of Québec between 1989 and 1992. The victims of this conspiracy were businesses such as restaurants, corner stores, garages and shopping centres, which lease commercial waste containers.

Mr. Justice Lévesque of the Québec Superior Court also sentenced Mr. Paré to perform 100 hours of community service. In addition, a Prohibition Order was imposed on the three individuals which requires them to comply with the *Act* for a period of ten years.

#### 4.1.3 Driving Schools

On 15 June 15 1996, the first trial by jury under the *Competition Act* concluded with verdicts of guilty on all six counts against Mr. Jacques Perreault who was associated with one of the accused driving schools based in Sherbrooke. The seven week trial commenced on 23 April 1996, before Mr. Justice Paul Marcel Bellavance of the Quebec Superior Court in Sherbrooke. The accused, Jacques Perreault, had exercised his right to have a separate trial by jury. On 9 September 1996, Mr. Perreault was sentenced to a one year prison term.

The charges against the accused included conspiracy to fix prices, engaging in price maintenance, predatory pricing policies and regional predatory pricing policies in the Sherbrooke driving school market in 1987. The accused was also charged for his role in engaging in predatory pricing policies and regional predatory pricing policies in the Magog driving school market during the 1988-1991 period.

On 6 November 1996, sentences were imposed against another principal accused in this case, following the Quebec Superior Court's decision to accept guilty pleas on 1 November 1996. Mr. Yves Aubé and his companies, École de conduite TecnicAubé Inc., 2172-3572 Québec Inc., and École de conduite Tecnic Estrie Inc. pleaded guilty to all three counts involving price-fixing, predatory pricing and

regional predatory pricing offences under the Act. Groupe Lauzon Inc. also pleaded guilty to the offence of price-fixing. The pleas were entered at the end of the first week of trial.

Mr. Justice Réjean Paul sentenced Mr. Aubé to 100 hours of community service and imposed a personal fine of \$10 000 payable within 30 days. In default of payment, Mr. Aubé would be subject to a prison term of four months. His company, Ecole de conduite Tenic Aubé Inc., was fined a total of \$40 000, payable within 30 days. The Court also imposed 15 year Prohibition Orders against the repetition of the offences on the above accused and also on École de conduite Asbestrie Inc. and Mr. André Comeau of Groupe Lauzon Inc.

On 28 January 1997, the last remaining accused in this case, École de conduite Lauzon Sherbrooke, pleaded guilty to breach of a Prohibition Order and was fined \$5 000.

#### 4.1.4 Fax Paper

On 17 February 1997, Mitsubishi Paper Mills Ltd. pleaded guilty to two charges under the Act; one under section 45, the conspiracy provision, for fixing prices for thermal facsimile paper; and one charge under section 61 for refusing to supply thermal facsimile paper to a Vancouver distributor because of the latter's low pricing policy. The company was convicted in the Federal Court of Canada and sentenced to a fine of \$850 000. The Court also issued a Prohibition Order against the company prohibiting further anticompetitive activity.

On 16 July 1996, New Oji Paper Co. Ltd., appeared before the Federal Court of Canada and pleaded guilty to a section 45(1)(c) offence. The accused was fined \$600 000 and a prohibition order was issued.

#### 4.1.5 Ready-Mix Concrete

Four companies in the metropolitan Québec City area were fined a total of \$5.8 million on 19 August 1996, after pleading guilty to one count of conspiracy under the *Competition Act*. This was the second highest fine imposed on a group of companies for one count under the Act.

Ciment Québec Inc., Ciment St-Laurent Inc., Lafarge Canada Inc. and Béton Orleans Inc. pleaded guilty to having entered into an agreement and collaborated with other persons to share the sales of ready mix concrete produced for projects requiring 300 cubic metres of concrete in the Québec City metropolitan area.

In addition to the fine, a Prohibition Order of 15 years' duration was imposed requiring the companies to respect the provisions of the Act and obliging them to understand the law and to ensure that their officers and administrators comply with the law. These officials are also required to attend information sessions on the Act, which will be prepared in collaboration with Bureau staff and presented by the president and legal counsel for each company.

#### 4.1.6 Compressed Gas

Mr. T. John Tindale, the former President of Canox, was convicted and fined \$35 000 under section 45(1)(c) of the *Competition Act* on 9 October 1996, in Ontario Court (General Division) in respect of a price fixing and market sharing agreement regarding various compressed gases. The conspiracy took place from 1989 to 1990. The companies Canox, Union Carbide-Linde Division, Canadian Liquid Air Ltd., Liquid Carbonic Inc., and Air Products Canada, and some of their senior executives, were previously convicted in this matter in the period 1991 to 1993. Mr. Tindale is currently appealing his conviction.

## 4.2 *Marketing Practices*

During this fiscal year, the Marketing Practices Branch focussed on complaints involving telemarketing, direct mail and the telecommunications industry. The following two cases warranted the laying of criminal charges under the *Act*.

### 4.2.1 *The Office Supply Centre (841299 Ontario Limited) & Richard Mellon*

On 17 May 1996, one charge under paragraph 52(1)(a) was laid against The Office Supply Centre (841299 Ontario Limited) & Richard Mellon. Four additional charges were laid against The Office Supply Centre (841299 Ontario Limited). The charges relate to a telemarketing scheme involving the sale of photocopier toner that occurred between July 1989, and February 1996. A pre-trial conference is scheduled for 3 September 1997.

### 4.2.2 *First Canadian Publisher/American Family Publishers (Vijay Sharma)*

On 21 March 1997, charges under paragraph 52(1)(a) were laid against a total of 37 individuals/companies who were involved in a telemarketing scheme in which consumers were asked to send money for a prize that never existed. A preliminary inquiry is scheduled for 16 October 1997.

## 4.3 *Mergers*

Merger activity in Canada continues to increase for the third consecutive year. The total number of merger examinations commenced during the 1996-97 fiscal year increased by 40 per cent, from 228 to 319. During this period, 188 Advance Ruling Certificates were issued, an increase of 55 per cent over the previous period and the number of prenotification filings increased 40 per cent. There were three applications filed before the Competition Tribunal and one consent order issued by the Tribunal.

The Supreme Court's decision on 20 March 1997, in *Southam* settled two significant points of law: *i*) the appeal courts owe the Tribunal considerable deference because it is a specialized Tribunal and *ii*) the correct remedy test in a contested merger case is curing the substantial prevention or lessening of competition, not returning the market to the pre-merger state of competition. This decision will have a very significant impact on the conduct of matters before the Tribunal as decisions on the merits of cases will only be overturned on appeal if they are unreasonable. As well, the Supreme Court's decision supports the principle that any proposed remedy must overcome the anticompetitive effects of a merger or reviewable practice even if it is far-reaching.

### 4.3.1 *CibaGeigy Limited and Sandoz Ltd*

Pursuant to an agreement dated 6 March 1996, CibaGeigy Limited and Sandoz Ltd., both Swiss companies, stated their intention to merge and form a new entity, Novartis Ltd. Both companies are competitors in a number of product areas.

Following an in-depth review of this matter, the parties were informed that Canadian competition concerns would be remedied by a proposed consent agreement being considered by the U.S. Federal Trade Commission (FTC) which would require a number of divestitures and licensing arrangements in these markets in both the U.S. and Canada. The FTC granted provisional approval to the agreement, and the transaction proceeded to close.

### 4.3.2 *Kimberly-Clark Corporation*

In July 1995, Kimberly-Clark Corporation ("Kimberly-Clark") publicly announced its intention to acquire Scott Paper Company. Both companies are major producers of sanitary tissue products,

including facial tissue, bathroom tissue, paper towels and baby wipes. As a result of this proposal, Kimberly-Clark acquired a controlling interest in Scott Paper Limited, the principal operating company of Scott Paper Company in Canada.

On 5 September 1995, the Director commenced an inquiry into the proposed transaction pursuant to section 10(1)(b) of the *Competition Act*. On 12 December 1995, the parties completed the transaction, after providing a written undertaking to the Director to hold the Canadian operations of Kimberly-Clark and Scott Paper Limited separate and apart while the Director completed the inquiry into the competitive effects of the merger.

The parties were subsequently informed that it was the Director's view that the merger would likely lessen or prevent competition substantially in the consumer markets for baby wipes, facial tissue and paper napkins and in the commercial markets for facial tissue, paper towels and wiping products. On 18 April 1996, Kimberly-Clark announced its intention to dispose of its controlling interest in Scott Paper Limited. On 24 May 1996, Kimberly-Clark sold the consumer baby wipes business of Scott in the United States and Canada to Procter & Gamble Inc.<sup>7</sup> The merger also raised significant competition concerns in the United States, the United Kingdom and Mexico. These concerns were resolved by divestitures of particular product lines and related capacity.

#### 4.3.3 *Southam Inc./Lower Mainland Publishing Inc.*

On 25 November 1996 the Supreme Court of Canada heard Southam's appeal of the Federal Court of Appeal's decision in this matter. The Federal Court of Appeal on 8 August 1995, had decided that the Competition Tribunal had failed to apply the proper test in determining product market. The Federal Court of Appeal had ordered that the matter be remitted back to a differently constituted panel of the Tribunal to consider whether the merger prevented or lessened competition substantially and to consider the factors set out in section 93. On 20 March 1997, the Supreme Court found that the Federal Court of Appeal should not have overturned the Competition Tribunal's decision as the proper standard for appeal was not "correctness" but reasonableness. The Court found that the Tribunal's decision on market definition was not unreasonable, and therefore found in favor of Southam.

At the same time the Supreme Court also heard Southam's appeal of the North Shore print real estate market decision. The Tribunal had concluded that the merger was likely to result in a substantial lessening of competition in this market, and subsequently, in a remedy decision, found the appropriate remedy to be divestiture of either the North Shore News or the entire Real Estate Weekly chain. The Federal Court of Appeal had upheld this decision and the Supreme Court dismissed Southam's appeal from the bench. As a result, Southam had to divest itself of either the North Shore News or the Real Estate Weekly chain within a six month period from the March 20th decision of the Supreme Court of Canada.

#### 4.3.4 *Hollinger/Southam Inc.*

On 23 May 1996, the Director issued an Advance Ruling Certificate in respect of the then proposed acquisition by Hollinger Inc. of an additional 21.5 per cent of the shares of Southam Inc. Hollinger already held a 19.5 per cent interest in Southam at the time of the request. The Council of Canadians, a public policy advocacy group, on 18 September 1996, sought an application for judicial review of the Director's decision. Because the Council was outside the 30 day period for seeking such a review, they were compelled to apply to the Federal Court for an extension of time. The matter was heard on 9 December 1996, and on 16 December 1996, the Court ruled that the Council had not justified their delay in bringing their application. In an *obiter* comment, Justice Cullen added that even if they had been within the required 30 day period, the Court did not believe that the applicants had proper standing to seek a judicial review. On 19 December 1996, the Council filed a Notice of Appeal of the Federal Court Trial Division decision.

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

On 1 March 1996, the Director filed an Application with the Competition Tribunal with respect to the acquisition by Dennis Washington, a Montana entrepreneur, of a significant interest in Seaspan International Ltd. in October 1994, as well as the acquisition of Norsk Pacific Steamship Company Limited in June 1995. In June 1996, Mr. Washington acquired control of Seaspan. Both Seaspan and Norsk provide marine transportation services in British Columbia.

Prior to the hearing scheduled to commence in January 1997, the Director and the Washington Group negotiated a proposed settlement, and on 13 January 1997, the Director filed an application for a Draft Consent Order with the Competition Tribunal. The Consent Order was approved by the Competition Tribunal on 29 January 1997. The Consent Order involves the divestiture of three packages of assets to address the Director's competition concerns in ship berthing in Burrard Inlet and Roberts Bank at the Port of Vancouver as well as chip and covered barging in B.C. coastal waters. The assets to be divested include five ship berthing tugs and a line boat, six to ten Seaspan chip barges and a tug as well as two covered Seaspan barges.

If the sales of the divestiture packages are not completed within one year, a Trustee will be empowered to sell C.H. Cates & Sons Ltd. (a Washington ship berthing company operating in Burrard Inlet), and/or the Norsk chip, and/or covered barging assets, as applicable.

#### 4.3.6 *Canadian Waste Services Inc./Allied Waste Holdings (Canada) Ltd*

On 5 March 1997, the Director filed an application for a Consent Order with the Competition Tribunal with respect to non-hazardous solid waste collection in the Sarnia, Brantford, Ottawa and Outaouais markets. The Consent Order relates to the acquisition by Canadian Waste Services Inc. of the non-hazardous solid waste business of Allied Waste Holdings (Canada) Ltd. which had acquired the shares of Laidlaw Waste Systems (Canada) Ltd. in December 1996. The solid waste collection business in these markets includes residential, commercial front-end, industrial roll-off and recycling collection. The Consent Order also addresses competition concerns resulting from the acquisition of the commercial waste removal operations of Laidlaw Waste Systems in the National Capital Region by Waste Management Inc. ("WMI") in September 1996.

In the Director's view, if the transaction were permitted to proceed, Canadian Waste would be able to significantly raise prices in the Sarnia, Ottawa, Outaouais and Brantford markets. The Director did not find that the merger would substantially lessen or prevent competition in other markets examined.<sup>8</sup>

The terms of the proposed Consent Order, which were agreed to by Canadian Waste and the Director and which are subject to approval by the Tribunal, involve the divestiture of Allied's waste collection business in Sarnia, the Canadian Waste business in Brantford, and the assets acquired from WMI in the Ottawa and Outaouais markets. To facilitate the divestitures in the Sarnia and Ottawa markets, the proposed Consent Order requires that Canadian Waste provide the prospective buyer(s) access at a preferred price to landfills in these markets. Canadian Waste will not own a landfill or other disposal facility in the Brantford or Outaouais markets.

#### 4.3.7 *ADM/Maple Leaf Mills*

Following the announcement in February 1996, that Maple Leaf Foods Inc. ("MLM") planned to sell its Canadian flour milling assets, jointly owned by ConAgra Inc. and Maple Leaf Foods, to ADM Agri-Industries Ltd. ("ADM"), a Canadian subsidiary of Archer-Daniels-Midland of Decatur, Illinois, the Competition Bureau conducted an extensive review of the proposed acquisition. ADM and MLM were the

two largest wheat flour millers in Canada. The assets to be acquired comprised wheat flour mills in Calgary and Port Colborne and two mills in Montreal.

The Director concluded that the transaction, as originally structured, would likely result in a substantial lessening of competition in the supply of bulk hard wheat flour in the Quebec/Atlantic Canada market (Quebec, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland). In the two other geographic markets likely to be affected by the transaction, i.e. the Ontario and Western Canada markets, the Director concluded that the merger would not result in a substantial lessening of competition. In Ontario, it was concluded that the U.S. Milling Company in Buffalo would be a significant competitive presence in the foreseeable future. In Western Canada, it was concluded that the merger would not substantially lessen or prevent competition, in part due to planned or actual expansion by other flour mills in this market.

On 28 February 1997, the Director announced that, with the agreement of ADM, he would shortly be filing an application for a Consent Order before the Competition Tribunal to remedy the substantial lessening of competition he identified as likely to result from the merger. Pending the filing of the application, the parties were permitted to proceed with the merger following the receipt of an undertaking from ADM to hold separate and apart from ADM the Oak Street mill in Montreal which was to be divested.

On 21 March 1997, applications for an interim order and a consent order were filed with the Competition Tribunal. On 26 March 1997, the Tribunal issued an Interim Order incorporating the terms of the hold separate undertaking. The hearing on the Director's applications was scheduled for May 1997.

#### 4.3.8 *Cast/Canada Maritime*

In March 1995, the Cast Group was acquired by Canada Maritime Services Limited, a subsidiary of Canadian Pacific Limited and became part of CP Ships. These were the two container shipping carriers carrying most of the container shipping cargo through the Port of Montreal. A formal inquiry was initiated in January 1995, and led to about two dozen Orders being issued under section 11 for the production of records and oral testimony.

The Director filed an application under section 92 with the Competition Tribunal on 20 December 1996, opposing this transaction. The application alleged that the merger prevents or lessens, or is likely to prevent or lessen, competition substantially with respect to the provision of intermodal non-refrigerated containerized shipping services operating through the Port of Montreal between Northern Continental Europe/United Kingdom and Ontario and Quebec.

The Bureau's Role in Economic and Regulatory Issues

## 5. **The Bureau's Role in Economic and Regulatory Issues**

Bureau economists and visiting academics in the T.D. MacDonald Chair in Industrial Economics provide expert economic advice on enforcement cases and related research matters. In 1996-1997, the Chair was held by Professor William Stanbury of the University of British Columbia.

In the area of enforcement, Bureau staff were involved in several cases. Two major cases were resolved in 1996-1997, Seaspan International Ltd. and Interac Association, both of which are discussed fully, elsewhere in this Report.

Research played an important role in 1996. To commemorate the tenth anniversary of Canada's *Competition Act*, the Competition Bureau sponsored a symposium in Hull, Québec, in May 1996. The



symposium covered diverse areas such as regulatory reform and the expanding role of competition policy in the Canadian economy and conspiracy law in Canada. Several staff from the Bureau and well-known academics in the field of Industrial Economics participated by presenting papers and discussing current problems.

Also in May 1996, an authors' symposium was held in Aylmer, Québec, on the subject of "Competition Policy, Intellectual Property Rights and International Economic Integration". For the occasion, the Bureau commissioned a set of papers with the Canadian Intellectual Property Office and Microeconomic Policy Analysis Branch of Industry Canada.

The Bureau also commissioned research in a number of areas such as telecom, health care, regulation, and the *Special Import Measures Act*. The principal focus of the research in some of these areas was to begin a process to assess the effectiveness of the Bureau's intervention in the regulatory process before the Canadian Radio-television and Telecommunications Commission and to report on health care reform and competition policy.

On the policy front, the Bureau was active in a number of areas. The Director provided his opinion on competitive issues on diverse matters such as the World Trade Organization Agreement in Basic Telecommunications and interdepartmental work relating to OECD discussions on agriculture and the maritime sectors. These views were expressed at the intradepartmental and interdepartmental levels.

## **6. Growing Bureau Involvement on the International Front**

Over the course of the fiscal year, the Bureau continued to step up its involvement on the international front. It contributed to the development and advancement of competition policy in a number of multilateral fora, and through bilateral meetings with the U.S. and other important trading partners. It also coordinated joint enforcement activities with foreign competition authorities.

Multilaterally, the Bureau continued to participate actively in the Competition Law and Policy Committee and the Joint Group on Trade and Competition of the Organization for Economic Cooperation and Development (OECD), with particular focus on the converging interrelationship between trade and competition policies, on competition and regulation, and on international cooperation.

In the North American context, the Bureau continued to contribute to the work of the NAFTA Working Group on Trade and Competition which is discussing the relationship between competition laws and policies and trade in the free trade area. The Bureau has also been involved in the development of competition policy issues in the western hemisphere as a member of the Working Group on Competition Policy, which is engaged in the discussions aimed at creating the Free Trade Area of the Americas.

Regarding the World Trade Organization, the Bureau actively encouraged the establishment of a Working Group on the Interaction between Trade and Competition Policy. The Bureau has also maintained its involvement in the Inter-governmental Group of Experts on Competition Policy of the United Nations Conference on Trade and Development (UNCTAD). Finally, the Bureau participated in the second APEC workshop on Competition Policy and Deregulation in Davoo City, Philippines.

As it has in past years, the Bureau continued to provide technical assistance both bilaterally and in support of UNCTAD and OECD multilateral programs. During the fiscal year, technical assistance was provided to Burundi, El Salvador, the People's Republic of China, Taiwan and Ukraine.

Internationally, the growing number and increasing complexity of cross-border cases, especially with the U.S., bring to the forefront the international dimensions of the Bureau's enforcement activities and continue to underline the need for enhanced international cooperation, consultations, coordinated

enforcement actions and dispute avoidance. During the year, the Bureau also participated in bilateral meetings with competition law authorities from other jurisdictions,

Work also continued towards finalizing a Canada/EC Agreement by the end of 1997. Once finalized, the Agreement will be a state-of-the-art approach to bilateral cooperation and coordination in competition law enforcement. It will contribute to ensuring that the benefits of multilateral trade liberalization are not hindered by private restraints to trade. It will also be reflective of the close cooperation that exists between the competition authorities of Canada and the European Union.

At the case level, there continued to be a substantial number of complex notifications from a variety of foreign competition authorities. During the 1996-1997 fiscal year, the Bureau received 38 notifications from foreign competition authorities and sent 17 notifications to foreign authorities or governments in compliance with the 1995 Canada-U.S. Cooperation Agreement and the 1995 Revised OECD Recommendation. The majority of these notifications involved contacts with U.S. antitrust enforcement authorities.

## **7. Compliance and Education**

Our programs to encourage compliance with the *Competition Act* continued to be a key Bureau activity. The Director and other senior managers of the Bureau undertook a variety of speaking engagements. The Bureau's new quarterly publication, *CompAct*, which aims to provide timely information on Bureau activities, has been well received by the business and legal communities. In its efforts to improve its ability to disseminate information on a timely basis, the Bureau has begun a review of its Internet presence and the use it is making of its home page on the Industry Canada Strategis site.

## **8. User Fees**

In preparation for consultation on a proposal for the introduction of user fees for a limited number of Bureau services and activities, the Bureau re-examined the comments that were received during the 1993 consultations on user fees and during the 1995 survey related to the Program of Advisory Opinions. Costing of Bureau activities was updated and the experience of other jurisdictions in this area was studied in preparation for the launch of a further, more in-depth, round of consultations. Steps were also taken to secure Treasury Board approval for the Bureau to access revenue from user fees in order to enhance service in those areas. It is expected that fees will be in place in the fall of 1997.

## 9. Bulletin on Corporate Compliance Programs

In February 1996, the Bureau issued a draft bulletin for comment on the subject of Corporate Compliance Programs. The document described the Bureau's views as to the benefits that flow from implementing an in-house program and the essential elements that the Bureau believes such a program must contain in order to be considered effective. The Bureau has received a substantial number of comments, many of them comprehensive, on the draft document which are being considered in the preparation of a final document. Release of the document is scheduled for early in the coming year.

## 10. Statistical Data

**Table 1. Civil Matters - Selected Activities**

	1994-95	1995-96	1996-97
Number of Complaints, Examinations and Inquiries			
Total complaints/information contacts	331	456	561
Examinations commenced (two or more days of review)	21	28	31
Application for inquiries under section 9*	5	4	2
Inquiries in progress at year end	10	13	16
Written Advisory Opinions	0	4	1
Disposition of Inquiries			
Inquiries resolved by Alternative Case Resolution	2	3	4
Applications to the Competition Tribunal	3	1	0

\* Refers to six-resident application to the Director for inquiry.

**Table 2. Criminal Matters - Selected Activities**

	1994-95	1995-96	1996-97
Number of Complaints, Examinations and Inquiries			
Total complaints/information requests	1048	968	1479
Examinations commenced <sup>1</sup>	53	55	46
Application for inquiries under section 9 <sup>2</sup>	2	2	8
Inquiries in progress at year end	31	24	29
Disposition of Inquiries			
Matters referred to the Attorney General of Canada	7	4	0
Matters where charges were laid	3	4	1
Matters where Attorney General declined to proceed or withdrew charges <sup>4</sup>	0	1	0
Matters before the courts <sup>4</sup>	16	14	10
Disposition of prosecutions (findings of guilt, guilty pleas, acquittals, stay of proceedings, orders of prohibition) <sup>4</sup>	16	8	22
Other Activities			
Examinations resolved by information contacts	23	16	32
Written Advisory Opinions	28	14	14
Mutual Legal Assistance Treaty (MLAT) Requests	2	3	1
Searches	5	4	0

- Examinations in 1992-93 and years prior were defined by two 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.
- Refers to six-resident application to the Director for inquiry.
- Alternative Case Resolutions include: investigative visits, orders on consent and written undertakings.
- May include matters referred during previous years.

**Table 3. Merger Examinations**

	1993-94	1994-95	1995-96	1996-97
Examinations commenced <sup>1</sup> (2 or more days of review)	192	193	228	319
Notifiable transactions	65	74	100	140
Advance ruling certificate requests	124	139	142	224
Examinations Concluded				
As posing no issue under the <i>Act</i>	185	183	204	296
With monitoring only	1	2	4	2
With pre-closing restructuring	0	0	0	1
With post-closing restructuring/undertakings	0	0	0	0
With consent orders	0	0	0	1
Through contested proceedings	0	1	0	0
Parties abandoned proposed mergers in whole or in part as a result of Director's position	2	3	3	0
Total examinations concluded <sup>2</sup>	188	189	215	306
Advance ruling certificates issued <sup>3</sup>	114	106	121	188
Advisory opinions issued <sup>3</sup>	10	11	10	2
Examinations ongoing at year end	35	39	52	65
Total examinations during the year	223	228	267	371
Applications and Notices of Application before Tribunal				
Concluded or withdrawn	0	1	1	1
Ongoing	2	1	2	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<sup>1</sup>**

	1992-93	1993-94	1994-95	1995-96	1996-97
Number of complaints, examinations and inquiries					
Total complaints received	13 657 <sup>2</sup>	11 000 <sup>2</sup>	8 500 <sup>2</sup>	6 751	6 277
Number of files opened	11 095 <sup>2</sup>	10 500 <sup>2</sup>	8 145 <sup>2</sup>	*	
Applications for inquiries under section 9	0	5	2	5	2
Inquiries commenced	41	46	38	8	18
Disposition of Inquiries					
Completed examinations/inquiries	196	399	349	278	383
Information contacts	1 174	654 <sup>3</sup>	762 <sup>3</sup>	86	246
Inquiries formally discontinued					
Cases involving undertakings <sup>4</sup>	3	38	10	9	8
Other cases	10	3	16	10	17
Undertakings received	20	5	4	4	4
Matters referred to the Attorney General of Canada	16	36	23	7	3
Matters where further action is not warranted <sup>5</sup>	19	2	0	3	0
Prosecutions commenced <sup>5</sup>	18	29	22	7	4
Prohibition orders without conviction <sup>4</sup>	2	0	0	1	0
Prosecutions concluded <sup>5,6</sup>					
Convictions	29	11	24	14	8
Non-convictions <sup>7</sup>	22	15	8	4	2
Total Fines	\$692 700	\$200 700	\$1 407 400	\$879 850	\$241 500

\* All complaints received are now given distinct file numbers. Thus, "Complaints received" and "Files opened" are the same.

1. Competition Bureau Regional Offices were closed during the 1995-96 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 five per cent.
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.

## NOTES

1. The Bill died on the Order Paper when the 21 June federal election was called on 27 April 1997. More information is available in our quarterly publication CompAct, Issue #3, and CompAct Issues number 1 and 2 provide more information on the consultation process.
2. On 1 May 1997, the CRTC announced a series of decisions which introduced new rules to facilitate the entry of new service providers into the local exchange market; established a price cap regulatory regime for the existing telephone companies; and allowed telephone companies to apply for broadcasting distribution licences. The Commission's decisions adopted many of the Bureau's recommendations including setting out clear rules governing access to the Stentor companies' networks by new entrants, minimizing regulation and maximizing reliance on market forces in local telecommunications markets.
3. The Bureau also filed a submission in April 1997.
4. Subsequently the Director and the companies reached a settlement on the matter and, on 30 May 1997, the Competition Tribunal issued a consent order under section 106(b) of the *Competition Act* varying four provisions of the CANYPS order.
5. The BCUC hearing was subsequently canceled due to the establishment of a government task force appointed to examine electricity market structure reforms in B.C. Submissions to the canceled hearing are being used as inputs to the work of the task force.
6. On 18 April 1997, the Government tabled its reply to the Committee and adopted the competition enhancing recommendations of the Committee. The Competition Bureau will continue to participate in the inter-departmental consultations chaired by the Department of Finance as the reply is developed into legislative proposals.
7. After a lengthy search for potential purchasers, on 6 June 1997, Kimberly-Clark disposed of its controlling interest in Scott Paper Limited to Kruger Inc., a Canadian-controlled privately-held company that produces newsprint and other paper products. These divestitures effectively resolved the competition concerns raised by the merger in Canada and the inquiry was discontinued on 10 July 1997.
8. On 16 April 1997, the Competition Tribunal issued the Consent Order.

## **CZECH REPUBLIC\***

(1996)

### **Introduction**

The competition policy of the Office for the Protection of Economic Competition of the Czech Republic was based particularly on the following principles in 1996:

- using powers provided for in the law for an effective action against any and all forms of anti-competitive behaviour;
- promoting the principles of economic competition in the process of preparation of new legal regulations;
- supporting the introduction of economic competition into key sectors of public services, particularly telecommunications;
- strengthening of the dynamics of the creation of the competitive environment by permitting agreements between undertakings, where such arrangements concern activities stimulating research, development, innovation and investment;
- supporting the introduction of rules governing the protection of economic competition into international trade, particularly with regard to newly concluded free trade agreements;
- informing the public about the legal regulation governing economic competition, and providing information on the application of competition rules.

Another feature of the activities of the Office for the Protection of Economic Competition in 1996 was an increase in the number of cases handled. In 1996, the Office issued a total of 131 decisions in individual areas of activities (agreements restricting competition, abuse of dominant and monopoly position and merger control).

### **1. Executed and envisaged amendments to the competition law and policy**

#### ***Institutional framework for the protection of economic competition***

Following the parliamentary elections held in June of 1996, a decision on changes in the system of central bodies of state administration was made. In addition to other things, this political decision concerned also the institution in charge with the protection of economic competition. In accordance with Act No 272/1996 Coll., by virtue of which certain measures in the system of central bodies of state administration of the Czech Republic are carried out, and Act No 273/1996 Coll. on the Operation of the Office for the Protection of Economic Competition, as of 1 November, 1996, the institution entrusted with

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\* The original language of this document is English.

the protection of economic competition in the Czech Republic is the Office for the Protection of Economic Competition with a seat in Brno (hereinafter "Office"). The Office has assumed the activities of the former Ministry of Economic Competition, with the former powers retained to a full extent.

The Office is a central body of state administration for the promotion and protection of economic competition from its prohibited restriction. The Office is headed by a chairman who is appointed and recalled by the country's president upon a government proposal.

The establishment of the Office reflected the need to change the position of the body of state administration in the area of protection of economic competition due to the nature of the activities thereof, which activities consist mostly of control and sanctioning. It is a move towards the existence of a traditional competition authority usual in western Europe.

The promotion and protection of economic competition is performed in areas specified by the Act on the Protection of Economic Competition and focuses on the prevention of agreements restricting competition and abuse of dominant and monopoly position, as well as merger control.

The Office also engages in surveillance of municipal bodies and bodies of state administration whose decisions may be in contravention of the Act on the Protection of Economic Competition. It is the duty of the Office to establish the occurrence of such incorrect procedures and request that they be remedied.

The Office plays an important role in the area of legislation by introducing competition rules into newly drafted acts or amendments to existing legal regulations.

Based on Act No 199/1994 Coll. on Public Procurement, in the wording of Act No 148/1996 Coll., the Office also performs surveillance of 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; and
- imposition of fines in cases of grave or recurrent violation of the relevant legislation.

In accordance with the antidumping law which is currently under preparation, the scope of operation of the Office shall be expanded by participation in the antidumping proceedings which shall be conducted by the Ministry of Trade and Industry.

Such co-operation shall consist particularly of the following activities:

- presentation of standpoints on investigation of applications alleging imports of dumping products;
- presentation of standpoints on issues concerning the protection of economic competition, and the assessment of damage caused by imports of dumping products;
- presentation of opinions on draft decisions on imposition of interim duties and decisions on the adoption, or, as the case might be, a repeal of a price obligation imposed on the importer; and
- presentation of opinions on a draft decision concerning the imposition of a final duty.



### ***Legal regulation governing economic competition***

In 1996, no changes were made to the legal regulation governing economic competition. The protection of economic competition is performed on the basis of Act No 63/1991 Coll. on the Protection of Economic Competition, in the wording of Acts No 495/1992 Coll. and No 286/1993 Coll. (hereinafter, "the Act").

The Act was modelled on the EC competition law and the wording of Articles 85 and 86, as well as principal institutes of the EC secondary law were adopted therein. The Act uses general clauses which leave space for interpretation within the meaning of decisions issued by the European Commission and the Court of Justice.

As the Czech Republic took upon herself the obligation to harmonise its competition law with that of the EC, which obligation is contained in Article 69 of the Europe Agreement establishing association between the Czech Republic and the European Communities and their member states, further analytical work aimed at the attainment of compatibility was continued in 1996.

Based on the results of analyses and expert studies, we can say that the legal regulation governing economic competition is largely compatible with the EC law. A new amendment of the Act which will result in full compatibility with the EC law shall introduce block exemptions, define a dominant position on the basis of market power and offer more precise definitions of mergers.

An important step towards the harmonisation of the Czech competition law with the EC law was the adoption of Implementing Rules for competition provisions of the Europe Agreement by the Association Council of the Czech Republic and the EU on 30 January 1996<sup>3</sup>. By virtue of this decision, the Implementing Rules became an integral part of the Czech competition law.

The Implementing Rules envisage a close co-operation between the Office and the DG IV of the European Commission in cases which have an impact on competition or trade between the Czech Republic and the Community. The Implementing Rules also contain the principle of provision of information pertaining to legislative changes under way, and a procedure for resolution of potential conflicts.

### ***Enforcement of principles of free competition in the draft legal regulations***

Standpoints of the Office on draft legal regulations in 1996 ensued from an effort to secure free access to the market and to establish transparent, objective and non-discriminatory conditions for individual undertakings.

A draft of the substantive intent of the act on court experts and court interpreters can be used as an example: it presumed automatic cessation of professional eligibility for the provision of such services upon reaching 65 years of age, which means that a certain group of persons has a limited access to the relevant professions. The Office suggested that this intention be dropped and professional eligibility be checked by regular individual assessments.

An important group of legislative proposals concerned the legal regulation protecting the interests of the Czech Republic, ensuing from international trade rules agreed upon particularly within WTO, against unlawful trade practices (draft law on the protection against imports of dumping products, and draft law on certain measures applied to export and import of products). Given the actual risks involved in a protectionist application of similar measures, the Office argued in its standpoints that the

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3. Official Journal of the European Communities, L 31, 9.2.96. In connection with the Czech Republic's application for admission to the European Union, answers to the EC Questionnaire were drafted.

space for such application should be limited in the draft regulation. The Office particularly insisted that the drafts be changed to comply with the respective provisions of agreements concluded within WTO.

The Office supported conclusion of free trade agreements with third countries in accordance with the policy of liberalisation and support of economic competition in international trade. In 1996, the Czech Republic concluded free trade agreements with Israel, Estonia, Latvia and Lithuania. Negotiations concerning conclusion of similar agreements with Turkey and Croatia have been initiated. All the above mentioned agreements contain rules for the protection of economic competition which are based on the principles of EC competition law. An effective enforcement of these provisions is secured through a Joint Committee, established by the relevant agreements.

## **2. Enforcement of the competition law and policy**

### ***Interventions against practices distorting competition, including agreements and abuses of dominant position***

#### *Agreements harmful to competition*

The Competition Office instigated proceedings in 24 cases of violation of the prohibition of agreements harmful to competition. The Office ruled in 13 cases that the law had been violated and imposed fines amounting to a total of CZK 16 470 000. The Office arrived at the conclusion that no violation of the law had occurred in eleven cases.

The Office was requested to approve 13 unprohibited agreements restricting competition. Of that number, seven have been approved so far, the rest is still under consideration.

The Office was not asked to grant any individual exemption from the prohibition of agreements restricting competition and issued no decisions on a repeal or restriction of an individual exemption.

#### *Oil products (Benzina, a.s., Benzina, s.p., Ěeské produktovody a ropovody, a.s.)*

In December 1996, the Chairman of the Office issued a decision on the appeal concerning the first-instance decision of the Ministry of Economic Competition on an illicit agreement on co-ordination of petrol prices between fuel distributors, concluded in December 1995.

In its first-instance decision, the Ministry of Economic Competition classified the procedure adopted by the distributors (Benzina a.s., Benzina s.p., and CEPRO a.s.) in their determination of prices of unleaded petrol after withdrawal of tax reliefs applying thereto as illicit. The agreement was allegedly reached during negotiations at the Ministry of Trade and Industry.

In the second-instance decision, the Chairman of the Office confirmed that Benzina a.s. and Benzina s.p. violated the Competition Act by concluding an agreement restricting competition within the meaning of paragraph 3, paragraph 1 of the Act. According to their agreement, the price consequences of the increase in consumer tax levied on unleaded petrol for the final consumer will be resolved by incorporating the increase in the prices of both unleaded and leaded kinds of petrol. The Chairman also reduced the fines originally imposed from CZK 50 million down to CZK 10 million in the case of Benzina a.s., and from CZK 10 million down to CZK two million in the case of Benzina s.p.

The decision to reduce the amounts of the fines was influenced particularly by the fact that neither participant intended to harm the consumer, but rather to indirectly facilitate the resolution of environmental problems which would occur if unleaded petrol was sold for a price adequate to the increase in the tax burden.

Objections of the company CEPRO a.s. were also considered in the decision on the appeal. CEPRO proved its non-participation in the agreement by showing it had used an independent procedure to determine prices.

The second-instance decision has entered into force.

*Media (Mittelrhein Verlag Bohemia, spol. s r.o., ASTROSAT, spol. s r.o.)*

In January 1996, the Ministry of Economic Competition initiated administrative proceedings concerning an alleged conclusion of an agreement restricting competition between the companies Mittelrhein Verlag Bohemia, spol. s r.o. (hereinafter "MVB"), and ASTROSAT, spol. s r.o. The above companies allegedly violated the Act by concluding an agreement on supply of a TV-magazine published by ASTROSAT to MVB who publishes national dailies Zemedelske noviny and Expres. The above mentioned agreement contained a provision obliging ASTROSAT not to supply the TV-magazine to other dailies.

In the course of the proceedings, the Ministry established that the fact that the TV-magazine in question could not be supplied to dailies listed in the agreement constituted a violation of paragraph 3, paragraph 1 of the Act. The Ministry prohibited further fulfilment of the agreement and imposed fines of CZK 200 000 in total on the undertakings concerned for their violation of the Act.

*Abuse of dominant position*

There were 25 instances of administrative proceedings pertaining to dominant position. In 15 cases, abuse of dominant position was established and fines amounting to a total of CZK 31 125 000 imposed. No violation of the law was established in ten cases.

*Insurance (Ěeská pojiš ovna a.s.)*

In February 1996, the Ministry of Economic Competition initiated administrative proceedings concerning an alleged abuse of monopoly by Ěeská pojiš ovna, a.s. The company was to abuse its monopoly by applying differential conditions when collecting fees for the same service (issuance of "green cards" - obligatory third party vehicle insurance certificates for 1996).

According to a by-law issued by the Ministry of Finance, Ěeská pojiš ovna is the sole provider of obligatory third party vehicle insurance. As part of the package, Ěeská pojiš ovna issues "green cards" which certain countries require as proof of purchase of obligatory third party vehicle insurance for the given calendar year.

The Ministry established in the course of the administrative proceedings that Ěeská pojiš ovna defined differential terms of payment for the issuance of green cards for 1996. Clients who purchase motor car insurance from Ěeská pojiš ovna were offered a green card free of charge, while other applicants who had not purchased motor car from Ěeská pojiš ovna had to pay CZK 60,- for their green cards.

After assessing the facts established during the administrative proceedings, the Ministry arrived at the conclusion that application of differential conditions to applicants for green cards constituted an abuse of dominant position within the meaning of paragraph 9 of the Act. In the case under investigation, Ěeská pojiš ovna engages in the given activity as the only undertaking by virtue of an authorisation by a legal regulation. It therefore is in public interest that the activity entrusted to the company be performed on the same terms for all customers. The Ministry imposed a fine of CZK one million on Ěeská pojiš ovna for violation of the Act.

Ěeská pojišovna appealed the above decision. The Chairman of the Office did not uphold the appeal but changed the decision. According to the second-instance decision, Ěeská pojišovna abused its monopoly position by offering "green cards" to clients who have purchased motor car insurance therefrom free of charge, and settled the costs of issuance of these cards from the payments for that insurance. Ěeská pojišovna thus made its service of motor car insurance more advantageous thanks to an advantage entrusted thereto by the state, and thanks to its monopoly on the obligatory third party car insurance market at the expense of other undertakings on the market of services of motor car insurance.

*Gas industry (Jihomoravská plynárenská)*

In November 1996, the Office issued a first-instance decision by which it imposed a fine of CZK 9 145 000 on the gas company Jihomoravská plynárenská, a.s. (JMP) for an abuse of dominant position on the market of work related to the hook-up of gas pipes for final off-takers. The company committed the abuse by requesting that the off-taker bear the cost of provision and installation of the gas meter together with the adequate costs incurred by the supplier in connection with the hook-up and gas supply. JMP thus violated the Energy Act which expressly stipulates that the supplier shall provide and install gas meters at his own cost.

JMP enjoys a monopoly at the relevant market because according to the Energy Act, works related to the hook-up of gas pipes to the off-taking gas appliance may be performed only by an undertaking possessing a state authorisation for gas distribution; i.e., in this particular case and region, by JMP. This fact was decisive in the assessment of the whole case. Given the existing monopoly, the off-taker cannot turn to another supplier who would perform the work required, and is therefore forced to accept the conditions defined by JMP as the sole supplier.

When deciding on the amount of the fine, the Office considered the fact that JMP acquired material benefits thanks to violation of its obligations. According to the Competition Act, the Office is obliged to impose a fine amounting at least to the material benefit acquired by the offender.

*High Court Decisions*

In 1996, eleven motions were filed against final decisions issued by the Office. The High Court in Olomouc (or the High Court in Prague, as the case might be) issued eight decisions. In two cases, the motion was overruled and the decision of the Office upheld, in three cases certain parts of the decisions were repealed, in two cases, proceedings were terminated and in one case, the decision of the Office was repealed and the case referred back for further assessment. Of the eight decisions issued in 1996, three concern motions filed before 1996.

*Motor vehicles (Škoda, automobilová a.s.)*

In November 1996, the High Court in Olomouc overruled a motion filed by Škoda, automobilová a.s. against a decision issued by the Minister of Economic Competition, wherein the Minister changed the decision of the Ministry of Economic Competition of June 1995. In its original decision, the Ministry arrived at the conclusion that Škoda's actions consisting in a termination of production of sheet metal spare parts for types of vehicles produced thereby without making sure that the Czech market is supplied with the above products and the above products are produced by another producer, thus causing a significant shortage of the relevant spare parts on the market from October 1994 till March 1995, constituted an abuse of dominant position within the meaning of paragraph 9, paragraph 3 of the Act. The Ministry imposed a fine of CZK five million on Škoda, automobilová a.s. for the violation of the Act. In the appeal against this decision, the Minister of Economic Competition reduced the fine to CZK 3,5 million because the abuse of dominant position was not intentional and the undertaking derived no benefits therefrom.

The high court examined the decision, including the proceedings preceding it, and ruled that the motion was not justified. The court was of the opinion that had there been competition on the relevant market, Škoda would have made sure there was a sufficient supply of the relevant spare parts. Moreover, Škoda's actions were detrimental to the consumer who had to pay much higher prices for the spare parts in short supply. The court stated in its justification that, apart from other things, the restriction of production by a dominant undertaking to the detriment of consumers constituted an abuse of dominant position in objective terms.

#### *Health insurance (Všeobecná zdravotní pojišťovna (VZP))*

In July 1996, the High Court in Olomouc overruled a motion filed by Všeobecná zdravotní pojišťovna (VZP) against a decision issued by the Minister of Economic Competition, wherein he imposed a fine (CZK 10 000) on VZP for an abuse of dominant position, and prohibited the relevant actions. VZP which enjoys a highly dominant position on the health insurance market (approximately 70 percent) refused to conclude a contract of provision of and settlement for dental care with an individual stomatologist without objectively justifiable reasons.

As VZP provides health care insurance by virtue of a special law, the fact that the prohibition of abuse of dominant position applies to VZP only insofar that its application does not prevent, *de jure* or *de facto*, fulfilment of special tasks entrusted thereto by the relevant special law, had to be taken into account. VZP, however, influences the market by its arbitrary decisions as to with whom it shall, or rather shall not, conclude contracts of provision of and settlement for dental care, thus restricting access of potential competitors to the market, and preventing the establishment of a competitive environment. If such situation persevered, VZP itself, rather than customers - patients, would decide about the success or failure of individual undertakings on the market.

The above ruling of the High Court sets "precedent" in the matter because it clearly designated VZP as an undertaking to whom the Competition Act applies to the full extent, and expressed a legal opinion that economic reasons cannot be considered an objective reason for refusal to conclude a contract, where two (or more) physicians meet the required terms and only one of them is turned down. On the other hand, it needs to be emphasised that the ruling cannot be interpreted as obliging VZP to conclude contracts with every single physician under any and all circumstances. Further similar cases therefore need to be assessed on an individual basis.

#### *Mergers and acquisitions*

The Office conducted 75 administrative proceedings pertaining to mergers in the period under observation. Of the total of 73 applications for permission to merge, 72 were approved and one rejected. The negative decision has not entered into force yet. In two cases, administrative proceedings pertaining to a failure to notify a merger were conducted and fines amounting to CZK 80 000 imposed.

Most mergers were effected by acquisition of control over another company by purchasing controlling interests or trade shares.

#### *Alcoholic beverages (ECKES AG/Likérka STOCK Plzeň-Bokov)*

The Office permitted the acquisition of a majority share, and thus also indirect control, in the Czech company *Likérka STOCK Plzeň-Bokov* (STOCK) by a German company, *ECKES AG* (ECKES) with a seat in Nieder-Olm through an acquisition of 100 percent of stock of an Italian company, *STOCKSpA, Terst* (SpA).

All the above companies produce alcoholic beverages. However, fernet-type alcoholic beverages are produced only by STOCK who enjoys a dominant position on this market in the Czech Republic. The

Office therefore came to the conclusion that the proposed merger cannot significantly restrict competition on the domestic market of production and supply of fernet-type alcoholic beverages.

Another reason behind the approval of the merger was that the acquisition shall make it possible for STOCK to export alcoholic beverages other than fernet, it will gain investment required to increase production capacity of Fernet Stock, and investment in modern computer and communication technology, and acquire know-how in the areas of sales and marketing.

*Veterinary decontamination (REC Mankovice/Veterinární asanaèní ústav Tišice)*

The Office did not approve an acquisition of 28 per cent of stock of Veterinární asanaèní ústav Tišice (VAÚ) by the company REC spol. s r.o. Mankovice (REC) which is an affiliation of the German company RETHMANN.

Both companies engage in veterinary decontamination of animal waste and production of animal protein meal.

REC would strengthen its dominant position on the relevant markets by acquisition of control over VAÚ. Given the barriers to entry and the fact that REC failed to prove the merger would bring about any benefits for the consumer, the merger was not approved.

The participant in the proceedings appealed the decision. No decision on the appeal has been issued yet.

*Interventions by bodies of state administration and municipal bodies - § 18 of the Act for the Protection of Economic Competition*

The Act on the Protection of Economic Competition in its effective wording stipulates in § 18 the powers of the Ministry of Economic Competition as a body performing surveillance of compliance with obligations by bodies of state administration and municipal bodies, in order to make sure that their own measures do not exclude or restrict economic competition.

Some of the specific cases dealt with by the Office on the basis of its above mentioned powers in 1996 may be used as an examples:

The Office looked into a complaint against a municipal district, Knínièky, which allegedly granted some advantages to a certain real estate company. The Office requested that the Knínièky district remedy the situation because it was unable to explain satisfactorily its selection of the given company for the purpose of sale of land for further development. The council was ordered to inform the citizens that they could sell their land to other real estate companies. The council complied with the order.

The Office dealt also with a complaint filed by a company operating gambling machines against the procedure applied by the District Office in erotice. The District Office restricted economic competition through its activities related to the power to approve operation of gambling machines in municipalities, vested in district offices, by granting preferences to one of such companies.

**3. Activities of the Office in the area of natural monopolies and privatisation**

The Office also dealt with issues stemming from the existence of natural monopolies.

When assessing the behaviour of gas distribution companies, which are natural regional monopolies, the Office discovered that some of these companies were not acting in accordance with the Energy Act governing business activities in the energy sector, and were passing on the consumer - off-taker more obligations than provided for in the Energy Act. In other words, the gas distribution companies were collecting as a share of suppliers' costs amounts higher than those permitted by the Energy Act. In this particular case, the Office collaborated with the Ministry of Trade and Industry (MPO) as the regulatory body, and pointed out the incorrect procedure used. MPO then drew the attention of all the gas distribution companies to the discrepancy between their actions and the legal regulation.

The Office dealt with a similar issue in connection with electrical energy supplies. The matter investigated was the application of the administrative guidelines to the Energy Act by energy suppliers (electrical transmission companies) who took advantage of the vague wording of the guidelines and charged excess amounts as off-takers' shares of suppliers' costs related to hook-ups. The Office initiated negotiations with the relevant regulatory body, i.e. MPO, which resulted in an amendment to the administrative guidelines.

The amended guidelines are more transparent in their definition of the consumer's obligations with respect to his share of supplier's costs, and there is a specific threshold for such share.

This was another case where the co-operation between the Office and the regulatory body led to a change which had a favourable impact on the position of the consumer in relation to the monopoly energy supplier.

Participation in the ongoing process of restructuralization and privatisation, and promotion of competitive concerns continued to be an important activity of the Office in 1996.

Important privatisation projects assessed by the Office included the following, to list just a few:

- furnishing of comments on government documents pertaining to the privatisation of major companies, namely JAWA a.s., Petrof, a.s., Ěeská spořitelna a.s. (sale of the share held by the Fund of National Property of the Czech Republic by means of global certificates of deposit), HARD Jeseník a.s., and Nová Hu a.s.
- as far as participation in the government privatisation commission is concerned, the most important standpoint furnished was that pertaining to the privatisation of Hotel Tranzit, a.s., on the basis of which it was decided to have privatisation proposal drafted in keeping with world trends in the provision of accompanying commercial services in the area of civilian air transportation.

**4. Statistical information on the application of the act for the protection of economic competition ("apec") by the office for the protection of economic competition in 1996 (status as of 18 december, 1996)**

Matter	issued	total fines imposed in CZK	appeals	in effect	total effective fines in CZK	motions filed to the High Court
1 Total number of decisions on individual exemptions from the prohibition under § 3, paragraph 1 of the Act	0	X			X	
2 Total number of decisions in cases of violation of the prohibition of agreements restricting competition (§ 3, paragraph 1 of the Act)	24					0
a) there was a violation of the Act	13	16 470 000	8	5	13 239 000	
b) there was no violation of the Act	11			11		
3 Total number of applications for approval of unprohibited agreements (§ 3, paragraphs 4 and 5 of the Act)	13	X		6	X	
A/ approved	7					
a) by virtue of a decision	7					
b) by elapse of the prescribed period of time	0					
B/ rejected	0					
4 Total number of decisions on withdrawal or restriction of an individual exemption (§ 6 of the Act)	0	X			X	
5 Total number of decisions on abuse of dominant position (§ 9, paragraph 3 of the Act)	25					
a) there was a violation of the Act	15	31 125 000	12	5	9 300 000	
b) there was no violation of the Act	10			10		
6 Total number of decisions on mergers (§ 8a of the Act)	75			74		
a) approved mergers	72			72		
b) rejected mergers	1		1			
c) failures to notify mergers.	2	80 000		2	80 000	
7 Total number of complaints pertaining to restrictive practices and abuse resolved in ways other than by administrative decision	255					



## The Year 1996 - summary data

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Total number of decisions issued	131
Effective	111
Total number of fines imposed	47 675 000
Effective	22 619 000
Total number of interventions by the Office for the Protection of Economic Competition undertaken in ways other than by administrative Decision	255

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**DENMARK\****(1996)***Summary**

Proposal for a new Danish Competition Act is being contemplated, which will imply a change of principles in Danish competition law to the effect that it will be based on prohibition instead of administrative review.

The Competition Council still finds it very important to terminate restrictive practices which are due to public regulation and to ensure competition between private and public enterprises on fair and equal terms. The Competition Council's publication of its recommendations to public authorities in that respect has caused some political debate.

During 1996 the Competition Council has also continued its efforts to terminate horizontal agreements with harmful effects on competition. The Competition Council's systematic analysis of the collegiate rules of the professional services is drawing to a close. This means that there will no longer be any anti-competitive agreements in this area. In a statement to the Ministry of Finance, the Competition Council has pointed to the problems, which call for tenders may entail if competition is not sufficiently workable on the market concerned. Finally, it can be mentioned that the Competition Council has treated two significant cases concerning exclusive rights.

One case concerned third party access to transmit electricity through the transmission network owned by the power stations which are regional monopolies. The Competition Council found that third party access would give way to a termination of the actual monopoly of the power stations, and that it would increase the competitive powers of Danish enterprises if they were given the possibility of buying electricity where they find the most favourable terms. The decision was overruled by the Competition Appeals Tribunal, as the Tribunal found that the Competition Council in this case had no legal authority to issue an order to give third party access. On the other hand, the case resulted in an amendment of the Electricity Supply Act to the effect that distribution companies and enterprises with a heavy energy consumption get access to the transmission network. Furthermore, the case should be seen in the light of the efforts which are made in the European Union to liberalise the electricity market.

The other case concerned the television broadcasting rights to football matches. The Danish Football Association, which owns the rights to all football matches involving Danish teams, including international matches with the Danish national side and the home matches of Danish teams in the major European tournaments, sold these rights to the two Danish public service channels and the largest cable television operator. Besides, these parties also made an agreement on establishment of a sports channel.

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\* The original language of this document is English.

## 1. Legislation

There have been no amendments to Danish competition law during 1996.

As mentioned in last year's report, a Committee appointed by the Minister for Business and Industry released a report in August 1995 containing a draft of a new Competition Act. The terms of reference of the Committee were to analyse the advantages and disadvantages of a change of principles in Danish competition law from administrative review to prohibition.

Political discussions are in progress about the contents of a new Competition Act, but a final proposal has not yet been introduced to the Danish Parliament.

## 2. Enforcement

### *Statistics on Activities*

The Competition Council has held 11 meetings and settled 48 cases in 1996.

From 1 January 1990 to 31 December 1996, 170 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, 19 cases in 1995, and 16 cases in 1996).

	1 Jan. 90 - 31 Dec. 96	1 Jan. 96 - 31 Dec. 96
Cases appealed	170	16
Appeals dismissed	91	14
Cases withdrawn	35	1
Competition Council's decisions overruled	33	6

As from 1 January 1997, eleven 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 can be obtained in several ways. By way of example may be mentioned the Competition Council's publication of two reports, one concerning the terms of payment and other conditions attached to the individual wage accounts of financial institutions, and the other concerning the co-operation between mortgage-credit institutes and financial institutions in procuring loans secured by mortgage on real property. Furthermore, the Competition Council has published a quarterly survey of the wholesalers' discounts and bonuses on plumbing articles.

The Competition Council publishes an annual report on mergers and take-overs. The investigation in 1995 showed *i.a.* a decrease of mergers and take-overs by six percent compared to 1994, which is the lowest number since 1987. On the other hand, the number of foreign acquisitions of

enterprises in Denmark remains almost unchanged. The investigation in 1995 also showed that about 75 percent of all mergers and take-overs are horizontal, i.e. between enterprises within the same line or stage of trade.

In future, the Competition Council will publish quarterly surveys of mergers and take-overs by the Internet. The surveys will contain general information about the acquired enterprises, such as their turnover, capital, number of employees etc., and information about the nationality, type of integration etc. of the acquiring enterprise.

#### *Horizontal Agreement*

The Competition Council has proceeded in bringing anti-competitive rules laid down by the organisations of the professional services to an end. A few of these cases are mentioned below.

The Competition Council ordered the Danish Law Society to cancel what was left of the society's recommended fees as well as a restrictive rule on price advertising (mentioned in the annual report of last year).

The case was brought before the Competition Appeals Tribunal, but was suspended while the Competition Council considered the results of resumed negotiations. The negotiations concerned an interpretation of the Competition Council's statement that the Council would not pre-reject that in certain basic areas it might be necessary to maintain recommended fees in deference to the functioning of the courts of law.

The Law Society suggested that they stopped recommending fees for administration of estates after deceased persons and division of the joint estate of spouses. However, the Society wished to continue recommending fees for legal pleadings, fees for bailiff's court sessions in connection with proceedings for execution or recovery of possession, and fees for collection of debts. Finally, the society volunteered to cancel the rule, which in practice prevented the lawyers from price advertising.

The Competition Council could not accede to the Law Society's suggestions, so the appeal case was reopened, and the Competition Appeals Tribunal has confirmed the Council's original order, which implied total termination of all recommended fees and the advertising rule.

The Competition Council has initiated negotiations with the few remaining organisations of the professional services which still issue recommended fees to their members. When these negotiations have been brought to an end, the Competition Council has finished its work, which was started in 1991, cancelling all anti-competitive collegiate rules and practices of the professional services.

The Competition Council has initiated negotiations with two parallel importers of pharmaceutical products in order to cancel a tacit collusion between the two importers.

The case was occasioned by a complaint from a producer of original products who wondered that the two importers could quote identical prices when they notified a specific drug to a public register. The prices were notified two weeks before they became effective, and the two importers would under normal circumstances not be in a position to know each other's prices.

In the opinion of the Competition Council, the two parallel importers did not furnish the sufficient evidence that they were able to quote identical prices before the notification to the public register without a collusive action of some kind. The Competition Council found the arrangement to entail harmful effects on competition, because it constituted an obstacle to competition between the parallel importers, and consequently reduced the dynamics which parallel import could add to the market.

The case has been brought before the Competition Appeals Tribunal.

In 1992 the Competition Council decided that, for the time being, there was no reason to take measures against a far-reaching co-operation agreement between the two largest Danish dairies. The dairies i.a. established a joint milk organising company and a joint production company. The Competition Council's decision was made on the condition that the dairies did not accumulate the surplus from all activities and thus made an equal, aggregated payment to the members of both co-operative companies. This would exclude competition between the companies, i.a. because the farmers would have no reason to prefer one company to the other, and competitive gains on the Danish market - for instance from price reductions - would inevitably entail harmful effects on the other party and accordingly, on the joint result.

In the autumn of 1996 it appeared that the planned rationalisations had not been executed, and that apparently, the dairies took advantage of their market position by means of increasing the prices of those products which were protected against competition, while products exposed to competition were not subject to any price rises. By way of example, the prices of non-industrial milk and butter were raised in the autumn of 1996 when the corresponding world market prices decreased.

Consequently, the Competition Council has decided to initiate negotiations with the dairies in order to make them change the agreement concerning the production company to the effect that the customers get a direct access to buy from the company (and not only through the marketing company), for instance as wage-earning production. Furthermore, the negotiations will aim at cancelling an exclusive agreement concerning butter and other products based on fats.

#### *Unfair practices*

After negotiations with the Competition Council, the association of Danish opticians withdrew an ill-concealed call on its members not to deal with a certain optician and his suppliers. The reason of this initiative was that the association found the optician's mail order sales of contact lenses unacceptable and therefore tried to put obstacles in his way.

It appeared from the case that the association had placed an anonymous order for contact lenses with the optician concerned. In that way the association found out that the optician got supplies from a Danish supplier of contact lenses. The information was immediately passed on to the members with the result that they threatened the supplier to discontinue their orders if the supplier did not stop his supplies to the optician. Consequently, the supplier ended his business relations with the optician for fear of losing his other customers.

The Competition Council found that the behaviour of the association entailed restraints of the freedom of trade with equally harmful effects on competition as a direct boycott appeal. The Council found it further aggravating that it had previously - in connection with another case - impressed on the association that it would not accept any boycott initiatives from the association nor its members.

Accordingly, the Competition Council called in the association for negotiations. By initiating negotiations in pursuance of the Competition Act, the Competition Council also ensured that future boycott threats from the association would be punishable according to the penalty provisions of the Act.

Besides the association's withdrawal of its pronouncements, negotiations implied that the association engaged to refrain from any future activities, which directly or indirectly can be understood as boycott appeals and the like, with the aim of obstructing the business activities of other enterprises.

The Competition Council has decided to initiate negotiations with the two largest Danish producers of ready-mixed concrete in order to make the companies reduce their list prices to a level which corresponds to their actual selling prices.

The negotiations were caused by the fact that the discount and bonus structure of the companies, with very high rates of discount, creates disparity in the competitive conditions of subsequent stages of trade. The Competition Council has previously endeavoured to change this structure through general publication of the selling prices and discounts of the companies. As this means did not have the desired effect on competition, the Council decided to send the information direct to the commercial users of ready-mixed concrete.

A subsequent check-up on the method showed that this goal-directed effort did not have the desired effect either, and therefore the Competition Council found it necessary to take direct measures against the prices and discounts.

The Competition Council did not find sufficient proof that a co-operative destructing plant had used predatory pricing against a competitor. The co-operative destructing plant has an exclusive right to process high-risk offal and is financially connected to a number of slaughterhouses, and the competitor found the plant to take an unfair advantage of its market position by undercutting him on the competitive markets.

The Competition Council based its assessment of predatory pricing on the following criteria: Whether the goods were sold at a loss, and whether the price policy clearly aimed at eliminating the competitor. The Competition Council found that neither of these criteria were fulfilled.

The Competition Council decided to initiate negotiations with a power station to make it allow a Danish importer of electricity - on fair and non-discriminatory terms - to use its transmission network, which covers Jutland and Funen. The Competition Council found that refusal to give third party access to the network would entail a harmful restraint of competition, which freezes the actual monopoly of the power station and excludes alternative suppliers from the market. Maintenance of such monopoly will also restrain an effective development of this market and impede the competitive powers of Danish enterprises, because they are prevented from buying electricity on the most favourable terms.

The decision was subsequently overruled by the Competition Appeals Tribunal, as the Tribunal found that the Competition Council was not empowered to order the company to supply on its usual terms for similar sales (as laid down in the Competition Act), inasmuch as the company had never sold such access before.

However, the Competition Council's decision led to an amendment of the Electricity Supply Act to the effect that distribution companies and enterprises with a heavy energy consumption get access to the transmission network. The amendment has been referred to the European Commission.

#### *Vertical agreements*

The Competition Council found that a number of agreements, involving the Danish Football Association, the two Danish public service television channels and the largest Danish - and formerly the only one - tele-operator, were subject to notification.

The Competition Council did not, for the time being, consider the agreements to entail harmful effects on competition - except for one stipulation which gave the parties an option to prolong the agreements, and the parties have accepted to cancel this option. However, the agreements are now available to the public in accordance with the Danish rules on transparency.

One agreement - the Framework Agreement - concerns the two TV stations' exclusive buying of all radio and television broadcasting rights from the Danish Football Association for the next eight years.

Another set of agreements - the Co-operation Agreement - aims at establishing a new Danish pay-TV sports channel by means of a joint venture between the parties of the Framework Agreement and the tele-operator. The sports channel will acquire exclusive rights to the broadcasting of three national league football matches each week.

The Competition Council found that radio and television broadcasting rights to Danish football matches make up a separate market, and that this is also the case as regards broadcasting and transmission of television sports programmes to Danish households.

The Competition Council also found that the parties of the Framework Agreement hold a dominant position on both markets, because:

- the Danish Football Association controls almost all rights to football matches involving Danish teams;
- the two public service stations broadcast to more than 2/3 of the viewers (measured by time);
- the tele-operator owns the largest television cable network in Denmark - about 1/3 of the households are connected to this cable network; and
- the two main broadcasters have bought the rights for a period of eight years.

The Competition Council attached importance to the fact that, due to its statutes, the Danish Football Association prevents its members from selling the rights to their matches individually to the broadcasting companies, and consequently, the Association controls almost all broadcasting rights to Danish football matches.

As mentioned, the Competition Council did not consider the agreements to entail harmful effects on competition - except for the one stipulation which gave the parties an option to prolong the agreement. In that respect, the Competition Council found it important that competing broadcasting companies were given a fair possibility of obtaining the rights, and therefore the option on prolongation was cancelled.

The Competition Council has, however, made it clear that, depending on future circumstances, the case may be reconsidered, and that the Council intends to follow the developments on the market closely.

The case has been brought before the Competition Appeals Tribunal by a competing television channel. Moreover, the Danish association of teams playing in the league has submitted a complaint to the Competition Council against the Danish Football Association for abuse of dominant position as regards its selling the broadcasting rights to football matches and its entering into sponsor agreements, etc.

The case should also be seen in the light of a total liberalisation of the Danish telecommunications sector as from 1 July 1996. The liberalisation has implied that all tele-operators are given equal access to establish cable networks, and that the former national tele-operator is allowed to perform broadcasting services.

Being a party of the agreement on the new sports channel, the tele-operator will become supplier of the television channel as well as transmitter of television signals through its cable network.

The Competition Council has considered whether or not an agreement between the above mentioned tele-operator and a transmitter of pay-TV should be notified to the Council. The agreement concerned administrative and technical services for coded programmes in the cable network. The



Competition Council found that the parties had a dominant influence, and accordingly, that the agreement was subject to notification.

The case has been brought before the Competition Appeals Tribunal.

### **3. Influence on other policies and legislation**

The Competition Council has investigated the procedures of local authorities when they invite tenders for maintenance of buildings and reconstruction projects. The investigation aimed at uncovering if the local authorities invited binding or estimated tenders for such tasks from a narrow circle of enterprises, or if the orders were perhaps undertaken in rotation by a closed circle of enterprises.

The results of the investigation disproved any such suspicions, as it appeared that the vast majority of large-scale orders were put out to competitive tendering. The only problem as to competition could be that tenders were not invited for minor maintenance jobs. One local authority had solved this problem, however, by means of gathering the minor jobs in one. In its report on the investigation the Competition Council recommended other local authorities to do the same.

In 1993, the Competition Council approached the Minister for Transport and recommended the Minister to make it possible for alternative conveyors to use the harbour facilities in Elsinore for transport of lorries and passenger vehicles between Elsinore and Helsingborg. The only existing ferry service was run by a joint Danish/Swedish public company.

The approach was occasioned by a complaint from a Danish shipowner, who had also lodged a complaint with the European Commission.

As the Minister for Transport did not comply with the Competition Council's recommendation, the European Commission initiated proceedings with the result that in the spring of 1996 the Minister for Transport allowed a competing shipping company - after competitive tendering - to use one of the ferry berths in Elsinore.

The Competition Council has approached the Ministry of Finance and recommended that all credit-rating agencies be given equal access to registered information about debtors who owe money to the public.

Having invited tenders for the registration of such debtors, the Ministry of Finance had made an agreement with the largest credit-rating agency. According to this agreement, debtors are subject to notification to the agency, and the agency is free to provide its subscribers with these data together with other data from the agency's register. The problem is that, due to the legislation on registered data, other agencies are precluded from getting equal access to the data.

The Competition Council concluded that the chosen solution implied a considerable risk of promoting a monopolisation of the credit-information market and entailed an unnecessary restraint of the freedom of trade. In the opinion of the Competition Council, the Ministry's application of competitive tendering for granting an exclusive right was an inappropriate means on a market, where the structure is characterised by one strong and many weak firms, and where there is not a sufficient number of tenderers with a fair chance of obtaining the assignment.

The Competition Council found that it will be possible to make allowance for competitive considerations as well as for data protection and data quality by establishing a central data base. If necessary such data base can be established under public management, and the data ought to be available to all agencies on fair, equal and objective conditions. Thus, all data would be gathered in one base, where

they can be currently updated in order to provide the necessary security of correct data, and the deterrent effect of the threat of being registered would also be optimal if all agencies with the requisite electronic equipment have access to the information.

The Competition Council has repeatedly recommended the Minister for Justice to give credit-rating agencies on-line access to the registers of titles, mortgages and other debts on equal terms with other financial advisers.

The Minister for Justice rejected the recommendation, arguing that on-line access to the registers was subject to a court decision, and the question of credit-rating agencies' access had not yet been tested by the courts of law.

Consequently, two credit-rating agencies submitted an application for access to the court. Both applications were rejected, however, first by the lower court and subsequently by the high court, so the Competition Council approached the Minister for Justice again and pointed to the necessity for an amendment to the law.

The Minister replied that the Competition Council's recommendation will be included in the considerations of a committee, which has been appointed to analyse the legal consequences of electronic exchange of registered data.

The Competition Council has approached the Minister for the Environment and recommended some amendments of the legislation on waste disposal. The proposed amendments aim at creating fair and equal competitive conditions between public and private enterprises on the markets of waste collection/transport and recycling.

The Competition Council has pointed to the privileged position which the existing rules give to public enterprises compared to private enterprises, and which cannot be justified by environmental reasons. Therefore, the Competition Council recommends the Minister for the Environment to provide for an amendment of the rules in order to ensure that public and private enterprises can compete on fair and equal market terms.

The Competition Council also recommends a clear separation of the local government administrations' executive powers and their business activities. Finally, the Competition Council recommends that the waste fees which are charged from citizens and enterprises ought to reflect the actual costs involved, and should not be used as an indirect subsidising of local enterprises - the way it has been done in some municipalities.

The Minister for the Environment has introduced a proposed amendment to the Act on National, Regional, Municipal and Local Planning with the purpose of promoting a decentralised commercial structure, i.a. by means of limiting the size of new shops in urban areas. The amendment also aims at locating shops with bulky lines of goods outside the inner city.

The Competition Council has taken a critical attitude to the proposal, which it finds to freeze the existing structure of the retail trade and lead to creation of local monopolies, as the already established large shops will no longer be exposed to competition from new-establishments. Besides, the Competition Council does not find the distinction between bulky and non-bulky lines of goods to be based on objective criteria. Finally, the severe control of the commercial structure will result in loss of market dynamics, i.a. because new concepts cannot be tested and because the structure cannot be adjusted to new consumer habits.

In connection with the contemplated total liberalisation of the telecommunications sector as from 1 July 1996, the Competition Council issued guidelines on fair competitive behaviour.

The Competition Council attaches special importance to three conditions. First, operators/dealers of basic network services (speech, data and picture) should not - neither commercially nor technically - make sale/rent of other services/products conditional upon sale/rent of the basic service. Secondly, the terms (prices and business conditions) of sale/rent of basic network services combined with other services/products should not be more favourable than if the services/products are acquired separately. Thirdly, agreements on subscription concerning availability or distribution of network access should not exceed six months.

These guidelines can be seen as recommendations to the Ministry of Research for the use of its further liberalisation of the telecommunications sector.



## **FINLAND\***

(1996)

### **1. Changes to competition laws and policies adopted or envisaged**

As stated in the previous OECD report, the Ministry of Trade and Industry set, at the close of 1995, a working party to revise the current competition legislation. The working group shall finish its work by 31 January 1997.

The government programme, the evaluation of the Office of Free Competition commissioned by the Ministry of Trade and Industry in 1995, and experience gained of the application of the law prompted an investigation on whether there were some issues in the legislation that needed revision. The working group now proposes several amendments to the current legislation, the most important of which concern merger control, and the division of work between the Office of Free Competition on the other hand, and the Competition Council on the other. The working group further proposes changes in the handling of competition restraints of minor importance and the introduction of negative clearance applications.

In the present legislation, the role of the Office of Free Competition is that of an investigative authority. In an instance of a prohibited restraint, the Office presents a proposal to the Competition Council on the forbidding of the restraint and the imposing of a competition infringement fine. Upon application, the Office of Free Competition may also grant an exemption from bans on resale price maintenance; a tendering cartel; and horizontal cartels.

In the present situation, the position of the Competition Council is twofold: firstly, it is an executive authority who has the power to forbid a competition restraint and to set a competition infringement fine. Secondly, it acts as the first instance of appeal in exemption matters solved by the Office of Free Competition. Due to the limited executive powers of the Office, issues which involve forbidding a competition restraint thus have to be handled twice.

The working group now proposes that the Office of Free Competition would make the decisions in the competition restriction cases it handles and that these would all be appealable to the Competition Council. Such a reform would emphasise the Council's court-like nature. The Council would still decide on the competition infringement fines imposed on forbidden competition restraints. The main purpose of the proposal is to clarify the powers from the viewpoint of entrepreneurs; also to unify the handling of competition restrictions and to increase the efficiency of the process.

On the issue of merger control, the present government programme requires a more efficient competition legislation to prevent monopolisation. In this context, the working group has examined whether provisions on merger control should be included in the Finnish legislation. The merger control proposed by the working group would be based on a prior notification of acquisitions. From the viewpoint of the legal protection of the companies obliged to notify, the working group recommends that this would be determined purely on the basis of turnover criteria. In order to exclude irrelevant cases, it has been

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\* The original language of this document is English.

suggested that the criteria be based not only on the combined turnover of the parties to the business acquisition but also on the minimum size limit of the company to be bought.

Provisions on negative clearance are not included in the present competition legislation either, although, on many occasions, entrepreneurs have wished to verify from the Office of Free Competition whether a practice conforms with the law or not. The need for an introduction of negative clearance was also pointed out in the evaluation of the Office of Free Competition commissioned by the Ministry of Trade and Industry. Hence, the working group proposes that a provision to that effect be included in the legislation.

One of the problems of the present legislation has been that the Office resources have been tied up too much with the investigation of competition restraints of minor importance. The working group now proposes that restrictions of minor importance be lifted from the Office list of duties, and it could be done when, in spite of a competition restraint, competition may be considered effective in specific markets, or when the restriction otherwise bears a minor significance for the safeguarding of competition. No criteria of turnover or market share have been set for "minor importance", as a bagatelle rule based on such criteria would, according to the working group, signify a major limitation in the field of application of the present law. In addition, the evaluation of the applicability of the market share criteria could prove too complex for the companies themselves, due to the difficulties involved with the defining of the relevant markets.

Finally, the working group proposes that a provision be included in the legislation on the compensation of damages, according to which an entrepreneur who has violated the Act on Competition Restrictions, either purposefully or out of negligence, would be obliged to repay the damage incurred. Presently, the position of the party who has suffered damage due to a competition restraint is determined either on the basis of the Act on the Compensation of Damages or on contract law. Whereas the compensation of a financial damage is the basic rule when contractual relations exist, under the Act on the Compensation of Damages, the obligation to compensate primarily only covers personal and material damage. Thus, entrepreneurs who have suffered from a competition restraint have been placed in an unequal position, depending on whether they have been in a contractual relationship to the company who has carried out the competition restraint or not. A provision on the compensation of damages would expand the damage to be compensated under the Act on the Compensation of Damages outside of the contractual relation, and provide equal treatment to entrepreneurs who have suffered due to a competition restraint.

The government is expected to present a bill to the Parliament on the revision of the competition legislation in the autumn of 1997.

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

### *Action against anti-competitive practices by competition authorities*

In 1996, 293 new matters involving competition restraints were brought before the Office of Free Competition, compared to the 269 of 1995. Of these, 67 percent were requests for action; three percent exemption applications; 13 percent inquiries, and seven percent of the cases were initiated by the Office itself.

In 1996, the Office resolved a total of 315 competition restraint issues; in 65 cases, by means of a decision, of which nine concerned exemption applications.

The Office of Free Competition made two proposals and referred one appeal involving an exemption application to the Competition Council in 1996, and the Council issued two decisions. The Supreme Administrative Court issued a decision in three cases.

Following the organisational reform carried out from 1 March 1996, the Office of Free Competition chose to monitor certain key industries more closely. These present ones include energy and public utilities (e.g. electricity, the water and sewerage utilities, district heating and port authorities) where the Office purports to promote the functioning of competition where competition is feasible and, otherwise, to tackle discriminatory and exploitative practices. One major task is the development of the evaluation criteria composing an unreasonable pricing practice considered an abuse of a dominant position.

Within another key area, relations between trade and industry, the primary objective is to ensure that powerful wholesale companies as gatekeepers do not hinder or restrict the entry of competing suppliers into the relevant markets. The Office also attempts to guarantee that the industry which offers commodities for reprocessing and end users does not engage in practices which tie clients or distribution channels or exclude competitors.

Forestry and forest industry includes the markets for chemical and mechanical wood products where the Office investigates and combats horizontal practices; and the raw wood markets and the harvesting and transportation services where the market structure and competition -related problems - few big buyers and a large number of small suppliers - resemble each other.

In the finance and insurance markets, a fourth key industry, the investigation centres on competition restraints in the credit, money and capital markets. The aim is to intervene with tying terms of agreement with which banks and insurance companies restrict their clients' switching into business relationships with their competitors.

Within the communications and media sector, the Office seeks to abolish public regulation, particularly within telecommunications and electronic mass communications, and to contribute to the creating of competition in the local call markets. In graphic mass media, the Office has investigated competition restraints in the newspaper industry, and found that the biggest provincial newspaper's occupy a dominant position in the advertisement markets of their own advertising areas. From this angle, the Office examines the pricing of advertisements and potential refusals to publish them.

In the field of health care, the Office attempts to influence regulation to introduce competition. The competition in health care has been negligent and the municipalities have acted both as buyers and producers of health care services. The Office proposes a reform that encourages reliance on market forces by separating the roles of the buyer and supplier, and by repairing the competition distortions caused by state aid in health care. The Office also attempts to eliminate the regulatory mechanisms impeding competition in the distribution of pharmaceuticals.

Competition restriction issues which are not among the so-called key industries are handled in the Complaint Unit which was set up in the context of the regulatory reform. A major part of its work has been taken up by the handling of competition restraints within the food-stuff sector, transportation and the business activities of municipalities and the state.

### ***Description of significant cases***

#### *Cases handled by the Competition Council*

##### *Fine imposed on Neste for the abuse of a dominant market position in the wholesale of motor fuels*

In 24 October 1996, the Competition Council imposed on Finland's major oil company Neste the first competition infringement fine for behaviour violating the Act on Competition Restrictions, i.e. Neste's abuse of its dominant market position in the wholesale of motor fuels. 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, and the Competition Council had issued a decision in June 1994, forbidding Neste to apply pricing principles which led to the discrimination of one of its customers, SEO.

Both SEO, Neste and the Office of Free Competition appealed the decision of the Competition Council: SEO with respect to the price-differentiation criteria approved by the Council; Neste demanded that the decision be annulled on part of the relevant markets, Neste's dominant position and the abuse of it; and the Office of Free Competition appealed the fact that the Council had not imposed a fine on Neste.

The Supreme Administrative Court dismissed the complaints of SEO and Neste, but sustained the one by the Office. In late 1995, the Supreme Administrative Court confirmed the abuse of a dominant market position by Neste for its application of a discriminatory pricing practice, and referred the matter back to the Competition Council for the imposition of a fine. This amounted to FIM two million.

By its decision, the Supreme Administrative Court confirmed that the client-specific price-differentiation charged by a company occupying a dominant market position should be based on genuine client-specific differences in costs, i.e. cost-accountability. A company in a dominant market-position shall not artificially affect the competitive scene between its clients who are possibly following differing business strategies. But the Court also 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 confirming to cost-accountability, if it is justifiable in view of the company's market position and the evolving features of market 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.

#### *Cases handled by the Office of Free Competition*

##### *Abuse of dominant position*

##### *Exclusionary rebate schemes - Valio*

In March 1996, the Office of Free Competition presented to the Competition Council a proposal on the terminating of an abuse of a dominant position and the imposing of a competition infringement fine of FIM three million on the Finnish dairy products company Valio.

Valio is the biggest dairy products company in Finland, and holds the largest market shares in the major dairy products markets. In addition to liquid dairy products - milk, cream and sour milk - Valio also produces fats, cheese, ice-cream and juice. Till the year 1992, almost all Finnish dairies were part of Valio and there were no other operators in the liquid dairy product markets. During 1993-1994, some dairies broke loose from Valio, and began to independently market their products.

In the beginning of 1995, Valio introduced a rebate table of liquid dairy products for individual retail customers. The compensations based on the sales volume were counted on the basis of the total purchases of all products (liquid dairy products, fats, ice-cream, snacks, juice, cheese) customers obtained from Valio, but the rebates were only granted from the prices of the liquid dairy products.

Valio is seen to possess a dominant position in the markets of liquid dairy products in Finland. Its market share in these markets is 80 percent, whereas the market shares of its competitors are small. Additionally, Valio's production capacity, the amount of production facilities and the product range are by far greater than those of its competitors.

The Office of Free Competition found in its investigation that the rebate table of liquid dairy products had had the effect of tying customers of dairy products to Valio and prevented them from tendering other, competing retailers of single products or product groups. It was beneficial for the retailers to concentrate all their purchases of dairy products to Valio in order to attract as large a rebate as possible



of the wholesale prices of liquid dairy products. On the other hand, retail customers were able to benefit from the rebate in the best possible way only when they obtained from Valio the entire amount of liquid dairy products needed. The customers did not receive any rebate in the event that they only purchased from Valio other than liquid dairy products.

The exclusionary and tying effects of the aggregated rebate scheme were felt in the liquid dairy products markets where Valio had, since 1994, encountered competition from independent dairies previously part of it, these markets being vitally important to Valio's competitors.

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

#### *Administering of copyrights*

In October 1996, the Office of Free Competition proposed to the Competition Council that it find the copyright association Teosto guilty of an abuse of a dominant position in the collective administering of musical art and that it order Teosto to terminate the practice.

Teosto monitors and administers musical and literary copyright as the sole association of its kind in Finland. Its customers - composers, arrangers, lyricists, authors, and publishers - have authorised Teosto to grant permits for the presenting and recording of their works of art. Teosto collects royalties from the public broadcasts of music from radio and television companies; restaurants; concert organisers and other users of music, and accounts these to the holders of rights it represents.

Teosto had applied different levels of royalties with respect to the public television and radio broadcasting company Yleisradio and the commercial television company MTV for the playing of the protected music, which it justified by the different financing resources of the two companies. The financing of the MTV group producing commercial television programmes is based on the selling of national and regional advertising space, whereas the financing of the national Yleisradio is based on television licence-fees and the public service fee and network rent obtained from MTV.

The Office of Free Competition held that Yleisradio and MTV exploited the same commodity - music - for the same purpose, i.e. the attracting of customers to watch programmes broadcast by the company. Yleisradio and MTV therefore belonged to the same group of customers and the Office found no objective justification for an unequal treatment of them. Teosto was thus found guilty of an abuse of a dominant position by applying a discriminatory pricing practice.

The Office of Free Competition further held that Teosto had abused its dominant position by applying intransparent pricing, since it had not separated from each other the copyright compensations of Yleisradio's radio and television broadcasts.

A difficulty involved in the case was that the arbitration court had already made an assessment on Teosto's different pricing for MTV and Yleisradio from the viewpoint of competition law, which, furthermore, was opposite to that of the Office. The arbitration court confirmed that the different pricing was justifiable particularly because the two companies were seen to operate in different relevant markets, MTV selling advertising space for TV where Yleisradio does not operate, and Yleisradio sending television programmes for compensation in the form of a licence-fee collected from the viewers. However, the result of the arbitration awards was that they made Teosto's pricing less discriminatory.

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

#### *Horizontal competition restraints*

*Purchasing co-operation in the electricity markets*

Due to the liberalisation of the Finnish electricity markets, the production and whole- and retail sales of electricity have been opened up for competition. Previously, each electric utility had the sole right for the electric utility operations on a certain geographical region, and all customers part of a specific distribution network purchased their electricity from the same utility. After the reform, the users of electricity have been free to choose their electricity producers; large users needing more than 500 kW since 1 November 1996, and smaller ones from 1 January 1997.

The electricity market's opening up for competition has made the market parties seek out new modes of operations, of which the central one has been joint purchases of electricity. On a level of principle, the Office of Free Competition has taken a positive stand to joint purchases, as, in the new market situation, they increase the competition within the field.

In April 1996, the Office of Free Competition granted an exemption effective till the end of 2000 to the collaboration between the shareholders of Kymppivoima in the joint purchases and temporary sales of electricity.

Shareholders of Kymppivoima consist of nine regional electric utilities who operate as the electricity distributors and retail sellers in their operational areas. Some of the shareholders also act as producers of electricity. The share of Kymppivoima is over ten percent of the total purchases of Finnish electricity, and one fourth of the wholesale electricity markets, including other electricity than that produced for own consumption.

To the end users of electricity the Office of Free Competition has, so far, granted one ten-year exemption. Six companies operating in entirely different fields (manufacture of dairy products; wholesale and retail sales; communications; real estate business; foodstuff industry and wood-processing) set up Voiman Ostajat (Power Buyers, unofficial translation), whose duty it is to obtain electricity and sell it at a prime cost to the shareholders. These have no obligation for exclusive purchasing.

When the Office granted the exemption, it found that the market share of Voiman Ostajat in the purchase of electricity in the Finnish markets is small (less than one percent). The Office held that the purchasing co-operation improved the users' negotiation powers with respect to traditionally powerful electric utilities and increased the buying options of electricity users. The collaboration enables the purchase of electricity e.g. from the electricity pool and the Nordic electricity markets. The shareholders are mutually competing companies when obtaining electricity but not competing sellers in the electricity markets or in the markets of the products they produce.

The purchasing collaboration gives the opportunity to exploit cost benefits arising from the so-called cruising benefit. The power peaks in the electricity use of the shareholders part of the collaboration occur at different times, and the users may, by joining their purchases, reach lower power orders than what their combined maximum power need would be.

*Vertical competition restraints**Warranty services of mobile phones*

The leading Finnish mobile phones manufacturer Nokia Mobile Phones and its main Swedish competitor in Finland LM Eriksson applied a warranty service policy which the Office found to seriously prevent their parallel imports without a justifiable reason. The companies provided warranty services only when the phones had been bought by firms from authorised dealers, or when private customers had bought the device. Parallel imports which had been shipped in professionally were excluded from the warranty services of Nokia and Eriksson and they were only repaired for pay. After the Office of Free Competition had delivered its opinion, the companies commenced warranty services of all mobile phones by early 1996.

*Other activities of the Office of Free Competition*

On 26 June 1996, the Office of Free Competition made a request to the European Commission for the examination of a concentration by Kesko and Tuko under Article 22 of Council Regulation 4064/89. Kesko, the leading wholesale company of daily consumer goods in Finland, purchased a controlling interest within its competitor Tuko, which the Office of Free Competition found to significantly strengthen Kesko and the K-Group's position, particularly in the wholesale and retail sales of daily consumer goods. By a decision of 20 November 1996, the European Commission opposed the concentration and declared it incompatible with the common market. The Commission considered that, as a result of the concentration, Kesko would acquire a dominant position in the Finnish markets in the retail and cash and carry sales of daily consumer goods. The Commission shall, in a separate decision, adopt appropriate measures in order to restore effective competition.

### **3. The role of competition authorities in the formulation of other policies: deregulation**

In 1996, the Office of Free Competition has sought to influence the regulation of electronic communications and the related administrative practice, with the aim of safeguarding the entry of new companies. The Office has given a statement about the granting of an operating permit for a new television channel and its terms, and made an initiative for the abolition of the public service fee charged by Yleisradio from the incumbent commercial television company and the new commercial entrant. According to the Office, entrepreneurs operating in the markets of the electronic mass media are artificially placed in an unequal position by the public service fee. MTV has, as the sole commercial mass communications company, contributed to the financing of the duties defined in the law. In the future, the new entrant Ruutunelonen will also participate in the costs. However, a commercial radio station Suomen Uutisradio competing with Yleisradio on a nation-wide basis is not obliged to pay the fee; neither are local radio station operators. Entrepreneurs operating in cable TV networks do not have to pay the fee either. The Office of Free Competition further finds that other companies than Yleisradio also offer programmes (news, documentaries and current affairs) fulfilling the public service criteria, i.e. collecting the fee for its operations only is not justified.

With its initiatives, the Office of Free Competition further sought to influence the regulation in the health care sector in a manner which would increase the competition between the public and private health services. The Office found, in particular, that in health care, the roles of the buyer and the producer have to be separated from each other in the activities of the municipality, and any impediments for the tendering of public or private services have to be removed. The Office also contributed to the deregulation of pharmaceuticals and pharmacies, e.g. by proposing the abolition of needs testing with respect to the operating permits of pharmacies and the medical tariff guiding the retail pricing of pharmaceuticals.

Additionally, the Office of Free Competition sought to secure the entry of new entrepreneurs in postal operations by issuing its negative opinion on legislative plans which would reserve to the state-owned Finland Post, the current sole holder of an operating permit, an exclusive right to deliveries of First and Second Class Letters, and alternative plans which would require that the holder of a restricted permit pay a considerable postal operations fee but not so Finland Post. Since the beginning of 1994, the Finnish legislation has enabled the penetration of new entrants into the postal operations market. Two restricted permit applications are presently pending in the Ministry of Transport and Communications.

The Office also took a stand to regulatory issues, particularly regarding the privatisation of state-owned companies and the turning of them into profit-making entities; the tendering of public procurements; environmental issues, telecommunications, electricity and traffic. The Office made a total of eight initiatives to ministries and issued written statements in approximately 60 regulatory matters.

#### **4. New studies relevant to competition policy**

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

- 1/96 JUKKA YLI-HANKALA, Yrityshankintojen valvonnasta EY:n kilpailuoikeudessa (On merger control in the EC competition law)
- 2/96 VELI-PEKKA SAAJO, Rovaniemen markkinoilla - tutkimus bensiinimarkkinoiden hintasodista vuosina 1992-94 (On the markets of Rovaniemi - a study of the price wars in the petrol market during 1992-1994)
- 3/96 HEIKKI POKELA, Vertikaaliset jakelukanavat: eri portaiden välisten sopimusten vaikutukset talouteen (Vertical distribution channels: the economic effects of agreements between the different trade levels)
- 4/96 MARKKU PULKKINEN, Vähämerkitykselliset sopimukset Euroopan yhteisön kilpailuoikeudessa (Agreements of minor importance in the EC competition law)
- 5/96 MATTI LISKI, Määrähinnan käytön taloudelliset vaikutukset (Economic effects of the use of recommended pricing)
- 6/96 JANNE KAIRO, Identification of Market Dominance through Trading Dependence

## FRANCE\*

(1996)

### Summary

#### *New legislation and reform projects*

The rules governing competition in France are set forth in Government Order 86-1243 of 1 December 1986, Title III of which was amended by the Law of 1 July 1996 on fair trade practices. The purpose of the revision was to:

- bring more fairness to trade between suppliers and large retailers of consumer goods, so as to prevent abuses of purchasing power; and
- simplify and clarify rules on invoicing by re-emphasising the importance of the contract between the parties.

In addition, regulatory reforms continued to be implemented, resulting in a gradual opening of state monopolies to competition.

#### *Implementation of competition law and policy*

##### *Anti-competitive practices (restraint of trade and abuse of dominant position)*

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

Throughout 1996, the DGCCRF (Direction générale de la concurrence, de la consommation et de la répression des fraudes) continued to actively work at singling out agreements of an anti-competitive nature, abuses of dominant position or situations of economic dependency, proving the existence of such practices and taking legal action against those that could not be prevented.

As in 1995, a large number of referrals concerned firms acting in unlawful concert in respect of government procurement, as well as abuses of dominant position, including those attributed to companies enjoying a legal monopoly position.

The Ministry of Finance referred 36 instances of anti-competitive agreements and abuses of dominant position to the Competition Council.

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\* The original language of this document is French.

### Summary of the activities of the Competition Council

One hundred and fifteen cases were referred to the Competition Council for adjudication. In addition, the Council was asked to issue 27 advisory opinions as part of its consultative role, so that, altogether, it handled 142 individual matters.

The Council issued decisions in 97 contested cases, 42 of which resulted in disciplinary measures or injunctions.

### Summary of the activities of the Paris Court of Appeal

Twenty-eight of the Competition Council's decisions were appealed to the Paris Court of Appeal.

The industries principally concerned by the Court's judgements were:

- building and construction,
- industrial supplies (cast-iron pipes),
- health care (government hospital procurement contracts).

Many cases concerned government contracts. They are particularly relevant in that they point to the concern of the competition authorities and the courts to ensure that government procurement is conducted in compliance with the rules of competition.

The first decision concerned agreements among 53 building and construction firms in connection with contracts for several bridges, including the Pont de Normandie, as well as the North, South and East TGV rail lines and their support structure. The agreements, which were unprecedented in scope, were designed to enable firms located throughout France to divide up the construction market for public infrastructures. In addition, the arrangements were to last for several years. The Court of Appeal ruled that the pacts had resulted in anti-competitive practices.

The second decision concerned conditional rebates by Lilly France for hospital pharmaceutical supplies. This major pharmaceutical company was granting discounts on any product in the public domain when purchased along with a drug for which Lilly-France holds a monopoly. The purpose of this conditional rebate was to restrict access by competitors to the market for the public-domain product. The Court of Appeal agreed with the Competition Council and disallowed the practice.

The third case concerned unfair practices by Pont-A-Mousson in the supply of cast-iron pipes for water-supply systems. The conduct of the company, which raised questions about the quality of products manufactured by a competitor and caused an artificial drop in prices, was designed to restrict access to the market by a competitor, in this case Biwater.

### *Mergers and concentrations*

#### Notification of the DGCCRF

As in 1995, mergers and acquisitions in France did not reflect what was happening internationally, with a decline in the number of operations there from the previous year. Concentrations were sustained in certain sectors, such as communications, distribution and services, where the pace of restructuring accelerated, but were down elsewhere, such as in manufacturing industries other than food processing.

One constant factor that emerged was the increased effort by French firms or by firms operating in France to avoid contravening domestic anti-monopoly legislation. As a result, the DGCCRF was informed about more planned mergers and acquisitions (27 in 1996), either on the initiative of companies or subsequent to informal talks.

#### Referrals to the Competition Council

The number of referrals to the Council was stable. Out of six planned mergers and acquisitions referred to the Competition Council, five resulted in decisions:

- two were granted unconditional authorisation (*Otis SA/Ascenseurs Soulier SA, Eridiana-Beghin-Say/Compagnie française de sucrerie*);
- three were authorised subject to certain adjustments (*Heineken/Fischer, Auchan/Docks de France, Callebaut AG/Barry SA*).

Of the remaining 21 planned mergers and acquisitions for which information was filed, a commitment by a Company was undertaken in only one (*Canal Plus/Nethold*).

#### ***Deregulation, privatisation and competition policy***

The opening up of sectors under government monopoly continued and the competition authorities have been seeing to it that this took place in a manner acceptable to all sectors of the economy.

It is possible for a dominant firm which heretofore enjoyed a monopoly position to hinder the entry of competitors. The market-opening stages must not only include the drafting of new regulatory instruments protecting fair competition, but should also provide for special monitoring of the practices of companies, which must be made to comply with the rules of fair competition.

Three sectors in which State monopolies had existed were being liberalised:

They were those of air transport, telecommunications and railways. Furthermore, the gas and electricity sectors are about to be opened up. The French government participated in the drafting and enactment of European directives concerning the electricity and gas sectors.

#### ***The role of competition authorities in formulating and implementing other measures.***

##### *The role of the DGCCRF*

In addition to paying special attention to the conditions under which sectors being deregulated were opening up to competitive forces, as in telecommunications or air and rail transport, as well as within the framework of governmental co-ordination, the competition authorities also contributed their expertise in connection with several projects concerning water supply and the advertising of rates for health-care services.

##### *The role of the Competition Council*

The Competition Council handed down 18 decisions. In addition to the five cited above concerning mergers and acquisitions, six had to do with competition issues, four with draft legislation restricting competition, and three were issued at the request of the ordinary courts regarding anti-competitive practices in cases before them.

In addition, for the first time ever, a request for an opinion was submitted to the Council concerning two draft decrees affecting the agricultural sector and seeking to exempt certain agreements from the scope of the Government Order of 1 December 1986, pursuant to Article 10 of said Order. The first of these concerned agreements among producers of the same commodities whose products are sold under a quality label. The second pertained to agreements among producers, or producers and distributors and processors, on structural measures to be implemented in the event of adverse economic conditions.

## Report

### *Changes or proposed changes to competition policy and legislation*

#### *New legislation on competition and related issues*

In preparation for the revision of Government Order 86-1243 of 1 December 1986 on pricing and competition, hearings were held with many trade associations, legal experts, economists, members of parliament and representatives of consumer organisations. This process resulted in the enactment on 1 July 1996 of the Law on Fair Trade practices. There were two primary purposes behind the revision.

- Bringing about greater fairness in trade between suppliers and retailers, so as to prevent abuses of purchasing power. A civil law procedure was created to cover certain practices, such as that consisting of demanding payment for stocking goods with no return benefits, or of suddenly ceasing to handle products and obtaining discriminatory benefits under the threat of not handling them. In addition, the civil procedure for refusal to sell was repealed.
- Simplify and clarify billing rules by giving precedence to contractual agreements between the parties for the purpose of rebates and terms of payment, subject only to compliance with competition rules and with the principle of non-discrimination.

Although the impact of the law will have to be assessed over the long run, an initial review shows that it has had a positive effect.

#### *Other related measures (recommendations and directives)*

No measure was taken in this connection.

### *Changes in competition policy and legislation proposed by the government*

#### Opening of State monopolies to competition

The opening of State monopolies to competition is continuing and the DGCCRF has been playing a key role in seeing to it that proper attention is given to the interests of all those involved in this transformation, which is part and parcel of the building of Europe.

The advantages to be gained from laws allowing competition will become evident only if such competition is free to take place. It is easy for a dominant firm to hinder access by competitors. Special attention must therefore be given to the various stages involved in opening markets, in terms of both the formulating of new regulations, which must favour balanced competition, and the behaviour of firms, which must comply with the rules of fair competition. Three sectors have principally been affected by the opening of competition in sectors under state monopoly.



- i) The air transport sector was the first to be affected by liberalisation measures, with the earliest steps dating back to 1986, when several airlines were authorised to fly routes to France's overseas territories. Other developments have taken place since then, such as the opening of domestic routes to foreign airlines, which was fully completed in April 1997.

In the case of ground support services supplied by airports, France has been preparing to translate into law the European directive on assistance during stop-overs and the Competition Council was asked for its opinion on draft legislation to that effect.

- ii) In the telecommunications sector, the state company has already spun off several businesses and it will have disappeared completely by 1 January 1998.

In order to facilitate the opening of the telecommunications sector to competition, the Law on Regulating Telecommunications created an independent authority, the Telecommunications Regulatory Authority (*Autorité de régulation des télécommunications* - ART). It is responsible in particular for exercising control over the conditions governing interconnection and for settling disputes arising in this area. Its decisions can be appealed to the Paris Court of Appeal, which sees to it that its decisions are consistent with competition law. The Competition Council's jurisdiction over competition issues in telecommunications was confirmed. The ART is also responsible for submitting to the Council any dispute falling within its jurisdiction. Furthermore, the law requires that the two independent bodies engage in mutual consultation and reaffirms the consultative role of the Competition Council in the drafting of regulations affecting competition.

As for the rules governing network interconnection contracts, these are considered private-law agreements and are subject to the ordinary law of competition. However, some of the contracts offered by powerful providers must obtain the prior approval of the ART. A free market exists in principle for services. The only remaining rules concern fees charged for universal service and for services for which there is no competition. The Ministry of Finance retains the right to approve prices in this field, and the Competition Council can be asked for its opinion.

In the area of mobile telephones, competition has intensified following the introduction of a third system. The first agreements on the development of alternative infrastructure networks have been signed and the government is encouraging the development of several such networks.

- iii) In rail transport, the revision of laws governing the SNCF national railway company resulted in the enactment of the Law of 13 February 1997, which is in compliance with European Directive 91-440 of 29 July 1991. It does not affect the centralised management of the system nor the monopoly of the national railway company in the area of domestic transport. The law makes a distinction between:

- the owner of the infrastructure, in this instance the railway lines, which is referred to as the French rail system (RFF). A state company has assumed FRF 134 200 million in SNCF debt (with possibly an additional FRF 20 000 million);
- the French national railway company (SNCF), a state company which transports people and freight over the system, under a monopoly. SNCF pays a fee to RFF for the right to use the rail system. On the other hand, RFF is responsible for the cost of work performed on the lines.

Furthermore, the law provides, on an experimental basis, for the shifting of financial responsibility for regional passenger service to the Regional governments. The reform is a step toward the

modernisation of the railway system. The advanced stage of the debate makes it possible, for instance, to anticipate the creation of “freight freeways”.

The opening up of the gas and electricity sectors is also in the making. The French government participated in the drafting and enactment of the European directive on the electricity sector, which calls for a controlled and gradual opening up of this area. It is also involved in the drafting of the gas directive, where it has been following a proven approach consisting of allowing improvements to take place which have been made necessary or possible by technological progress and are likely to improve services to consumers, and ensuring that the obligations of the public utilities are kept in place and performed under conditions that are financially satisfactory to the operators responsible for them.

#### Government procurement code reform

Work has begun on a reform of the Government Procurement Code. The justification for such a reform comes from the growing volume of government purchasing as well as from the complexity of the existing code.

Government procurement, which amounts to some FRF 700 000 million annually, or 10 per cent of the GNP and 20 per cent of the government’s budget, is a major economic factor.

The current government procurement code is also highly complicated and relatively ineffective. The thresholds above which competitive bidding is mandatory are set too low. Many invitations to bid are declared unsuccessful and contracts are subsequently negotiated under conditions over which the authorities have little control.

It seemed useful, therefore, to raise the thresholds to match those applicable to procurement by the European community. However, the procedures for negotiating contracts when the thresholds are not attained have been revised to provide greater transparency in selective bidding.

In addition, the new regulation is consistent in that it closely follows the various steps involved in the government purchasing procedure.

The new government has not made its position known on a possible revision of the government procurement code.

#### ***Implementation of competition laws and policies***

*Action against anti-competitive practices, including agreements in restraint of trade and dominant positions.*

#### Summary of the DGCCRF activities

Besides examining ways to help transform competition law, and in addition to the major regulatory reforms implemented, the DGCCRF is constantly ensuring compliance with existing regulations and fighting abusive practices which could distort competition.

The DGCCRF kept up its pace in 1996, as it continued to actively work at singling out anti-competitive agreements, abuses of dominant position or situations of economic dependency, proving their existence and taking legal action against those which could not be prevented.

Its staff prepared 309 indicators of anti-competitive practices, undertook 242 investigations and issued 185 reports, including those produced at the request of the Competition Council. The Ministry of Finance referred 36 cases to the Council pursuant to Article 11 of the Order of 1 December 1996 (anti-competitive agreements and abuse of dominant position). As in 1995, the referrals included a large number of instances of unlawful concerted practices in connection with government contracts and abuses of dominant position, including those attributed to companies enjoying a legal monopoly position.

Firms with legal monopolies must refrain from distorting competition in their sector and preventing competitors from gaining access to markets. Electricité de France (EDF) and France Télécom, for instance, were investigated by the DGCCRF. The Paris Court of Appeal confirmed that holders of monopolies were not to take undue advantage of the dominant position of either diversified subsidiaries or their traditional core business.

Enforcing competition law in the field of health care helps put medical expenses under control, as demonstrated by investigations of government hospital procurement contracts, or the case which led the Competition Council to impose a penalty on a major pharmaceutical company, Lilly France, for abusing its dominant position. In this instance, the Competition Council, in judging the seriousness of the charges, took into consideration the monopoly position held by this corporation with respect to certain patent medicines, in a highly captive market where consumers are obeying doctor's orders.

The departmental offices of the DGCCRF, which act as the authorities on site, play a key role in this area: by participating in government commissions examining bids tendered and in those issuing invitations to bid, advising national government officials in conjunction with ensuring the lawfulness of contracts, and by helping detect signs of favouritism (some 100 government contracts have been scrutinised for favouritism since 1996).

Furthermore, because government procurement is predictable and involves large volumes of goods and services, it is a particularly sensitive area for prohibited agreements. The DGCCRF has remained highly vigilant, with the Ministry referring ten cases concerning anti-competitive practices in government procurement to the Competition Council.

#### Summary of Competition Council activities

A total of 115 cases were referred to the Competition Council, the remit of which was broadened as a result of the provisions of the Law of 1 July 1996 to include unlawful price-cutting. Under its mandate, the Council has the authority to levy fines on firms or trade associations guilty of practices in restraint of trade, and to issue injunctions against such practices.

Acting in its consultative capacity, the Council also issued 27 advisory opinions, for a combined total of 142 cases handled during the year. The number of cases that come before the Council has levelled off since 1994:

Referrals or requests	1987	1993	1994	1995	1996
Adjudicative	107	103	113	128	115
Advisory	24	24	27	19	27
Total	131	127	140	147	142

In emergency situations, the Council may also issue protective orders.

Of the 115 cases referred to it, 18 involved petitions for protective measures, slightly less than the previous year.

The total number of proceedings commenced was slightly below that for 1997 (down seven). Since 1994, proceedings have been initiated primarily at the request of companies (about 45 per cent).

The Council convened 94 times in 1996, to examine 124 cases. It issued 97 decisions, of which 41 resulted in penalties or injunctions.

#### Decisions by the courts

##### *i) Summary of the decisions of the Paris Court of Appeal*

The Paris Court of Appeal handed down 34 judgements and granted stays of execution in five cases. During the same period, appeals of 28 decisions by the Competition Council were heard by the Court.

The industries principally concerned by the decisions of the Court of Appeal were:

- building and construction, including industrial supplies (cast-iron pipes),
- health care (government hospital procurement)

In addition, the Court of Cassation handed down ten judgements in cases on appeal from the Paris Court of Appeal, itself ruling on appeals of decisions by the Council. It denied nine of the ten petitions.

##### *ii) Summary of the decisions of civil and commercial courts*

The civil courts having jurisdiction over competition law have exclusive jurisdiction in the case of anti-competitive practices, pursuant to Article IV of the Order of 1 December 1986.

Proceedings to combat unethical practices by supermarket chains continued in 1996 before civil and commercial courts and resulted in exemplary sentences:

- in the matter of Inter Marchandises France (ITM), the Paris Commercial Court, in its judgement of 25 November 1996, ruled that by authorising the Ministry to take action on behalf of the victims, the lawmakers in 1986 had sought to provide for a purely civil procedure to fight restrictive practices, in the event that victims refrained from doing so for fear that their products would be kept out of stores in retaliation;
- in Cora, the Colmar High Court, in its judgement of 5 February 1997, ruled that Cora had obtained goods at very low prices from one of its suppliers, unjustifiably and in a discriminatory manner;
- in Carrefour-Ego Fruits (judgement of 4 March 1997);
- in Auchan-Soviba (Versailles Commercial Court's judgement of 7 March 1997).

In issuing those judgements, the courts sought to put a stop to discriminatory practices by supermarket operators in respect of their suppliers.

#### Summary of major cases

##### *i) Summary of major cases before the Competition Council*

This is the most common category of unlawful practices. The Council examined 16 instances of anti-competitive agreements in government procurement or the private sector.

Many cases involved construction firms and disclosed the existence of anti-competitive practices in connection with various government contracts involving local or regional entities (contracts by the Gard département, the Cavalon valley waste removal services, the invitation to bid for the supply of electromechanical equipment for a pumping station at an exit on the A57 motorway, several contracts by the Var département, and practices in connection with an invitation to bid issued by SANEF). In one of the above instances, the same firm had formulated the offers of other bidders, or at least of some of them, so that all had submitted the same bid, in some cases perfectly identical to that which had been passed on to them. Many other firms implicated in these cases contended before the Council that the practices of which they were accused, such as the submission of estimates calculated in advance by another firm, were in no way anti-competitive. The Council ruled that the submission of a bid based on an estimate by a theoretically competing firm constituted a practice that is tantamount to an anti-competitive agreement. Such practices result in principals being denied the opportunity to secure independent, competitive bids, whereas nothing prevents firms from submitting a theoretical offer. Another decision, concerning the bidding for contracts in the Var, provided an opportunity for the Council to reiterate the view that setting up a group of companies in response to an invitation to bid, although not in and of itself an unlawful act, could be subject to sanctions if the group had been formed for purposes of restricting competition.

In eight instances, ranging from book-printing works to towing services, property management and assessment, legal fees, farming and wine-making, the Council issued decisions against trade associations which had drawn up and issued rate schedules or instructions to raise prices.

The Council objected to agreements aimed at keeping a competitor out of a market. Automobile dealers who had asked the organiser of a car show to bar entry by manufacturer's representatives were disciplined by the Council. Likewise, the Council condemned a taxi-owners' co-operative with a telephone exchange for having prohibited its members from finding customers on their own through individual radio calls, and for having prevented the development of casual services likely to be in competition with them. In another instance, the Council did not authorise practices by an association to which most ambulances in Amiens belong, and which required new applicants for membership to be sponsored by one of their direct

competitors. Lastly, the Council ruled against the practices of architects' associations which had called upon their members not to submit entries to two competitions organised by a government entity, on the grounds that, in one case the conditions under which the contest was organised were not satisfactory and, in the other, insufficient compensation was being offered to applicants whose submissions were rejected.

In 1996, the Council examined several provisions contained in general terms and conditions of sale, exclusive or selective distribution agreements as well as franchising agreements.

In a case concerning cosmetics and personal care products, the Council declared lawful a clause wherein manufacturers required that their products be sold by qualified registered pharmacists. The provision was deemed acceptable in that it was objective and non-discriminatory. On the other hand, certain provisions were judged to be anti-competitive, such as the requirement that premises be closed off and set apart, that the sale area be of a certain minimum size, or that products be displayed in store windows.

In a case concerning the distribution of high-priced watches, a clause was disallowed which required that they be sold exclusively in watch or jewellery stores. The Council estimated that it was legitimate for the manufacturer to demand that retailers handle a diversified range of products, or that advisory and technical assistance be available for repairs, but that the manufacturer could not add a provision concerning the need for stores to be specialised. Such a condition could turn out to be discriminatory in that it would enable only traditional watch and jewellery stores to retail the products, excluding from distribution any other retail business such as tax-free shops selling other goods (perfumes, pens, textiles, etc.) which, given the experience they have gained over time, are perfectly capable of selling watches or could have employees adequately trained in the field.

In a like manner, Autodesk, a software company, and Spirotechnique, a manufacturer of scuba diving equipment which discriminated in how it enforced its own qualification and safety standards, were both condemned for having kept their products from mail-order retailers and forcing retailers to sell them at the prices they set.

In cases concerning two franchise companies, the Gymnasium fitness centres and "Z" brand children's clothing stores, the Council again disallowed clauses whereby a franchiser required franchisees to use equipment or products sold by companies under its control for various installations and supplies.

For the first time, in connection with the Heli-Inter Assistance case, the Council examined practices by a firm holding a monopoly position through an essential facility which it used on its own. A semi-private local entity had contracted out the operation of the Narbonne heliport to Heli-Inter Assistance in April 1998 for a period ending in 2005. In November 1994, the Narbonne hospital had asked for tenders on helicopter emergency transport services, stating in the specifications that the helicopters would have to use the Narbonne heliport. Jet Systems SA, which had submitted the winning bid, objected to practices by Heli-Inter Assistance, manager of the heliport and the former provider of the emergency services, aimed at preventing it from performing its transport contract under acceptable technical and financial conditions. The Council considered that one contract existed for the operation of the Narbonne heliport and another for the helicopter emergency service at the Narbonne hospital.

In particular, the Council stated that when a firm with a monopoly on an "essential facility" was coincidentally a potential competitor of a service provider requiring the use of said facility, that firm could restrict or distort competition in the market downstream from the services in question by taking undue advantage of its dominant position and of the position of dependency in which its competitors found themselves, by charging an unjustifiably high price for access to its facility. The Council based its approach on the principles which underlie European resolutions or draft directives concerning the operation of "essential infrastructures". It noted that the operator of an essential facility was required to accept all reasonable requests for access by its competitors within the service sector, and to set its prices in

a non-discriminatory fashion, taking into consideration the costs incurred by its own services in a competitive situation. Prices also had to be proportionate, related to costs, disclosed and rational.

In this instance, it deemed that the flat rate charged by Heli-Inter Assistance was unjustified and discriminatory. The Council underscored that the absence of a cost breakdown for services restricted the ability of Jet Systems to bargain and made the prices charged not transparent, as well as that Heli-Inter Assistance had provided no data making it possible to compute the costs it incurred when it was the service provider up to the end of 1994. The Council estimated that the conduct of the heliport operator was designed to prevent Jet Systems from performing the contract under acceptable business and technical conditions, and that it could cause Jet Systems to fail to perform its obligations with respect to the Narbonne hospital, as well as to deter said hospital from contracting with another firm besides Heli-Inter Assistance to provide the service in question.

In three other cases, the Council imposed penalties on firms in a dominant position for having granted conditional rebates and loyalty rebates for the purpose of restricting competition:

- an advertising agency which gave conditional rebates to advertisers provided that they purchase space simultaneously in the regional and local telephone yellow pages, and sought to persuade them not to place ads in a competing directory;
- Eli Lilly France, which offered discounts on medication indispensable for treating intensive-care patients and for which it held a monopoly provided that customers also purchase another drug which it manufactured (see Court of Appeal Activities, below);
- Coca-Cola, which granted rebates to wholesaler-storage operators if they agreed to sell mainly Coca-Cola products.

Lastly, in three instances, the Council imposed penalties on firms which held a dominant position and had sought to force competitors out of their market. The French Ski Federation had threatened local officials with the cancellation of competitions if they continued to distribute insurance that was in competition with its own “snow card”. The French electrical utility EDF had refused to purchase power from independent producers. The only draft-beer manufacturer in Martinique had balked at selling to a restaurant.

The aim of the provisions contained in the Law of 1 July 1996 is to fight the practice of artificially low retail prices without the need to prove the existence of an anti-competitive agreement or a dominant position. In 1996, the only such case to come before the Council concerned trade between businesses, which ruled that it fell outside the scope of the new legislation.

#### *ii) Review of the principal cases before the courts*

Even though they concern different types of practices, three judgements by the Paris Court of Appeal – the court to which decisions of the Competition Council can be appealed – affirming judgements by the Competition Council in the area of government procurement are worth reviewing here briefly.

The first of these judgements concerned unlawful agreements among 53 building and construction firms in conjunction with government contracts for the construction of several bridges, including the Pont de Normandie, and TGV railway lines in the North, South and East regions, along with related facilities.

Through these agreements, which were of unprecedented scope, construction firms in all of France were able to unlawfully divide up the market of public works contracts for government construction

projects. The arrangements were concluded for a period of several years. The Court of Appeal deemed that the pacts constituted anti-competitive practices.

The penalties imposed on the leading firms that were parties to the agreements were affirmed. However, as the economics ministry had requested, those issued against small and medium-sized firms were significantly reduced.

The second judgement concerned the practice by Lilly France of using conditional rebates in hospital medication procurement. The third ruled on the unfair conduct by Pont-a-Mousson in the supply of cast-iron pipes for water-supply systems.

In both instances, the Court's decision included an analysis of the notion of relevant market, wherein the role played by demand was clearly emphasised.

Furthermore, in both instances, the Court noted the presence of an abuse of dominant position. By questioning the quality of products manufactured by its competitor Biwater, Pont-a-Mousson had caused prices to drop artificially and hindered access to the market by that firm. As for Lilly France, by combining discounts on a product in the public domain with rebates on a product for which it held a monopoly, it sought to restrict access by its competitors to the market for the first of those drugs.

#### *Mergers and acquisitions*

-- Number, size and type of mergers reported or subject to review

As in 1995, mergers and acquisitions in France did not reflect what was happening internationally, with a decline in the number of operations there from the previous year. Concentrations were sustained in certain sectors, such as communications, distribution and services, where the pace of restructuring accelerated, but were down elsewhere, such as in manufacturing industries other than food processing.

One constant factor that emerged was the increased effort undertaken by French firms or by firms operating in France to avoid contravening domestic anti-monopoly legislation. As a result, the DGCCRF was informed about more planned mergers and acquisitions (27 in 1996), either at the initiative of companies or subsequent to informal talks.

Another trend that is becoming more widespread concerns the practice of no longer requiring firms to complete useless formalities and abide by unnecessary waiting periods, and instead consenting immediately to projects whenever a thorough administrative review has demonstrated that they were not harmful to competition in the sectors concerned, even though they may significantly alter the shape of markets.

In 1996, 27 mergers were announced, of which six were referred to the Competition Council (the number of cases referred to the Council was unchanged from a year earlier).



A decision has been reached in five of the cases submitted:

- two received unconditional authorisation (Otis SA/Ascenseurs Soulier SA, Eridiana-Beghin-Say/Compagnie française de sucrerie)
- three others were authorised subject to some adjustments (Heineken/Fischer, Auchan/Docks de France, Callebaut AG/Barry SA)

Commitments by the companies were made in only one of the other 21 announced mergers (Canal Plus/Nethold).

It should also be noted that, with the publication since 1994 of the Ministry's decisions in the official gazette of the DGCCRF, it has become possible to assemble a record of decisions, so that companies have gained legal security by having access to more disclosure and predictability about the competitive aspect of their planned or completed mergers.

Mergers and acquisitions in France  
Annual data

	1993	1994	1995	1996
Number of operations	903	691	536	472
Applications filed	21	20	20	27
Referrals to the Council	12	10	6	6

-- Review of the principal cases brought before the Competition Council

In the five instances when cases were referred to it, the Council verified that it had jurisdiction over the operations. In order to do so, it first examined the nature of each operation to ascertain that it constituted an economic concentration within the meaning of Article 39 of the Government Order, which states as follows: "Economic concentration results from any action whatsoever involving the transfer of title or beneficial ownership, in whole or in part, in respect of the assets, rights and obligations of a firm, or which has as its purpose or consequence to enable a firm or group of firms to gain a decisive influence, either directly or indirectly, on one or more other firms." In the case of the five operations examined by the Council in 1996, it was evident that the projects in question amounted to instances of economic concentration.

As a second step, the Council examined whether the thresholds set by the Order had been reached, namely whether the firms concerned controlled a combined market share in excess of 25 per cent or had combined revenues of at least FRF 2 000 million. In the Fischer/Heineken case, the merger gave Heineken a share of the market for beer sold in retail outlets as well as of that for beer sold by bars, hotels and restaurants in excess of 25 per cent. In the case of Auchan's acquisition of Docks de France, a review showed the companies concerned had combined net domestic sales of more than FRF 7 000 million and each had annual revenues of more than FRF 2 000 million.

Once it had determined that it had jurisdiction, the Council addressed the merits of the case. It examined whether the mergers constituted a threat to competition, based on a series of criteria including

the market shares of the firms concerned, the market shares of other firms, the relative weight of imports, possible supply problems, the degree of capital intensiveness in the sector, the size of the investment required to gain access to the market, the existence of patents, the competitive situation among firms, etc. Whenever a merger was likely to reduce competition, the Council investigated its economic impact to examine whether it contributed sufficiently to economic progress to offset its repercussions on competition. Such contributions could for instance be in the form of the firms gaining a greater ability to innovate, or improving in their competitiveness, advantages for consumers, better environmental protection, etc.

In three of the cases before the Council, it was determined that mergers should be authorised subject to certain conditions.

- In the case of magnetic bearings for turbomolecular pumps, Seiko, by acquiring the French manufacturer of magnetic bearings S2M, was likely to increase its dominant position by preventing competitors supplied by S2M from having access to the only independent manufacturer of magnetic bearings. Pursuant to the opinion issued by the Council, the economics ministry required Seiko-Seiki Belgium to supply magnetic bearings made by S2M to any manufacturer of turbomolecular units upon request, for a period of three years, and to license the manufacturing of such magnetic bearings.
- In the matter of Auchan's acquisition of Docks de France, the operation threatened to harm competition in certain areas, even if the acquisition did not give Auchan a dominant position in the sector of hypermarket distribution. Further to the Council's opinion, the Ministry authorised the merger, on condition that Auchan divest itself of certain stores.

In one instance, that of the merger of breweries, the Council estimated that its impact would be negative. It concluded that the acquisition of Fischer by Heineken would significantly affect supply in the market for beer sold in retail outlets. The relative demand concentration did not appear to the Council to indicate that distributors would be in a position to impose prices on their suppliers. In the market for beer sold in bars, hotels and restaurants, it noted that there was a very high concentration on the supply side, while demand remained divided among a large number of small entities. The contention by Heineken that the merger would enable Fischer to develop its export sales did not appear sufficient to the Council to offset the risk to competition. Further to this opinion, the Ministry made its authorisation conditional on the disposal by Heineken of a number of wholesale subsidiaries with combined sales in France equal to those of Fischer.

-- Major case before the DGCCRF

One case which was not referred to the Competition Council should be mentioned briefly, for it provided an opportunity to narrow the concept of relevant market in the field of audio-visual rights.

It concerned the acquisition of UGC-DA by Canal Plus. The primary market concerned was that of the distribution of films to television broadcasters.

The analysis had to extend beyond this notion, however, for although television program schedules contained various types of programmes, it seemed relevant to distinguish between those consisting of existing material (films, cartoons, etc.) and those with material of a one-time nature (news, magazines, variety shows, game-shows, etc.). Within the category of existing material, a further distinction needed to be made:

- between programs for young people and documentaries or television drama;

- within the category of television drama, between theatrical releases and made-for-television films;
- given the quotas contained on applicable regulations on the number of French films shown, lastly, between French and foreign films.

Examined under this light, the consequences of the merger were not the same for all markets concerned.

In so far as foreign films were concerned, the power of the new company was offset by both the bargaining power of buyers and the existence of other major suppliers.

With respect to French films, although the new company's catalogue accounted for a substantial share of the existing inventory, other suppliers still had enough features available for television channels to fill their quotas without having to turn to the Canal Plus-UGCDA catalogue for some time, in any event for the normal period before the repeat showing of a film.

Hence, the acquisition was not likely to harm competition. It was authorised by the ministry on 7 October 1996. The examination of the sector continued in connection with the acquisition by Canal Plus of Nethold, which led to a review of pay television. The ministry again authorised the take-over, after Canal Plus undertook to supply other television stations with films at the prevailing market rates.

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

*The role of the DGCCRF*

Besides paying close attention to the conditions under which sectors were being deregulated, such as telecommunications, air and rail transport (see Section I above) and as part of the government co-ordination program, competition authorities contributed their expertise to several projects.

In the health care field, a reduction of medical expenses requires that consumers be clearly informed about rates charged by health professionals. In 1996, several official decrees made it compulsory:

- for physicians to post their rates;
- for prescription eyeglass makers to advertise their prices;
- for plastic surgeons to submit estimates along with specific information, whenever the cost of a procedure is above FRF 2 000.

The government has created a "water monitoring unit" (*Observatoire de l'eau*) in order to examine the problem of rising rates charged to consumers for water. It includes representatives of various interested parties, including consumers. The assignment of the DGCCRF, which operates the unit along with the water division of the environmental ministry, consists of securing improved disclosure of water rates. To this effect, a new decree requires distributors to issue detailed invoices listing the rates for all services in connection with water supply (supply of drinking water, collection and treatment of waste water, distributor's share, share of local district, etc.) along with taxes and fees, so as to enable consumers to clearly identify what they are paying for.

Subsequent to a tightening of existing safety measures governing the collection and disposal of animal carcasses, this public service could no longer be performed free of charge by the private sector. New regulations had to be adopted in order to restore service after it stopped operating.

The government requested the DGCCRF to conduct a full audit of the service so as to establish the cost of collecting, processing and incinerating carcasses.

Subsequent to the audit, the new law on the removal of carcasses enacted at the end of 1996 represents a radical change for this service, which is now financed through taxes and is subject to competitive bidding at the local level, under the supervision of national government representatives.

As part of the law, DGCCRF representatives are to contribute their expertise in conjunction with competitive bidding procedures and the negotiations of rates for services. There is to be more competition under the new system, combined with continued incentives to invest and reduce costs.

#### *The consultative role of the Competition Council*

The Competition Council issued eighteen opinions. Besides the five concerning mergers and acquisitions (see above), six had to do with competition issues, four with draft regulations containing provisions limiting competition, and three were issued at the request of courts of law, regarding anti-competitive practices identified in cases before them.

The eight opinions issued by the Council regarding bills or draft implementation decrees, or on competition issues, concerned among others:

- a bill on fair trading practices;
- a bill on telecommunications regulations;
- government procurement reform;
- the operation of financial services by the Post Office;
- competition in the French banking and financial system;
- the setting of rates by bailiffs;
- a decree on the advertising of drug prices.

In addition, for the first time ever, a request for an opinion was submitted to the Council concerning two draft implementation laws affecting the agricultural sector and seeking to exempt certain agreements from the scope of the Government Order of 1 December 1986, pursuant to Article 10 of said Order. The first of these concerned agreements among producers of the same commodities whose products are sold under a quality label. The second pertained to agreements among producers, or producers and distributors and processors, on structural measures to be implemented in the event of adverse economic conditions.

The Council can report only on opinions published. Out of 18 decisions handed down, fourteen were published in the DGCCRF's official journal (Bulletin Officiel de la Concurrence, de la Consommation et de la Répression des Fraudes - BOCCRF). An opinion issued in 1994 and one issued in 1995 were published in 1996.

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## GERMANY\*

(1st July 1996 - 30 June 1997)

### Executive Summary

#### 1. Legislation

- the focus of the legislative work in competition law and associated fields is on the amendment of the Act against Restraints of Competition (ARC), the amendment of the Energy Industry Act, the passing of the Telecommunications Act, the creation of a Post Act, the revision of the law governing public procurement as well as changes in the action against prohibited cartels. Work was carried out on all the legislative proposals in the reporting period. Only the Telecommunications Act was adopted, however, during this period;
- the Telecommunications Act provides *inter alia* for the following important changes: the elimination of the network monopoly of Deutsche Telekom AG as from 1 January 1998, the interconnection (by force if necessary) of networks, an independent regulatory authority;
- in the summer of 1997, the legislator made collusive tendering among cartels (so-called bid rigging) a criminal offence for the first time and at the same time gave competition authorities exclusive responsibility for imposing fines on enterprises.

#### 2. Agreements / abusive practices by dominant firms

- the most important hard-core cartel which the Bundeskartellamt proceeded against in the reporting period concerned manufacturers of power cables. Fines totalling over DM 280 million have meanwhile become unappealable;
- the Bundeskartellamt instituted proceedings against the co-operation between United Airlines and Lufthansa. It is liaising closely with the EC Commission in this case;
- with regard to the supervision of price abuses the proceedings of the Bundeskartellamt against energy utility companies and Lufthansa are particularly interesting.

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\* The original language of this report is English.

### **3. Merger control**

- Prohibition or prevention of mergers:

Potash Corp./Kali und Salz (fertilisers), PSG Postdienst Service/Axel Springer Verlag (newspaper distribution), Herlitz/Landré (paper/stationery), Fresenius/Schiwa (dialysis), Merck KGaA/KMS Laborchemie.

- Clearance of mergers in a modified form:

Neckarwerke/Technische Werke Stuttgart (electricity), RWE/Thyssengas (gas supply), Bayernwerke/Isarwerke (electricity).

- Important clearances:

Deutsche Telekom/France Télécom (telecommunications: "Atlas", "Global One"), Fresenius/Grace (dialysis), Coca Cola/Coca Cola licensees (drinks), Heidelberger Druck/Linotype-Hell (printing machines).

## **1. Changes to competition laws and policies, proposed or adopted**

### **1.1 Summary of new legal provisions of competition law and related 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.

The 1995/96 Report mentioned six projects aimed at drafting and adopting laws of competitive relevance and at revising existing competition law, namely the proposed amendment of the ARC, the proposed amendment of the Energy Industry Act, the drafting of the Telecommunications Act and the criminalisation of collusive tendering. Of these projects, only that concerning the Telecommunications Act came to fruition in the reporting period. Collusive tendering was made a criminal offence only recently, whereas the other legislative projects are still the subject of much controversy. In addition, three other legal provisions of competition relevance came into effect. The description of the legislative projects will be as topical as possible so that those developments may be omitted which have since become obsolete.

As mentioned in the previous report, the Telecommunications Act took effect on 1 August 1996. To facilitate new providers' access to so far monopolised areas (in particular, the fixed network) the Act provides for sector-specific regulation of market-dominating providers. All providers have to acquire a licence for certain services. If for technical reasons there is only a limited number of licences, these will be allocated by tender or auction. The price of up to DM 40 million for fixed network licences originally intended to be charged by the Federal Government is lowered considerably, because the EU Commission considers charges in excess of administrative expenses to be anticompetitive.

The lawmaker has assigned the comprehensive technical and competitive regulatory tasks arising from the Telecommunications Act to a sector-specific regulator, to be set up. Until 31 December 1997, however, these tasks will be performed by the Federal Ministry for Post and Telecommunications and the Economics Ministry, respectively. As the regulator has wide responsibilities for competition issues, close co-ordination between this body and the Bundeskartellamt will be necessary. Therefore, the Telecommunications Act provides that when granting a limited number of telecoms licences and defining product and geographic markets the two authorities must reach agreement. In proceedings concerning fee

regulation and interconnection of networks the Bundeskartellamt must be given an opportunity to be heard. There is an important difference between general competition law and telecoms law as far as the legal procedure is concerned. The competition authorities' decisions are subject to review by the civil courts, whereas the telecommunications regulator's decisions are subject to review by the administrative courts.

The German telecommunications markets will not be fully liberalised until 1 January 1998, but in the meantime a host of measures has been taken to start the liberalisation of the telecoms market in Germany. For example, the Federal Minister for Post recently ordered Deutsche Telekom AG to interconnect its network (in particular local residential subscribers) and that of its competitors at a significantly lower price than had been intended by Deutsche Telekom (Pfennig 2.7 on average for all tariff zones).

In the context of the enactment of the Anti-Corruption Act a new criminal offence "restrictive agreement in respect of competitive tenders" (Section 298 of the Criminal Code) came into force in August 1997. From a competition law perspective the accompanying regulations are of particular importance. The period of limitation for administrative offences under competition law was adjusted to the provisions governing limitation under criminal law and extended to five years. In addition, exclusive responsibility of the competition authorities for imposing fines on enterprises was adopted in the context of criminal offences and administrative offences under competition law. In future the Bundeskartellamt may impose a fine on the enterprise profiting from the cartel agreement, independent of criminal proceedings directed against the offender personally, and this is possible even if the public prosecutor has not yet closed the proceeding against the offender or if the case has been dropped already.

The international part of the revised German Trade Mark Act of 25 October 1994 came into force on 20 March 1996. An Act to Modify the Trade Mark Act, which came into force on 20 July 1996, was necessary, however, to enable German applicants to acquire Community trade marks. The provisions of the Trade Mark Act are also applicable to Community trade marks, if they have already been registered or even if registration has only been applied for. In agreement with the EC trade mark law directive, also the owner of a Community trade mark may now file claims for damages and the furnishing of information to which he is entitled under the Trade Mark Act.

In the autumn of 1996 the German lawmaker has revoked the legal obligation under Section 129 (1) No. 2 of the Code of Social Law V to sell imported drugs. The reason was that the Federal Supreme Court had affirmed the Bundeskartellamt's pharmaceuticals re-import decision which had prohibited three leading pharmaceutical wholesalers from unfairly hindering an importer of drugs by generally refusing to supply re-imports and parallel imports of drugs. The lawmaker's abolition of Section 129 (1) No. 2 Social Law Code V again reinforces the trend of the current Drugs Price Ordinance towards the sale of original preparations, because the latter enable pharmacies to earn higher absolute margins. The adoption of an obligation to sell imported drugs had originally been intended to remedy a situation where pharmacists, as a result of the Drugs Price Ordinance with its predetermined margins, have no economic incentive to sell lower-priced drugs, which include reimported drugs, because higher-priced original preparations allow them to earn higher margins in absolute terms. It remains to be seen whether and to what extent this will have a negative effect on competition from imported drugs which had just started to pick up in the wake of the Federal Supreme Court's decision.

The Recycling Act (Kreislaufwirtschaftsgesetz) came into force on 7 October 1996. Under that act industry and trade are considered as originators of waste. Therefore they are held responsible for their products in the sense that manufacturers and distributors are under the legal obligation to take back and have recycled certain types of waste. Since individual compliance with such duties would overtax manufacturers or traders financially and organisationally, the lawmaker has provided for the possibility of industry-wide co-operation in collective recycling systems. One such model of a recycling system has been introduced in the form of Duales System Deutschland GmbH (DSD), which was put in place for the recycling of sales packaging under the 1991 Packaging Ordinance. Other recycling systems have been

designed for used batteries, used cars or electronic waste. As their effects on competition may raise concerns, such collective systems are subject to scrutiny also under competition law.

### *1.2 Government proposals for new legislation*

In July 1997 the Federal Ministry of Economics submitted a preliminary draft, containing a complete overhaul of the ARC. The draft largely corresponds with that presented in the 1995/96 report. There is broad consensus among experts on the contents of the amendment even though representatives of German industry have complained that it does not provide for the adoption of European merger control provisions (particularly those relating to the acquisition of control). In the meantime, however, calls for changes and additions to the draft have emerged in the political discussions which may result in the amendment not being passed in the current legislative period if no compromise can be reached. Bavaria, in particular, has demanded that tougher provisions be adopted against concentration in the distributive trades and against buying power of the traders vis-à-vis manufacturers. Another demand is for sales below purchase price (dumping prices) to be prohibited if there is no reasonable justification for them.

The draft submitted in June 1996 by the Economics Minister to amend the Energy Industry Act has also met with considerable political obstacles. In the meantime broad agreement has been reached on dropping the energy sector's present exemption from the general ban on cartels, which resulted in energy generators gaining incontestable monopolies in their respective supply territories by means of demarcation and concession agreements. Particularly controversial, however, is the question whether the communities should be granted single buyer status in municipal energy distribution. Communities as owners of their municipal energy undertakings want to prevent a situation where instead of them supplying their whole territory the end users themselves can choose their own supplier of electricity or gas in future (negotiated third party access). Since communities are used to defending their interests irrespective of party affiliation in the German Parliament, the Federal Government can only seek to reach a compromise on that matter.

Recently, the Bundestag, the Lower House of Parliament, decided on a bill to revise the Post Act which had been under discussion for a long time. It provides for the abolition of the German postal monopoly for letters weighing more than 100 g (so-called exclusive licence). Deutsche Post is to retain an exclusive licence running to the end of 2002 for letters weighing less than 100 g. The market for bulk printed matter (so-called Infopost), which has already been opened to competition for mailings weighing more than 100g, is to be completely liberalised starting in 1998. Although it is to be anticipated that also this Act will meet with fierce resistance within the Bundesrat, the Upper House of Parliament, its enactment is very likely, because the old Post Act expires at the end of 1997 so that the monopoly of Deutsche Post would expire anyway effective 1 January 1998 if no agreement is reached.

In September 1996, the Federal Government decided to fundamentally revise the German law governing public procurement and include in the ARC a chapter dealing with the awarding of public contracts. This was done in the light of the fact that the Federal Republic has not yet transposed the EU directive on public procurement of services into German law. Only a few weeks ago, the European Court of Justice decided on a submission of the surveillance committee for public procurement contracts (Vergabeüberwachungsausschuß) that the Federal surveillance committee for public procurement contracts (located at the Bundeskartellamt) has the quality of a court within the meaning of Article 177 of the EC Treaty. However, the present law governing the awarding of public sector contracts is mere budget law and might not satisfy the competition law requirements of the EC directive. The bill submitted to the Federal Cabinet in late August therefore provides for an extensive revision of the German law governing the awarding of public sector contracts and its inclusion in the ARC. Besides goods and building contracts also services by professionals are to be covered for the first time by the rules governing public procurement. The relevant decisions are to be reviewed by chambers for the awarding of public procurement contracts (the former surveillance committees for public procurement contracts), and appeal against their decisions is to lie with the courts of appeal of the Länder (Oberlandesgerichte) and with the Federal Supreme Court (Bundesgerichtshof). This legislative proposal has also been delayed, however,

because political resistance has been forming in the Bundesrat, urging that criteria (such as compliance with the collective wage agreements, apprenticeship training, the furtherance of women) that have nothing to do with competition should be taken into account for the awarding of public sector contracts. If no agreement is reached soon, the bill cannot be enacted on 1 January 1998 as envisaged, and possibly its enactment in the current legislative period is also in jeopardy.

The Federal Ministry of Justice has prepared a bill revising the Patent Act, which is being co-ordinated with the patent authorities and the judicial authorities of the Länder at present. Patent and utility model applications are to be made easier, and in future it would be possible to file also foreign language applications. The Federal Ministry of Justice aims to have the legislative procedure finalised still in the current legislative period so that the Act may come into force in 1998.

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

### **2.1 Action against anticompetitive practices, including agreements and abuses of dominant positions**

#### *Summary of activities by competition authorities*

##### *i) Agreements (action in the form of administrative fine proceedings against cartels)*

In the reporting period the Bundeskartellamt again proceeded against hard-core cartels constituting an administrative offence, i.e. in particular price-fixing and territorial agreements among competitors. Throughout Germany enterprises and associations of firms of the following industries were searched: power cables, flour mills, traffic signs and telematics systems as well as pipelaying. In proceedings against cartel agreements among road marking companies initiated in 1994 and still being pursued 33 decisions imposing fines totalling DM 24 million have meanwhile become unappealable. Additional administrative fine decisions have been issued since in the context of these proceedings. In the power cable case described under significant cases, fines imposed were for the record amount of DM 280 million in view of the enormous economic significance of this cartel.

##### *ii) Exemptions from the general ban on cartels*

As can be seen from the following table, legalisation of newly notified cartels played a minor part in the reporting period. The focus of the Bundeskartellamt's investigations was therefore on old cartels as well as on renewals of such cartels or changes to their subject-matter, which have to be notified. At the instance of the Bundeskartellamt's fifth Decision-making Division the export cartel for oil pipes has been dissolved. The Exportgemeinschaft Großschiffbau, an export cartel in the shipbuilding industry, disbanded on its own initiative.

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 July-Dec.1996		Total number since 1958	Still effective as at Dec. 1996
	additions	deletions		
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)	-	-	17	8
Rationalisation cartels Section 5 (2)	-	-	24	2
Rationalisation cartels Section 5 (2) and (3)	-	-	40	11
Specialisation cartels Section 5 a (1) Sentence 1	3	-	66	20
Specialisation cartels Section 5 a (1) Sentence 2	-	1	57	15
Co-operation cartels Section 5 b	2	-	122	112
Purchasing co-operation Section 5 c	-	-	10	9
Export cartels Section 6 (1)	-	2	115	35
Export cartels Section 6 (2)	-	-	14	2
Import cartels Section 7	-	-	2	-
Emergency cartels Section 8	-	-	4	-
<b>Total</b>	<b>5</b>	<b>3</b>	<b>594</b>	<b>266</b>

There is no contradiction between the consistent enforcement of the German ban on cartels by the 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. According to the wording of the legal requirements for the legalisation of such cartels, the agreements should result in reviving competition by rationalisation or specialisation, for example. Authorisation as a rule is granted for a specific period and can be revoked once granted. It should be noted, however, that purchasing co-operation agreements operated exclusively by small and medium-sized firms 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.

Special difficulties arise in examining cartels initiated by the Government and/or the lawmaker itself in an attempt to achieve an environmental policy goal through self-commitments by the business community, because compulsion does not seem expedient. The proposed recycling systems provided for under the Recycling Act (see above under legal provisions) involve the danger that the firms make arrangements over and above those necessary for waste collection and recycling and hinder manufacturers in competition that do not belong to the recycling system concerned. In the context of the Used Car



Ordinance, for example, the Bundeskartellamt ensured that the guaranteed take-back free of charge does not only cover motor cars intended for the German market and first registered there, but also all cars intended for the market of the European Community. With a view to obtaining exemption under Article 85 (3) of the EC Treaty, the agreement on the joint recycling of batteries under the Battery Ordinance, which also drew critical comment from the Bundeskartellamt, was notified to the European Commission.

*iii) Vertical restraints*

Violations of the ban on resale price maintenance (RPM) and the prohibition of binding price recommendations can be challenged in administrative fine proceedings. In the reporting period, the Bundeskartellamt therefore conducted searches on the premises of manufacturers suspected of exerting indirect pressure in order to enforce compliance with price recommendations.

*iv) Control of abusive practices by dominant firms*

All enterprises may have recourse to the civil courts in the face of anticompetitive practices of their competitors or suppliers. However, it is often difficult if not impossible for them to show that they are discriminated against or hindered by their competitors in the absence of facts justifying such discrimination. The Bundeskartellamt, by contrast, has a good insight into business practices in the marketplace and thus is in a position to conduct *ex officio* investigations there. The ARC therefore provides for different situations in which the competition authority can proceed against market-dominating competitors and suppliers to protect small and medium-sized firms, in particular.

On the basis of a special provision which enables the Bundeskartellamt to order admission to a trade organisation in cases of unjustified unequal treatment, the Office ordered admission of a German removal contractor (DMS International) to a group of international movers (GIM). The competent Decision-making Division held that DMS met all the requirements for admission as laid down in GIM's statutes. Moreover, non-membership placed DMS at a competitive disadvantage, for it is only through GIM that a German contractor with international operations can become a member of the international organisation FIDI (Fédération Internationale des Déménageurs Internationaux).

The Bundeskartellamt challenged the pricing of Deutsche Lufthansa on the Berlin - Frankfurt route which was not served by competitors. The Office prohibited the airline from charging over DM 10 more for one-way tickets on this route than on the Berlin-Munich route, which is also served by competitors. Lufthansa argued that these prices did not cover costs, but the Bundeskartellamt countered that neither dominant companies nor companies in competition have a right to full cost recovery. Lufthansa has filed an appeal with the courts against this price abuse decision.

*v) Supervision of price abuses by monopolists (utilities)*

Nation-wide, regional or community-wide monopolies are held in Germany by public- or private-sector utilities, whose monopolies are largely based on ownership of a network (essential facility), for example, electricity, gas or water lines, telephone and cable TV network and rail network. Since so far they have been exposed to no, or only insignificant, competition, price supervision by the competition authorities is of particular importance. However, the relevant responsibilities are highly fragmented. The largely regional electricity supply companies are subject as a rule to supervision by the Land Governments, whereas responsibility for the telecommunications and postal sector lies with the Ministry for Post or the Economics Ministry, and from 1 January 1998 with the regulator of postal and telecommunications services and with to the Federal Railway Office (Eisenbahnbundesamt) for the railways .

The Bundeskartellamt discontinued the proceeding brought against the east German Vereinigte Energiewerke AG (VEAG) for suspected excessive electricity prices on the ground that higher prices resulted from VEAG inevitably having to generate electricity from brown coal. It was found though that

the east German regional distribution companies supplied by VEAG charged significantly different prices. Some of these companies come within the Bundeskartellamt's responsibility because they engage in activities beyond their respective Federal Land. Otherwise, the Land energy authorities are responsible which are part of the respective ministries. The Bundeskartellamt instituted price abuse proceedings against the five distribution companies that charge the highest prices.

*Summary of activities by courts*

The Berlin Court of Appeals (Kammergericht) in December 1996 upheld the Bundeskartellamt's prohibition decision directed against 16 public lottery companies which was already described in last year's Annual Report. Only the lottery company of the Land Hesse filed an appeal on points of law with the Federal Supreme Court against this decision.

In a decision directed against the largest German publisher of legal publications, the Bundeskartellamt had declared RPM for CD-ROM products illegal in 1994. RPM, which German law allows only for publications, did not cover CD-ROM products as well, because they offered other and far more applications, e.g. the provision of extensive data bases and the search for reference publications, the Bundeskartellamt had held. The Berlin Court of Appeals had shared this reasoning, but in March 1997 the Federal Supreme Court ruled that also CD-ROM products, as substitutes for books, were covered by the RPM exemption for publications. It is, however, possible that this decision will soon be overridden by the EU Commission. More than a year ago, the Austrian book chain Libro lodged a complaint against RPM prevailing in Germany and Austria with the EU Commission. Although the majority of the EU ministers for culture advocate an exemption for the book market, Karel Van Miert, the Competition Commissioner, has indicated that he intends to allow the complaint in respect of the border-crossing trade. But if RPM is to be abolished in the frontier area between Germany and Austria it is unlikely that ultimately it can be maintained in all of the German-speaking area.

The Bundeskartellamt's decision prohibiting the exclusivity agreements of the tour operators TUI and NUR with Spanish hotel owners, which was upheld by the Berlin Court of Appeals in the reporting period, was now fully affirmed by the Federal Supreme Court, too, in its decision of 7 October 1997. The Federal Supreme Court, in particular, refused to submit the case to the European Court of Justice because the cases, in the Court's view, from the outset did not qualify for exemption within the meaning of Article 85 (3) of the EC Treaty. This decision is of fundamental importance to the Bundeskartellamt because it has confirmed the application of Community competition law by the Bundeskartellamt.

As reported in last year's Annual Report, the Bundeskartellamt had prohibited IMAX Corporation, Toronto, Canada, from treating the Munich-based Big Screen Cinema Projektionsgesellschaft mbH differently from Sony Corp. of America, New York, as regards the supply of two-dimensional large-screen film projection systems in the geographical market of Berlin (IMAX had promised Sony exclusive supply for a period of three years and therefore refused to sign a contract with Big Screen). In view of the delivery period of about two years and the construction conditions to be laid down by IMAX for the theatre in connection with large-screen projection systems, the competent Decision-making Division had to order the immediate enforcement of the decision so that Big Screen might retain the possibility of effective legal protection. IMAX appealed against this order and moreover filed an application for restoring the suspensive effect of the appeal, which was dismissed by the Berlin Court of Appeals in an unappealable decision. The case has now been settled because IMAX thereupon concluded a delivery agreement with Big Screen.

In a decision on surplus electricity purchases from independent companies the Federal Supreme Court in October 1996 ruled that the basic rights of public electricity suppliers were not infringed by their obligation under the 7 December 1990 Act of Feeding Electricity from Renewable Resources into the Public Network (Stromeinspeisungsgesetz) to buy surplus electricity from renewable resources at minimum prices set at an amount which exceeds the value of such electricity.

On 2 July 1996, the Federal Supreme Court ruled that the obligation of territorial supply companies to purchase self-generated surplus electricity from independent companies and to pay a fee calculated on the basis of the buyers' cost saving also applies to electricity obtained from combined heat and power stations. The court argued that the sparing use of electricity from finite primary energy resources was encouraged also where it was a question of using electricity generated as a by-product of industrial processes for energy industry purposes.

In July 1995 the Bundeskartellamt prohibited the gas supply companies Ruhrgas AG and Thyssengas GmbH from implementing, effective 1 January 1997, the demarcation agreement operated by them. While demarcation agreements between energy suppliers are classic cartels in the form of territorial agreements, they are exempted from the German ban on cartels, because supply companies count among the so-called exempted areas. The Bundeskartellamt therefore based its prohibitory decision on European competition law (Article 85 (1) of the EC Treaty). On 30 October 1996 the Berlin Court of Appeals suspended the appeal proceedings brought against the prohibition by Ruhrgas AG and Thyssengas GmbH and, at the Bundeskartellamt's suggestion, submitted 11 key questions and numerous secondary questions to the European Court of Justice, requesting it to give a ruling thereon. The European Court of Justice decision will assume paramount importance if the proposed amendment of energy legislation is not passed by the German legislator, in which case the energy suppliers' exemption from the cartel ban of the ARC would remain in place and as in the past the Bundeskartellamt's only option would be to attack monopolies held by energy suppliers on the basis of European competition law.

*Description of significant cases, including those with international implications*

In July 1996, the Bundeskartellamt instituted proceedings against the Cologne-based Deutsche Lufthansa AG and against United Airlines Inc., Illinois, USA, for co-operation arrangements (code-sharing, co-ordination of flight routes, flight schedules, price policy, marketing, advertising, etc.) which almost amount to a merger. As this special case of an aviation alliance between a national airline and an airline from a non-EU third country is subject to special jurisdiction, it is by way of exception left to the national competition authority to prohibit the co-operation arrangement under Article 85 (1) of the EC Treaty or to grant an exemption under Article 85 (3) of the EC Treaty - possibly attaching conditions to it. In view of the international orientation of the country-crossing aviation market it is impossible, however, to examine the alliance in isolation. It can only be judged in the context of comparable alliances such as the co-operation between British Airways and American Airlines. Since the various alliances ought to be treated using the same standards, if possible, and since any competitive discrimination ought to be avoided, the Bundeskartellamt liaises closely with the EU Commission, which has initiated its own proceeding in this case under Article 89 of the EC Treaty (no exemption possibility).

The power cable case, in which the Bundeskartellamt imposed record fines so far totalling DM 280 million on 14 manufacturers, two cable industry organisations and 23 persons in charge, is of utmost importance as regards action against criminal offences in the cartel field. All of these fines have already become unappealable. Based on a quota system, those concerned had been dividing up the market for power cables among each other practically for decades. The amount of the fines was based on the cartel turnover achieved by them in the three-year period in which the offence has not yet become statute-barred. The fine for the large companies was 10 per cent of this cartel turnover, but in view of the minor contribution to the offence by the small and medium-sized companies, and taking account of their economic performance, some of the fines imposed on the latter amounted to only about five per cent of the cartel turnover.

***Mergers and acquisitions***

*Statistics on number, form and type of mergers notified and/or controlled under competition laws*

In 1996 the number of notified mergers slightly decreased, as can be seen from Table 2:

**Table 2**  
**Mergers Notified Pursuant to Section 23 of the ARC**

<b>Year</b>	<b>Mergers</b>
1973	34
1974	294
1975	445
1976	453
1977	554
1978	558
1979	602
1980	635
1981	618
1982	603
1983	506
1984	575
1985	709
1986	802
1987	887
1988	1 159
1989	1 414
1990	1 548
1991	2 007
1992	1 743
1993	1 514
1994	1 564
1995	1 530
1996	1 434
<b>Total</b>	<b>22 188</b>

**Table 3**  
**A breakdown of the total figure by type of merger is as follows:**

	<b>1993</b>	<b>1994</b>	<b>1995</b>	<b>1996</b>
Mergers notified and reviewed prior to completion	1 050	1 086	1 089	1 006
Mergers notified after completion and found to be subject to control	310	331	276	280
Mergers not subject to control	154	147	165	148
completed mergers total	1 514	1 564	1 530	1 434

**A breakdown by type of merger is as follows (1996)**

Acquisition of assets	313
Acquisition of interest	673
of which : majority interest acquisition	601
Joint venture	410
Contractual relations	12
Interlocking directorates	-
Competitively significant influence	6

By type of diversification, horizontal mergers (1 235, of which 288 with and 947 without product extension) again clearly predominated in 1996. In addition 78 vertical und 121 conglomerate mergers were notified.

*Summary of significant cases*

In the reporting period, there were four merger prohibitions in formal proceedings. However, there were a number of merger cases involving competition concerns which gave rise to in-depth investigations or warning letters in the period under review. Twelve proposed mergers were abandoned in advance of formal proceedings before the Bundeskartellamt; in five other cases, projects were modified and completed in a way that took account of the competition concerns. A number of proposed mergers of great economic significance were allowed to go ahead on thorough examination by the Bundeskartellamt:

In the opinion of the Bundeskartellamt the joint ventures Atlas and Global One by Deutsche Telekom, France Telecom and Sprint notified as mergers under Section 24a of the ARC strengthened Deutsche Telekom's dominant position in the market for packet-switched data transmission services and therefore ought to have been prohibited under the German merger control provisions. However, such a decision would have been in conflict with the Commission's decision to exempt these projects under Article 85 (3) of the EC Treaty. In view of the precedence of European law in cases of conflict, the application of German merger control provisions to the Atlas and Global One mergers was ruled out. The mergers were therefore not prohibited.

The Bundeskartellamt did not prohibit Münchener Rückversicherungs-AG's proposed acquisition of a 51 per cent share in the Cologne-based Deutsche Krankenversicherungs AG (DKV) from Allianz AG. Münchener Rück already held directly 10 per cent and indirectly 39 per cent of the remaining shares in DKV. Not prohibited either was Allianz AG's proposed acquisition of a 25.7 per cent share in the Munich-based Vereinigte Krankenversicherungs AG (VKA) from Münchener Rück. The remaining VKA shares are held directly or indirectly by Vereinte Holding AG. Simultaneously with the Bundeskartellamt's clearance the EU Commission had declared compatible with the common market Allianz AG's proposed acquisition of all shares in Vereinte Holding AG from Schweizerische Rückversicherungs-Gesellschaft. The three merger projects were another step towards dismantling the links between the Allianz and Münchener Rück groups. The effects of the Münchener Rück/DKV and Allianz/VKA mergers were felt in the market for private health insurance. As the two leading firms DKV and VKA in 1995 had market shares in Germany of 15.2 and 13.3 per cent respectively. After Allianz AG had withdrawn from the firm, DKV's market position was not to be expected to be strengthened as a result of its merger with Münchener Rück. Nor was a market-dominating position of VKA likely to result from its merger with Allianz because VKA's market share had been declining for some years, its new business comparatively slack and new entrants in the last few years were numerous.

The Münchener Rückversicherungsgesellschaft's plan to merge its primary insurance activities, which are to be controlled by Hamburg-Mannheimer, within the Victoria AG under the name of ERGO

was also given approval. In Germany ERGO (DM 21 bn in premiums) will be second, far behind Allianz (DM 38 bn in premiums) in the primary insurance business. The merger will bring little change in the reinsurance sector, in which Münchener Rück is the world market leader with a share of 10 per cent. As a result of the merger, Allianz, which has a stake in Hamburg-Mannheimer-Versicherungs-AG, will also gain a share in ERGO. This share will, however, be so small that it will give Allianz no competitively decisive influence on ERGO.

On 25 November 1996, the EU Commission granted a German application for referral of the RWE/Thyssengas and Bayernwerk/Isarwerke merger cases to the Bundeskartellamt for further scrutiny. While the two proposed mergers came within the competence of Brussels on account of the turnovers of the companies involved, they only concerned regional electricity and gas supply markets in Germany. The Bundeskartellamt welcomed the Commission's decision to refer this case as a contribution to increased decentralised application of competition rules within the EU to cases whose main impact is felt on the national market. The two proposed mergers were allowed to go ahead in 1997. While the proposed Bayernwerk/Isarwerk merger has a considerable horizontal and vertical concentration effect in Germany, there is, on the other hand, the deconcentrative effect as a result of RWE's complete withdrawal from Isarwerke. Moreover, Bayernwerk and RWE committed themselves to either cancelling, by mutual agreement, the demarcation agreement between Isarwerke's subsidiary Isar-Amper-Werke and RWE's associated company Lechwerke AG, Augsburg, or to ensuring that Isar-Amper-Werke unilaterally waives its rights under this agreement. In the light of this commitment an overall assessment of the proposed merger allows the conclusion that the market-dominating position of Bayernwerk and Isar-Amper-Werke within the interconnected network and at the regional level in Bavaria is no longer likely to be strengthened.

RWE's acquisition of an interest in Thyssengas will have a rather significant vertical concentration effect in the gas supply market, because Thyssengas supplies a number of gas distributors in which RWE holds major participations. Thyssengas's market-dominating position in its supply territory would likely have been strengthened, if the two companies had not committed themselves to improving the competitive chances of other gas companies in Thyssengas's territory, in particular those of Wingas GmbH, of Kassel, with its own pipeline, whose market entry is imminent. Thyssengas undertook to waive certain exclusive rights in its agreements with buyers; RWE agreed not to use its influence to encourage its associated companies to purchase gas from Thyssengas.

As a result of these commitments potential market entry to the gas supply market, on which Thyssengas currently retains a monopoly, has improved to an extent which ensures that Thyssengas's market dominance will not be strengthened even though there will be vertical concentration between RWE and Thyssengas.

The merger between the Esslingen-based Neckarwerke AG (NW) and the Stuttgart-based Technische Werke der Stadt Stuttgart AG (TWS) was allowed to go ahead after the utilities concerned made commitments to remove the Bundeskartellamt's original competition concerns. While the merger of NW and TWS, which supply the city of Stuttgart and part of its surroundings, into Neckarwerke Stuttgart AG (NWS) will eliminate potential competition between them in the area where their territories overlap, the supply territory will at the same time be opened up to outside competitors as a result of the undertakings given. Moreover, since actual competition among the two utilities was rather unlikely, the Bundeskartellamt held that the strengthening of dominant positions in the distribution of electricity could be ruled out. The merging parties agreed to waive exclusivity clauses in their concession agreements with communities. As a result these communities are no longer prevented from allowing competitors to use their public roads for local supply purposes. NW and TWS also committed themselves not to agree exclusivity clauses in new concession agreements. Nor will they conclude new demarcation agreements hindering other companies to supply electricity within the territory. They also waived such rights in existing demarcation agreements.

Also the following case raised competition concerns: Fresenius AG, Bad Homburg, had combined its world-wide dialysis business with that of W.R. Grace & Co., Boca Raton, USA, and contributed it to the newly set up Fresenius Medical Care AG, Bad Homburg. This merger, whose economic centre of gravity is abroad, results in the formation of the world-wide largest supplier of dialysis products and services. Although Grace's market share had been only small in Germany, it had to be considered as a competitor of Fresenius that was strong in terms of resources. Since as a result of the merger an important competitor of Fresenius exited the domestic markets and thus a market-dominating position on various German markets for dialysis and dripfeed solutions would have been created or strengthened, the Bundeskartellamt would not allow the proposed merger to go ahead, unless the following changes were made: Prior to the completion of the Fresenius/Grace merger, Fresenius had to sell its stake in Schiwa GmbH, Landorf, and Grace its German dialysis activities in Rena-Med Medizintechnik GmbH, Bremerhaven, to an independent competitor that is strong in terms of resources. Schiwa and Rena-Med were thereupon sold to B. Braun Melsungen AG. This also led to a competitively acceptable demerger of Fresenius/Schiwa, a case for which a prohibition had been issued that had become unappealable.

The Bundeskartellamt has given the green light to the proposed acquisition by Heidelberger Druckmaschinen AG of a majority stake in Linotype/Hell. The transaction involved the product markets for two different types of offset machines. In view of its market share of 60 per cent, its leading position on the international market and its superior financial strength, Heidelberger Druckmaschinen holds a paramount market position in respect of sheet-fed offset machines. By contrast, it is not among the three leading companies as regards rotary offset printing. Linotype/Hell makes pre-press equipment. Initial concerns that Heidelberger Druckmaschinen might now design the pre-press equipment in such a manner that it fitted only its own printing machines have proved unreasonable from an economic perspective, according to the Bundeskartellamt's findings. Therefore, the merger has been allowed to go ahead.

The Bundeskartellamt has also cleared the following merger: The Berlin-based Coca Cola Erfrischungsgetränke GmbH (CEEG), an indirect 100 per cent subsidiary of the Atlanta-based The Coca Cola Company (TCCC), acquired three holding companies of Coca Cola licences as well as the relevant distributing companies. In compensation for the sale of their shares in the respective bottling and distribution companies, the selling shareholders were given majority stakes in CEEG. The aim of the merger was to combine further licence territories that had so far been handled by independent Coca Cola licensees. For the combined licence territory CEEG was to be granted a new licence agreement by TCCC. The number of so-called "free" Coca Cola licensees in Germany would thus have been reduced to eight. The Bundeskartellamt did not prohibit the merger because the contractual commitments of the licensees to Coca Cola on the basis of the bottling agreement are so close already that no perceptible strengthening of Coca Cola's market position is to be anticipated from the envisaged acquisition of the licensees' bottling and distribution facilities. Nor has there so far existed any substantial price competition among the sales territories between the licensees which might have been restricted as a result of the merger.

There were several cases in which the concerns raised by the mergers that were modified in the reporting period could not be eliminated:

The completed merger between the leading German stationery manufacturer, the Berlin-based Herlitz AG, and Papierwarenfabrik Landré based in Gronau, Leine, raised considerable competition concerns at the Bundeskartellamt. In its warning letter of 31 October 1996, the Bundeskartellamt informed the company that it intended to prohibit the merger. Late in 1993, Herlitz had already taken over the economic management of the Gronau learning aids manufacturer through a trustee. The Bundeskartellamt's findings showed that as a result of the merger the paramount market position of Herlitz in the supply of so-called learning aids (exercise books, etc.) had been clearly strengthened (the aggregate market shares of the companies on the markets concerned ranging between 50 and 70 per cent). Meanwhile the merger has been formally prohibited.

The acquisition of PSG Postdienst Service GmbH, Berlin by the Axel Springer Verlag AG (ASV), Berlin also met with serious concerns from the Bundeskartellamt. The Bundeskartellamt presumed that the ASV had a market-dominating position in certain press markets (readership and advertising markets). The acquisition of PSG, which operates around 250 press retail outlets in east Germany (31 of which are railway station bookshops), would have led to a strengthening of this position. The structure of the German press distribution system - the supply of medium-sized press retailers by wholesalers and of medium-sized railway station bookshops by publishers - previously guaranteed a large degree of neutrality which ensured that every publication had an equal opportunity of being sold. The vertical integration would have enabled ASV to influence the last stage of the press distribution system and thus achieve improved access to the sales markets, to make access more difficult for actual competitors and to create higher market entry barriers for potential competitors. It would have also offered an opportunity of enhancing ASV's market positions in the undominated magazine markets and thereby also indirectly securing its position in dominated markets. The merger was therefore prohibited (in January 1997).

As already reported, the Bundeskartellamt had prohibited the proposed merger of T&N plc., Manchester, with Kolbenschmidt AG, Neckarsulm, because it anticipated that the companies' dominant position in the piston ring market would be strengthened. Although T&N originally sought a decision by court, the case has meanwhile become obsolete because the Düsseldorf-based Rheinmetall AG bought the shares for which T&N had had an option to buy. This merger between Rheinmetall and Kolbenschmidt has not been prohibited by the Bundeskartellamt since it was not accompanied by any structural change in the market for piston rings.

The merger between the Canadian Potash Corporation of Saskatchewan (PCS) and Kali- und Salz-Beteiligungs AG (K+S AG) was also notified during the reporting period and prohibited in February 1997. Since 1993 K+S AG has more or less been the only producer of potassium in Germany and the largest supplier in the European Union via its subsidiary Kali und Salz GmbH (K+S GmbH), in which it holds 51 per cent of the shares. The association with the world market leader PCS, which although not present in Germany is active in neighbouring European countries, would in the long run have structurally secured and thus strengthened the market-dominating position of K+S GmbH in the German market. Since PCS would have been able to start supplying the German market at any time, the merger would have removed one of K+S GmbH's important potential competitors. At the same time, the global oligopoly would have tightened further and K+S GmbH would have been incorporated into PCS's pricing policy for the world market. The enterprises submitted an application to have the merger authorised by the Federal Minister of Economics under Section 24 (3) of the ARC. This was rejected, however, making the prohibition unappealable.

Due to the Bundeskartellamt's concerns Illinois Tool Works (ITW) and P.W Lenzen GmbH&Co. KG abandoned the plan to buy Titan Umreifungstechnik GmbH, Schwelm, a subsidiary of Hoesch-Krupp, which makes steel hoops and the mechanical equipment used in their production. But now ITW wants to buy Titan Umreifungstechnik in co-operation with Thyssen AG and intends to notify the planned acquisition with the EC Commission. It remains to be seen whether ITW will be able to bypass the Bundeskartellamt's decision this way.

The Bundeskartellamt prohibited the planned takeover of KMF Laborchemie Handels GmbH (KMF) by Bender & Hobein GmbH, a subsidiary of Merck KGaA, Darmstadt. In 1995, Merck achieved a group turnover of DM 6.3 billion, with the pharmaceuticals sector accounting for a good 50 per cent of this figure. The Bundeskartellamt believed that there was a risk of Merck, as the leading manufacturer of laboratory chemicals, also gaining control of trading in these chemicals as a result of the merger. This aroused fears that it would be more difficult for chemical manufacturers to gain market access and that prices to ultimate consumers would increase. The decision has not yet become unappealable.

In 1995, the Bundeskartellamt prohibited the construction company Hochtief AG from increasing its stake in its competitor Philipp Holzmann AG from 20 per cent to 35 per cent on the grounds that this



merger would result in a market-dominating position in the German market for large construction projects. The parties appealed against the prohibition and the proceedings are currently before the Berlin Court of Appeals. During the appeal proceedings Deutsche Bank AG, which owns around 25 per cent of the Holzmann shares, and Hochtief AG notified the EC Commission that they had acquired joint control of Holzmann by concluding a pooling agreement. The examination of this pool of shareholders, which was obviously intended as a method of circumventing German merger control regulations, was initially not the responsibility of the Bundeskartellamt merely because Deutsche Bank achieves slightly less than two thirds of its Community-wide turnover in Germany. From the competition point of view, however, this merger does not have to be assessed any differently from the merger originally notified to the Bundeskartellamt. The Federal Republic of Germany therefore informed the EC Commission under Article 9 (2) of the Merger Regulation that the merger threatened to create a market-dominating position which would considerably impede effective competition in a German market. The enterprises withdrew their application once the Commission had announced its intention to refer the merger to the Bundeskartellamt. This prevented the EC Commission from being used to help circumvent national merger control.

In the reporting period the Berlin Court of Appeals confirmed the prohibition decision of the Bundeskartellamt in the WMF/Auerhahn case.

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**GREECE\****(1996)***Executive summary**

This Annual Report summarises the enforcement of the Greek Competition Law since May 1996. The last report submitted during the meeting of the Committee on Competition Law and Policy that was held last April, covered the year 1995 and the first quarter of 1996.

During the period under review there have been no legislative changes made, with respect to the Greek Competition Act 703/77 on the Control of Monopolies and Oligopolies and on the Protection of Free Competition.

**1. Enforcement**

During the reporting period 90 cases have been notified to the Secretariat of the Greek Competition Committee.

Out of the 90 cases, 73 of them have been handled as analysed in Table 1.

The cases entered/handled within the aforementioned period can be classified into four categories as presented in the following Table:

**Table 1**

	Cases entered	Cases handled	Decisions taken	Pending* before the CC
1. Agreements	9	2	2	-
2. Complaints	17	7	7	-
3. Mergers	62	62	7	7**
4. Provisional measures	2	2	2	-
<b>Total</b>	<b>90</b>	<b>73</b>	<b>18</b>	<b>7</b>

\* in the stage of final decision

\*\* the difference is analysed in the following Table 3

The 62 merger cases notified during this period can be further analysed in Table 2 and Table 3 that follow:

**Table 2**

\* The original language of this document is English.

	Merger Cases Notified
Post notifications	48
Prior notifications	14
<b>Total</b>	<b>62</b>

**Table 3**

Mergers Cases Notified	Actions taken by the Competition Committee
Files closed (post notifications)	48
Decisions issued (prior notifications)	7
Decisions pending (prior notifications)	7
<b>Total</b>	<b>62</b>

*Description of main cases**Agreements*

In the Petrolina/Eko case an exemption was granted to the notified co-operative joint venture according to the provisions of art. (3) of the Greek Competition Act. Petrolina is involved in the bottling process and storage of liquid gas, while Eko is involved in the production and marketing of petrochemicals and liquid gas. The notified joint venture will have as its effect the co-ordination of their competitive behaviour in the process of bottling and storing liquid gas, while the final product will be independently distributed by each of the undertakings concerned. The raw materials will be independently supplied by each one of the parties to the merger. The final product will be distributed separately under their brand names while its price will be determined in accordance with each firm's pricing policy. The relevant market affected was the market of bottled liquid gas for household as well as for professional applications. The joint venture was ascertained as an operation of co-operative nature falling within the provisions of art. 4(5) of the Greek Competition act according to which operations, including the creation of a joint venture, that have as their object or effect the co-ordination of the competitive behaviour of undertakings that remain independent shall not constitute a concentration. Following this assessment the agreement was appraised as not eligible to be granted a negative clearance due to the financial power and the significant market shares held by both firms (20 percent) that could effectively establish a barrier for both effective and potential competitors.

Following this assessment the agreement had been granted a 15 year individual exemption as satisfying the three conditions set for in art. 1(3). for the exemption of agreements i.e. where:

- 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;
- they do not impose on the undertakings concerned, restrictions which are not indispensable to the attainment of the aforementioned objectives;

- they do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the relevant market in question.

In the Motor Oil Hellas/Saudi Arabian oil company case the undertakings concerned notified an exclusive purchasing agreement for crude oil. The two parties Saudi Arabian oil company (involved in the exploration, production and marketing of crude oil and production and marketing of refined products) and Motor oil Hellas (involved in the oil refining and trading business) applied for negative clearance or for a 25 years exemption if the first was not granted. According to the agreement notified Motor oil Hellas shall purchase from Saudi Arabian oil company for 25 years all the quantity of crude oil needed. The agreement examined was actually a second step to follow the general co-operation plan between the two firms; the first step being the agreement through which Saudi Arabian oil company acquired joint control of Motor oil Hellas, an operation that was examined under the provisions of merger control law in the EU and was declared compatible with the Common Market (may 1995).

In its assessment the competition committee concluded that the notified agreement resulting to the sharing of markets or sources of supply fell within the prohibiting provisions of art. 1(1) of the Greek Competition Act. The same prohibition would apply even in cases where subsidiaries are being bound to meet their purchasing needs exclusively from the parent companies. Taking into account the resulting anti-competitive constraints faced by third parties in the market, the elimination of the purchaser's free choice, the positions held by the parties in the relevant market of crude oil and refined products; as well as, the duration of the agreement the competition committee concluded that negative clearance could not be justified. Following the examination of the agreement in the light of the three conditions set for in art. 1(3) of the Greek Competition act, the competition committee issued its final decision for a 15 year exemption.

### *Mergers*

In the United Technologies Holding Cmbh/Sutrak Transportkälte GmbH case the acquisition agreement was notified because the market share threshold was met. The relevant product market affected in Greece was the market of air-conditioning systems for buses. The market shares for United Technologies and Sutrak Transportkälte in the Greek market for the year 1995 were 16 percent and 23 percent respectively. The strong bargaining power of purchasers resulting to fluctuating market shares (the respective figures for the 16 percent and 23 percent market shares were zero per cent and 46 percent for the year 1993 and six percent and 27 percent for the year 1994) together with the fact that there are no barriers to potential competition from new entries in the market led the competition committee to issue a positive decision since the agreement was appraised as not constituting a significant impediment of competition in the national market and particularly by creating or strengthening a dominant position.

In the consolidated Eurofinance Holdings S.A./Interbank Hellas S.A. case the acquisition agreement notified was appraised as not constituting a significant impediment of competition in the national market and particularly by creating or strengthening a dominant position the relevant market affected in this case was ascertained to be the product market of banking products and services in general. No distinction to special product markets (i.e. retail banking, corporate banking, investment banking etc.) was made due to the very small market shares attained by the two parties involved. Both banks possessed 1.5 percent of the total assets, held 1.3 percent of the total deposits and just 1.4 percent of the total credits granted among all the banks operating in Greece. According to these criteria (total assets, deposits and credits) consolidated Eurofinance Holdings S.A. held respectively the 17th, 17th and 16th position while Interbank Hellas held respectively the 20th, 14th and 17th position in the relevant ranking of all the commercial banks in Greece (data 1995). As a result of the notified acquisition the 10th, 12th and 14th position would be gained. Based on these facts the competition committee issued a positive decision accompanied by the imposition of a fine amounting to five million Dr for each of the undertakings concerned since the agreement was put into effect before the issuance of the relevant decision. According to the provisions of art. 4e(1) of the Greek Competition Act a concentration is prohibited to be put into

effect until a decision is issued ,while in case of breaching this prohibition a fine not exceeding 15 percent of the aggregate turnover of the undertakings concerned is being imposed.

In the Kamari S.A/Bosinakis S.A case the notified concentration involved the acquisition of Bosinakis S.A by Kamari S.A, the latter belonging to the Filippou group of companies. The Bosinakis firm had been involved since 1973 in the production of rusks being the second in the market, while the first (Elite S.A) belonged to the actually acquiring group. Further to that two other firms owned by the same group were involved in the same market. The competition committee in its assessment of the relevant product market affected, concluded that it should comprise rusks regardless of whether they are being sold packed or unpacked, Swiss rolls and crumbs. In its appraisal of whether the acquisition would constitute a significant impediment of competition in the national market with respect to the determined relevant market, the competition committee concluded that the resulting market share of 75 percent or even of 83 percent if only packed rusks were considered, would result in a significant impediment of competition. In its decision the competition committee prohibited the concentration while it imposed a fine amounting to 109 million Dr to Kamari S.A and 11 million Dr to Bosinakis S.A according to the provisions of art. 4e(1) of the Greek competition act since the agreement was put into effect before the issuance of a decision and ordered the separation of the undertakings concerned by transferring the control of Bosinakis S.A to third parties within one year from the issuance of the decision. The separation should be notified within ten days from the day it comes into effect. Following the provisions of art. 4d(7) an application by the interested parties has already been submitted to the Ministers of national economy and development (ex commerce) in order the concentration to be approved. No decision has been taken yet.

In the Concretum S.A/Halkis Cement S.A case the notified concentration involved the acquisition of Halkis cement by Concretum a holding company owned by Calcestruzzi Spa. The latter belongs to the Ferruzi group of companies. The relevant product markets affected in this case was ascertained to be the product market of grey cement and the product market of white cement, while the implementation of the concentration would lead to a combined market share of 53 percent in the grey market and of 48 percent in the white market for Concretum through Aget-Heraklis (owned since 1991) and Halkis Cement. In its assessment the competition committee concluded that the resulting market share if taken under static market conditions would be a strong indication of a dominant position in the national market with the relevant negative effects to competition.

However the various indications/conditions pertaining in the cement market, i.e.:

- the expected increase of demand in the domestic market;
- the inelastic demand of cement to price fluctuations;
- the rather inelastic supply of cement;
- the existing effective competition from the Titan S.A ; as well as the presence of Halips S.A controlled by Ciment Français;
- the existence of importing firms controlled by Holderbank and Lafarge;
- the lack of barriers to entry the Greek market;
- the need to explore new markets due to the existing economies of scale and the surplus productive capacity in the cement industry; and
- the presence of imports from the near and middle east in the European market

led the competition committee to issue a positive decision since the agreement although changing the structure of the market, was appraised as not constituting a significant impediment of competition. The positive decision was accompanied by fines amounting to 105 million and 12 million imposed to Concretum S.A and Halkis Cement S.A respectively, as the agreement was actually put into effect before the issuance of a decision and a fine amounting to five million imposed to Concretum S.A for breaching its obligation to notify within the time provided by the law.





## HUNGARY\*

*(January 1996-June 1997)*

### 1. Changes to competition law and policy proposed or envisaged

#### *Summary of new legal provisions of competition law*

A new Competition Act, namely "Act No. LVII/1996 on the Prohibition of Unfair and Restrictive Market Practices" entered into force on 1st January 1997 replacing the previous "Act No. LXXXVI/1990 on the Prohibition of Unfair Market Practices".

The most important new elements of the Act to be applied for proceedings commenced from 1 January 1997 are as follows:

- the scope of the new act [Art. 1] covers market practices carried out on the territory of Hungary by natural and legal persons and companies without legal personality. The new wording cuts out the definition of “economic activity” of the previous act, in this way extending its scope for example to investorial activities i.e. a field which was not covered by the old legislation. The extension of the scope to market activities of foreign undertakings in respect of anti-competitive practices is another new feature;
- the new act has kept the basic structure of the previous one and apart from anti-competitive practices contains provisions relating to “consumer fraud” and other “unfair market practices”;
- the new law extends the prohibition on agreements to all kinds of vertical-type agreements [Art. 11]. (The previous Act covered horizontal agreements and of vertical restrictions it was only resale price maintenance which was prohibited.) Another extension is that the new act also covers “decisions by social organisations of undertakings, public corporations and other similar organisations ...”. The scope of the prohibition has been extended also from an additional point of view, the new prohibition covers prevention, restriction and distortion of competition. The provision about the automatic voidness of agreements infringing the prohibition is also a new element of the regulation;
- in the field of abusive control the new act has an entirely new concept for defining dominant positions [Art. 22]. Contrary to the previous one, this definition does not contain market share thresholds, but is built on the ability of the undertakings to act independently to a great extent from other market participants. Costs and risks of market entry and exit, financial strength of the undertakings, the structure of the relevant market and market shares are among the factors to be taken into account assessing the existence of dominance in a particular case;

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\* The original language of this document is English.

- the new act has kept the spirit of the old one and contains a general prohibition of abuse [Art. 21]. However there are some new elements put into the illustrative list of particular state of affairs of abuses, such as tying, withholding of goods, discrimination and predatory pricing;
- in respect of M&As the new act modified the notification thresholds. The turnover thresholds of the old act has been amended - HUF ten billion (USD 50 million) joint net turnover, in the case of financial institutions, ten per cent of their total assets is considered in place of net turnover. The market share will not be a threshold any more - the previous Act contained an alternative threshold of 30 percent market share. There are some new elements in the definition of concentrations, e.g. acquisition of parts of undertakings; creation of concentrative-type JVs, acquisition of majority voting rights and acquisition of the right to appoint the majority of executive officials [Art. 23]. In difference to the previous competition act the new legislation explicitly defines that temporary acquisitions by financial institutions do not fall under the scope of M&A control [Art. 25];
- although with different wording but in close harmony with the European Merger Regulation the criteria of the assessment of M&A transactions have been reworded [Art. 30];
- the Hungarian competition authority may decide about separation or divestiture of the merged undertakings if the parties failed to apply for authorisation and the authority may not have been authorised the transaction [Art. 31].

### *New guidelines*

The Office of Economic Competition (OEC) is not empowered to issue implementing rules or guidelines to the Competition Act. However, the OEC published its new notification forms for agreements and mergers in harmony with the provisions of the new Competition Act.

### *Government proposals for new legislation*

The 1996 Competition Act empowers the Government to adopt regulations about group exemption of agreements. In March 1997 the Government adopted three block exemption regulations, namely, for :

- exclusive distribution agreements;
- exclusive purchasing agreements; and
- agreements in the insurance sector.

Other regulations (for motor vehicle distribution agreements, franchise agreements) are under drafting, it can be expected that these will be adopted before the end of 1997.

Both the March 1997 regulations and those under elaboration in their draft forms represent simplified versions of the relevant EC regulations.

## **2. Enforcement under the 1990 Competition Act**

One of the characteristics of the Hungarian Competition Act is that it regulates both unfair market practices and deception of consumers. Whilst rules relating to unfair market practices fall within the exclusive competence of the civil courts, the second area belongs to OEC competence. A substantial part

of the workload of the Office stems from the law enforcement in this latter field, nearly half of the Competition Council decisions belongs to this category.

### *Actions against restrictive agreements and abuses of dominant positions*

This paper reports the law enforcement experience of the Office of Economic Competition (OEC) gained in the period between January 1996 and June 1997. Since the new Competition Act stipulated that all the cases commenced in 1996 have to be assessed under the provisions of the 1990 Competition Act, in the first half of 1997 the majority of the OEC decisions were made under the 'old' Competition Act.

The total staff of the OEC numbered 104 persons at the end of 1996. The OEC has no regional offices.

#### *Restrictive agreements*

The 1990 Competition Act prohibited restrictive agreements or practices between competitors (horizontal cartels) or the fixing of restrictive resale prices (as one form of vertical restraints). Pursuant to the cartel regulation the prohibition applies to actual restrictions as well as agreements potentially leading to restrictions.

During the reported period two comprehensive *ex officio* examinations were conducted concerning the anti-competitive agreements on the beer distribution market. This product commands special attention because the situation on the market (oligopolistic market structure, stagnant or declining demand, minimal imports) objectively creates incentives for restrictive agreements. In one of these specific cases the subject of the examination was the joint distribution network of five regional companies of the Kobanya Brewery and Kanizsa Brewery, which breweries are under the same ownership. The other case concerned the activity of the joint wholesaler of the Sopron Brewery and Martfu Brewery, which also have the same owner. (The extensive nature of the examination is indicated by the fact that a total of 240 undertakings were parties to the cases, and the four breweries met 58.6 percent of Hungarian beer sales.) The wholesalers concluded agreements with other wholesalers and large retailers. The Competition Council decided that the provision of these contracts preventing resellers from selling beer at a price below a definite price was a violation of the cartel prohibition. In their form the agreements constituted RPM, but they can also be considered horizontal price fixing between wholesalers as competitors. Due to the immediate action against the cartel the Competition Council considered that the actual anti-competitive effect of the price fixing could not be exploited. Therefore the Competition Council prohibited such anti-competitive practices and imposed only symbolic fines amounting to three million 240 thousand HUF (ca. USD 16 200). These decisions have not been challenged, and most of the fines have been paid.

In the process of elaborating new regulations for professions like doctors, engineers, architects, patent officers, auditors, lawyers, etc., the OEC advocated the creation or increasing the scope for fair competition. Sometimes these endeavours of the OEC have proved to be successful. (e.g. the draft bill on 'Professional Chambers of Designing and Expert Engineers and Architects' intended to exclude from the market the designers with secondary level qualifications who used to be able to do simple planning work. As a result of an OEC opposition a three year period is granted by the ultimate version of the Act for these designers to obtain a special qualification for pursuing planning activities under this Act.)

In the period concerned two applications for exemption from the cartel prohibition were received. The Competition Council denied the exemption in one case, and in the other case the agreement had no restrictive character at all.

In one of the cases the Chamber of Commerce of Hajdu-Bihar County applied for an exemption concerning the minimum fees for driving instruction proposed by the Chamber. The Competition Council

refused to grant the exemption because of two reasons. First, the Chamber cannot be qualified as an entrepreneur entitled to ask for exemption. Second, the majority of entrepreneurs affected did not want to accept the Chamber's recommendation. The decision has not been appealed. This case raised several theoretical problems. Some of these are solved in the 1996 Competition Act (extending the scope of the Competition Act to associations and chambers), but they also indicate that chambers may act even against the intention of some of their members - note that the membership is obligatory - and they have some role in attempts to restrict competition among their members. Various interest representation bodies and trade associations also show an inclination to restrict competition.

*Abuse of dominant positions*

The Competition Council made 69 decisions concerning the abuse of dominance. Out of these, the respondent was condemned in 12 cases, while the procedure was terminated due to the revocation of the claim in seven cases. In 50 cases the Competition Council either found no violation due to the absence of dominance, therefore its abuse is excluded by definition, or, in ten cases the dominant position was established, but its abuse could not be substantiated.

In abusive-type cases the high proportion of rejections is primarily attributable to the fact that the applicants assume the existence of dominance in cases when one party is indeed highly dependent on the other - for instance, because it based its business on one supplier or customer and thus assumed excessive risk -, but the other party is not dominant as defined in the Competition Act. Such cases often simply revolve around some contractual dispute.

Four out of the 12 condemning Competition Council decisions (on grounds of abuse of dominance) were related to the conduct of the National Savings Bank plc. (OTP Rt.) in the area of mortgage lending:

- the increase of service charges was publicised three months after they became effective;
- during the negotiation of the contracts for mortgages the bank created the impression that the purchase of an insurance service from OTP-Garancia Insurance Co. was a precondition for concluding a mortgage agreement; furthermore, the unilateral but lawful changes in the general terms of the mortgage were not based on objective criteria and were implemented in a non-transparent manner;
- the amount of government subsidy for the consumers available for long term subsidised mortgages was calculated with a technique disadvantageous to the consumer, thus reducing the amount of available subsidy;
- they unreasonable refrained from concluding contract facilitating the use of government mortgage subsidies.

In analysing how much the complaints about mortgage lending were justified, the fact could not be neglected that OTP had market power due to its 90 percent market share and the commitments arising from the long term contracts. Furthermore there was no market pressure on OTP, and presumably there would not be any market pressure for quite some time that would encourage it to make its business practices more customer friendly. The market is open to competitors, but no other banks have entered this market to an appreciable extent.(All four decisions have been challenged before the Court.)

Two condemning decisions were adopted against Kabeltel Budapest Ltd. Both of them found a section of the general terms of contract applied by the service provider illegal and detrimental to the consumer. The anomalies present on the cable television market highlight the fact that on this market,

where the service provider enjoys natural monopoly after the installation of the network, regulation is called for, an institutionalised opportunity for protecting the interests of consumers is absent, and at this time the only possibility for law enforcement is that of the competition law. Both decisions were challenged before the Court.

The Metropolitan Public Maintenance Co. (Fovarosi Kozterulet-fenntartó Vallalat) was also condemned. Upon the introduction of the garbage collection charge, the firm failed to change its garbage collection system in time in accordance with the consumer demand, and charged the consumers for undemanded services. The fine imposed was a token amount but it influenced the behaviour of the company. (However, the OEC decision was challenged by the defendant.) In the second half of 1996, in an investigation started upon a similar complaint, the Competition Council of the OEC established that relatively fast reaction was made after the consumer complaint has been received to eliminate the unlawful situation. The infringement, though apparently of minor importance, is a warning sign that, when the regulation is changed in a manner detrimental to the consumer, the regulator and the undertaking concerned have the common obligation of acting with the greatest care in respect of the technique, substance and implementation of the regulation.

The Competition Council condemned the Debrecen Waterworks Co. (Debreceni Vizmu Rt.) because it was willing to invoice on the basis of the measured consumption only if one of two types of water meters identified by the firm were installed out of the approximately 80 types licensed by the authorities. With this conduct it excluded the distributors and manufacturers of the other brands from the market without any reasonable justification. Unfortunately this phenomenon is not unique, and even though such behaviour has lost its legal basis as a result of legislative changes of recent years, certain service providers (in the case of gas and water pipelines, electricity grids and other areas where the installation of certain fittings, instruments etc. and the commissioning of the system is subject to regulatory licenses) follow discriminating business policy which constitutes barriers to entry. (Debrecen Waterworks challenged the decision of the Competition Council.)

### *Mergers and acquisitions*

The Competition Council adopted decisions on 30 cases; in 22 cases it permitted the concentration, while in the remaining cases it declared the absence of obligation for authorisation.

In some significant cases the market participants purchased their competitors or other undertakings on their vertically connected markets. Instance for such subject-matters are the Hungarian Oil/Nitrogenworks (MOL-Nitrogenmuvek), the Dunapack/Halaspak, the Graboplast/Keszta-Dunawall, the National Savings Bank/Merkantil Bank (OTP-Merkantil Bank), the Agrana/Hungarian Sugar (Agrana-Magyar Cukor) and the Siemens-Erokar acquisitions. All of these transactions were authorised by the Competition Council for certain reasons, among which the role of import competition can be mentioned in the first place, or in some cases detrimental effects stemming from the decrease in the number of market participants or from the higher level of concentration were outweighed by advantageous economic effects.

Several privatisation decisions resulted in transactions falling under the competence of the Competition Act. Examples include the acquisition of Hungarhotels plc. by Danubius plc. In this particular case the merger of the capacities of the Danubius and Hungarhotels plc. was examined in four regions (geographic market) and concerning three, four and five star hotel accommodation (product market). Any appreciable increase in market share was noticeable only in the category of four star accommodation in Budapest region. However, the Competition Council considered that there is a considerable fluctuation of consumers and of the hotels themselves in Budapest between the three and four star, and the four and five star categories. Thus the market power of the applicant following the acquisition of control is better described by its joint share on the three-four or four-five star hotel accommodation market (relevant market) than its share on the market of four star hotels alone. Having considered the possibility of market entry and exit, the Competition Council estimated that the market share of the applicant that reflects its real

market power on the Budapest hotel market was approximately 35 percent, and considered that the proposed acquisition would not prevent the development of competition on that market. Accordingly, the acquisition of control was authorised.

In most concentration cases subsidiaries were merged or amalgamated into the parent company. This is a typical trend, adjusting in accordance with market consideration the situation that arose as a result of the decentralisation wave of transformation and privatisation. Such cases included the merger into the parent companies of the subsidiaries of OMV, Danone, Messer Griesheim, Porsche Hungary, Balatonboglar Vineyard, Sarvar Poultry Processing plc., and Vertes Power Plant. [These kinds of concentration do not constitute transactions to be authorised according to the provisions of the new Competition Act anymore.]

The Ciba-Geigy/Sandoz case was an interesting example of the merger of subsidiaries that also had international relevance. The foreign parents that owned various subsidiaries in Hungary merged, and requested authorisation for their merger in Hungary because of the effects of the deal in this country. However, the scope of the Competition Act effective until 31 December 1996 did not cover undertakings operating abroad or concentrations emerging in this manner.

#### *Experience related to court reviews*

Cases investigated by the experts of the OEC were (and are also, under the new Act) decided by the Office's Competition Council, a decision-making body comprised of seven staff members (five lawyers and two economists). Each case was decided by a minimum group of three out of the seven members with a lawyer as chairman. Decisions of the Competition Council can be challenged before the Metropolitan Court of Budapest, with possible subsequent appeal to the Supreme Court.

In 1996 final judgements of the Supreme Court altered OEC decision on legal grounds in three cases, while in two other cases the Metropolitan Court reversed the decision of the Competition Council. However, only seven out of the 127 court decisions reversed the OEC decisions which fact indicates that the conceptual basis for the decisions is largely identical during the six and a half year practice of law enforcement.

With one exception, the decisions altered in 1996/1997 do not entail any difference in the interpretation of law between the OEC and the courts. The reversal is primarily because discretionary elements frequently play a significant part in competition law proceedings.

In one case, however, there was a fundamental difference of principle. Subsequent to a Metropolitan Court decision upholding the decision of the OEC, the Supreme Court did not consider the conduct of Hungarian Railways (MAV Rt.) illegal because it acted in the capacity of customer, which, according to the court, does not constitute an economic activity (production or service provision for consideration) under the scope of the Competition Act. The OEC protested against this interpretation at the court of appeal (at a special College of the Supreme Court, where Supreme Court decisions may be appealed for last resort), but this special College of the Supreme Court (as the court of review) upheld the above view. In the future this dispute will not reoccur because the new Competition Act defines the scope of the Act in such a way that it indisputably covers any practices committed by customers.

The procedure for competition cases at the Metropolitan Court takes one-one and a half years, while, if the ruling is appealed to the Supreme Court, this last phase takes an average of three years. This is shown by the fact that the court review of the Competition Council decisions made in 1991-1993 have been completed, with a few exceptions. Decisions which have not been yet finalised relate mainly to significant cartel and abuse of dominance cases or the illegal advertising of tobacco and alcohol products. As far as cartel cases are concerned, the sugar cartel decisions of 1993 was upheld by the Metropolitan Court, but the Supreme Court will hold the first hearing only in the autumn of 1997. In the coffee cartel

case of 1994 the Metropolitan Court has not made its decisions yet. Of the dominance cases, the court review of an OEC decision from 1991 stating the excessive pricing of number plates and a dismissing decision from 1993 on the excessively low purchase price of sunflower seed have not been concluded yet.

### **3. OEC participation in the formulation and implementation of other policies**

According to the provisions of the 1990 Competition Act, ministers are obliged to solicit the opinion of the Office of Economic Competition on every draft bill that would have a restrictive effect on competition, including, in particular, market access, exclusive rights or price regulations. The OEC received about two hundred drafts last year, of which only a smaller part had the effects listed above.

In 1996 there were no major changes in the regulation of public services; the relevant laws were adopted previously and some of them had been in operation in prior years (for instance, price controls in telecommunication). Part of the regulation of the energy sector came into effect in 1996. The experience with the operation of regulatory systems confirmed the concerns and doubts that the OEC had at the time when the rules were formulated, and raised new ones. Regulations do not adequately fulfil their competition policy function; they contain numerous details which are not in line with the original theoretical models they were moulded after. The principles are not carried through all the details, which hinders or prevents the implementation of the original intentions.

The price regulation of telecommunications is one example for unsound solution; it is a price cap type system, which is considered modern, but the actual parameters have been defined loosely, therefore there is no pressure for efficiency. This has resulted in the situation that the price increase introduced by Hungarian Telecommunications plc (MATAV) in 1997 was smaller than what would be possible under the price control system. The government has given up the right to revise the price control system that was established in the concession agreement in 1993.

Another deficiency in the system is that although the concession agreement requires MATAV to record the costs of the activities performed under exclusive rights separately, i.e., as a monopoly, this has not been done so far. Even if it were to happen in the future, it would promote the competition policy objectives adequately only if the network and other expenses were separated, and the various activities were fully segregated in the accounts. This is also a precondition for the effective operation of the regulation and the enforcement of public consumer interests.

The price control system does not cover the full range of concession activities, and the company, which also engages in non-concession businesses, can engage in cross subsidisation in a manner not transparent to the regulators or the OEC.

The price regulation of electricity also raises problems. The system is a mix of several regulatory models (price cap, cost based, rate of return based). As a result, the benefits of none of the models are present. In the price cap system the average allowed price level is set for a relatively long period (three-five-ten years) on the basis of an automatic adjustment mechanism ("indexation"). In this model the regulated firms are interested in more efficient operation, there is no need for permanent cost analysis (it is needed only at the introduction of the system and upon its adjustment). The presence of the principles of the other regulatory models and the most recent developments (quarterly review) eliminate the essence and the benefits of the price cap system.

In the energy sector the vertical levels have been partially separated. However, the regulation should serve the purpose of the separation of infrastructures and of activities that constitute a natural monopoly from the areas and activities suitable for competition, and the introduction of competition in the latter field. In our view the separation in practice does not go hand in hand with the introduction of competition in this area. The separation itself has remained partial because some natural monopoly

activities are mingled with others, while the problems of cross subsidisation have not been resolved satisfactorily.

There are some competition law enforcement experiences in some other areas related to regulation or the absence thereof affecting competition:

- some local utilities supervised by local governments can also be considered as natural monopolies (communal services, local transportation etc.). However, local regulations are not supported by uniform principles and solutions; as a result, either the local by-laws appropriate for the new situation have not been issued, or there are great differences regarding the content of the rules. This is one of the reasons why there are many anomalies on these markets. Since the boundaries of mandatory state responsibilities and the market are continually changing in the case of these services, while the defencelessness of the consumers does not necessarily lessen as a result of the appearance of competition, it would be necessary to define in law the minimum requirements, regulatory principles or potentially applicable solutions that the local governments' by-laws must be in line with;
- in many instances the public administrative -ownership- or entrepreneurial-type decisions of local governments take the same legal form, i.e. they are considered as public administrative resolutions. As a result, the ownership- or entrepreneurial-type decisions can be challenged only in a procedure used for decisions made in the capacity of public administration (administrative lawsuit, petition to the Constitutional Court). This may mean for the competition supervision that any elements of the decisions made by local governments in their entrepreneurial capacity but clad in the legal form of public administrative decision that violate competition law can only be challenged in a lengthy administrative lawsuit, while other undertakings can be subject to competition supervision proceedings for the same offence. Such a distinction is not justified.

Realising these anomalies the OEC drew the attention of the Parliament to the circumstance that regulations were needed in the areas where market failures were present, and regulations would have important competition policy functions. Therefore neither the situation of lacking regulation nor the situation of regulation that does not fulfil its competition policy functions in these areas is desirable. Both types of shortcomings exist in Hungary.

For the request of the Economic Committee of the Parliament the OEC prepared a detailed submission in June of 1997 summarising the most important competition policy aspects of the regulations in the different specific sectors.

#### **4. Publications on competition law and policy**

In the period between January 1996 and June 1997 surveys and reports relating to competition law and policy were published as follows:

VISSI, Approximation to the Competition Policy of the European Union. Study prepared for the "Conference on Competition Policies in the Countries in Transition" Florence, 7/8 June 1996

VISSI, The Competition Act and the Economic Policy Background of Its Amendments. Study prepared for the Third Hungarian Lawyer's Assembly published in: "Gazdaság és Jog" 7-8/1996

VISSI, Market Infrastructure, Competition Policy, Accession to the Union. Study prepared for the "XXXIVth Assembly of Economists", Győr, 22 May, 1996 published in: 'Közgazdasági Szemle' September/1996



VÖRÖS, Handbook of European Competition Laws. 2nd edition, LOGOD, Budapest, 1996

TOTH, Competition Law of the European Community. JATE, Szeged, 1996

Sarai-TOTH, EC Competition Law. ITD Hungary, Budapest, 1997

Kaszaine-MISKOLCZI, Handbook on Competition Law. HVG-ORAC, Budapest, 1997

**5. Statistical information on the application of the 1990 Competition Act in the period from January 1996 till June 1997**

*Types of cases concluded by the decisions of the competition council*

Blanket Clause	32
Unfair Market Practices	-
Consumer Fraud	82
Restrictive Agreements	8
Cartel Notification	2
Abuse of Dominant Position	69
Merger	30
Case Transferred by Court for Imposing Fine	1
Sum total	224

*Types of the decisions of the competition council*

Establishing the Violation of Law	64
under Article 3 (Blanket Clause)	4
under Article 11 (Consumer Fraud)	50
under Article 14 (Concerted Practices)	7
under Article 20 (Dominant Position)	12
imposing fine based on a court decision	1
Authorisation	22
of Merger or Acquisition	22
Refusal of Approval	1
for Exemption of Cartel	1
Termination of Proceedings	56
Refusal of Complaint	81

*Imposed fines ( in thousand HUF)<sup>1</sup>*

Type of Case	1996	1997 Ist half	Total
Blanket Clause	5 400	-	5 400
Unfair Competition	100	-	100
Consumer Fraud	40 236	12 210	52 446
Cartel	3 240	30 000	33 240
Abuse of Dominant Position	62 507	6 800	69 307
Total	111 483	49 010	160 493
Average Sum per Case	2 477	2 580	2 508

1. Exchange rates:  
1996: 1 USD  $\approx$  160 HUF  
1997: 1 USD  $\approx$  200 HUF.

## IRELAND<sup>\*</sup>

(1996)

### Summary

The Competition Act 1991 was amended by the enactment of the Competition (Amendment) Act 1996 in July 1996 giving the Competition Authority power to investigate breaches of competition law and, where necessary, to bring civil and criminal court actions in order to stop anti-competitive arrangements or abuses of dominant positions. It also provides for fines and imprisonment of the firm(s)' directors. The Act created a new post of Director of Competition Enforcement who has been appointed. In addition to taking court proceedings, the Authority can now also undertake studies into practices or methods of competition in any sector on its own initiative. The Act strengthens competition law by providing for offences and penalties provisions and by instituting a system of public enforcement of competition laws.

During the year, 35 notifications of agreements were made to the Authority bringing the total of notifications since the Act came into force to 1 347. The Authority disposed of 90 notifications in 1996, bringing the total disposed of to date to 1 074, or 80 percent. The Authority took 19 decisions in 1996, bringing the total decisions to 475 (some decisions incorporated a number of notifications).

The Minister for Enterprise and Employment announced the setting up of a Competition and Mergers Review Group in September 1996. The primary purpose of the Review Group was to make recommendations to improve the competition regime as regards its legislative provisions and structures, with the emphasis on the treatment of mergers under competition law and the updating and consolidation of the Mergers Acts 1978 and associated legislation. The Competition Acts, 1991 and 1996 will also be reviewed and the Review Group were also requested to examine and make recommendations on the Restrictive Practices (Groceries) Order, 1987.

During the year, 171 mergers were notified to the Minister under the Mergers Acts. Two were referred to the Authority for investigation in May and December 1996, but the investigation of the latter case continued into January 1997. No mergers were prohibited in 1996.

### 1. Changes in competition law and policies adopted or envisaged

The Competition (Amendment) Act, 1996 was enacted on 3 July 1996 and gives the Competition Authority power to investigate breaches of competition law and, where necessary, to bring civil and criminal court actions in order to stop anti-competitive arrangements or abuses of dominant positions. In criminal proceedings the Act provides for fines up to IR£ three million or ten percent of turnover, whichever is the greater, of an undertaking concerned, and for imprisonment. It also provides that one member of the Authority is to be designated Director of Competition Enforcement. The Authority can also undertake studies into practices or methods of competition in any sector on its own initiative.

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\* The original language of this report is English

The right of action (under Section 6 of the 1991 Act) by aggrieved persons against undertakings has been extended to include a right of action against directors, managers or other officers of an undertaking as well. Complaints can also be made to the Authority under the 1996 Act. An aggrieved party who has made a complaint to the Authority still has the right to take a private action under Section 6 if they wish.

Following the enactment of the Competition (Amendment) Act 1996, the Minister for Enterprise and Employment announced the setting up of a Competition and Mergers Review Group on 30 September 1996. The Review Group's terms of reference are to review and make recommendations on:

- the mergers legislation in the context of a legislative consolidation;
- the effectiveness of competition legislation and associated regulations;
- cultural matters in the context of the 1991 Act and in particular section 4(2) of that Act; and
- appropriate structures for implementing the above legislation.

The primary purpose of the Review Group is to make recommendations to improve the competition regime as regards its legislative provisions and structures, with the emphasis on the treatment of mergers under competition law and the updating and consolidation of the Mergers Acts 1987 and associated legislation. The Competition Acts, 1991 and 1996 will also be reviewed in terms of their effectiveness, the existing structures and the methods of application. The Review Group will examine and make recommendations also on the Restrictive Practices (Groceries) Order, 1987 with emphasis on the below cost selling aspects of the Order. It is expected that the review will take a minimum of 12 months to be completed.

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

### ***Action against anti-competitive practices under the 1972 Act - The work of the Director of Consumer Affairs***

The main matters which were dealt with by the Director of Consumer Affairs in 1996 were as follows:

- (a) *Sugar*: In his 1995 report the Director referred to the lack of transparency in the published terms of supply of the major sugar supplier. Progress continued to be made during the year under review on agreeing the level of detail appropriate for inclusion in the published terms for wholesalers/retailers. However, greater transparency is required particularly when a company is in a dominant position and discussions are continuing with the Company. This market continued to receive attention from the European Commission (DG IV).
- (b) *General Grocery Products*: The arrival on the Irish market of a large UK grocery chain gave rise to numerous complaints of below cost selling. Initial investigations have confirmed that the Company was not selling below net invoice price. However, as distribution costs are borne directly by the Irish operation the Director has secured the Company's agreement that in regard to any future allegations of below cost selling they will supply him with a clear statement as to the actual distribution costs of the particular products the subject of his investigation.

- (c) *Alcoholic drinks*: Pre-Christmas sales of alcoholic drinks also gave rise to allegations of below cost selling which on investigation by the Director were not found to be in breach of the law.

***Action against anti-competitive practices - under the 1991- 1996 Acts - the work of the Competition Authority***

*Enforcement activities*

New legislation giving the authority enforcement powers, as described above, only came into force in early July. Enforcement activity by the Authority during the second half of 1996 was relatively limited, partly due to the change in the composition of the Authority itself. By the end of 1996, 94 complaints had been received by the Authority alleging breaches of the Competition Acts. Upon preliminary examination 21 of these were found not to involve issues relevant to the Competition Acts and the files were closed. A number of other files were closed following a preliminary investigation. At the end of 1996 further information was being sought in respect of the remaining 35 complaints on hand.

*Notifications*

The number of notifications of agreements made to the Authority in 1996 was 35 compared to 38 in the previous year. Up to the end of 1996, a total of 1 347 notifications had been made, of which 984 had been dealt with at the start of 1996.

*Decisions*

During 1996 the Authority took 19 decisions and disposed of 90 notified agreements leaving 273 out of the total of 1 347 left to be dealt with. The low number of decisions taken in 1996 resulted from changes in the membership of the Authority, i.e. one of the former Members retired in July, thereby resulting in the Authority having no quorum to take decisions until the new Authority took office in mid November 1996. Some of the decisions are discussed below.

*Exclusive purchasing agreements*

*Tedcastle McCormick/Distributors*

Tedcastle McCormick had notified agreements with several of its distributors which involved the exclusive purchase of its petroleum products, including fuel oils and petrol. Because of the network of agreements, involving all the oil companies, under which distributors were subject to long-term exclusive purchasing requirements, the Authority considered that the Tedcastle agreements offended against Section 4(1) of the Act. The Authority considered that the agreements overall satisfied the requirements of Section 4(2), apart from the fact that they were of indefinite duration and were subject to a lengthy period of notice of termination, and these were not considered to be indispensable. After Tedcastle limited the term of the agreements to five years, with no period of notice, the Authority granted licences for a period of ten years to the amended agreements. (Decisions Nos. 459, 460, 467 and 470).

*Premier Dairies/City distributors*

This decision concerned a standard agreement between Premier Dairies Group and distributors of its liquid milk and other products to doorstep customers and smaller retail outlets in the Dublin area. The distributor was granted exclusive delivery rights in a defined area, and could sell only in that area, and was not permitted to deal in similar products. The Authority did not consider that the agreements involved exclusive distribution in a specified area, since Premier itself distributed products to retail outlets for resale and to other large customers. It considered that the arrangements were designed to enhance the efficiency

of liquid milk distribution, and to ensure a comprehensive and timely doorstep delivery system. It believed that the distribution agreements did not offend against Section 4(1).

The Authority was concerned that there was nothing to indicate that, while Premier recommended resale prices, the distributors were free to set their own resale prices. Following this concern, Premier informed the distributors that they were able to set resale prices. The Authority was also concerned that the requirement on the distributor to avail of a billing preparation service provided by Premier could be used to ensure adherence to resale prices set by Premier. Premier informed its distributors that they were free to avail of the billing service or not, which satisfied the Authority's concerns. It issued a certificate for the amended agreement. (Decision No. 461).

*Mergers and sales of business*

*Fuel Distributors/BnM Fuels*

This decision concerns an agreement for the purchase by BnM Fuels Ltd of the business and certain assets of Fuel Distributors Ltd and the National Coal Company Ltd. The latter is engaged in the importation and distribution of coal to wholesalers and retailers, and BnM Fuels is a subsidiary of Bord na Mona, the State owned the turf producer. Insofar as the merger involved the importation, distribution and wholesaling of coal and coal products, it came within the exclusive jurisdiction of the European Commission under the European Coal and Steel Treaty and could not be considered under national legislation. What could be considered by the Authority was only the sale of Fuel Distributors' business of retail coal sales to domestic consumers, and its non-coal business of stevedoring services. Since this retail coal business accounted for less than one per cent of the total household solid fuel market, it was found to have no impact on competition. In the circumstances, the Authority issued a certificate for the notified agreement. (Decision No. 458).

*Irish Helicopters/Bristow Helicopters and others*

This decision concerned arrangements for the sale and purchase of Irish Helicopters Ltd (IHL) by Aer Lingus to a consortium involving Bristow Helicopters Ltd and Petroleum Helicopters Inc., being UK and US firms respectively. There were many potential competitors in the market and the Authority did not believe that the share purchase agreement offended against Section 4(1). It issued a certificate in respect of the arrangements. (Decision No. 469).

*Other agreements*

*Electricity Supply Board/The Register of Electrical Contractors of Ireland*

This decision concerns an unwritten agreement between the Electricity Supply Board, the State electricity company, and the Register of Electrical Contractors of Ireland Ltd, regarding the connection of electrical installations to the electricity supply. The ESB agreed that it would only connect customer electrical installations to the ESB supply provided that a valid completion certificate had been prepared and submitted by an electrical contractor registered with RECI, or by an inspector employed by RECI. The agreement was the subject of proceedings in the High Court.

The High Court found that amendments to the RECI Memorandum, Articles and Rules overcame defects under the Competition Act. Following publication of notice of intention to grant a licence, the Authority received several submissions from third parties. RECI made further amendments to its Rules following discussions with the Authority.

The Authority did not consider that the issue of completion certificates *per se* offended against Section 4(1). Non-registered contractors, however, were placed at a competitive disadvantage relative to registered contractors, because of the fee required for each inspection, and because they were not able to secure a connection for their clients to the national grid without having their work certified by RECI inspectors. For these reasons, the Authority considered that the arrangements offended against Section 4(1).

The Authority considered that a provision which implied that membership of RECI might be restricted to applicants whose business was above a certain size offended against Section 4(1). Following an amendment which dealt with the Authority's concerns, the rule no longer offended against Section 4(1). Another rule, which related to suitability of premises, was also considered to offend against Section 4(1), but it had been deleted in 1993. This was also the case in respect of a rule which allowed RECI discretion to reject an application for registration without disclosing reasons, which was amended in March 1993 in a way which dealt with the arbitrary aspects of the adjudication process. The Authority also noted that it was open to other contractors to establish a rival organisation.

The Authority considered that the arrangements as amended satisfied the requirements for a licence under Section 4(2). It accepted in particular that RECI had shown that it was striving to raise safety standards, which benefited consumers. The Authority considered that the rules, as originally notified, however, would not have been licensable. It granted a licence for ten years, up to 21 March 2006, for the amended arrangements, without any conditions being attached. (Decision No. 462).

#### *Irish Seafood Producers Group Ltd (ISPG)/Producers*

This decision concerns exclusive marketing agency agreements whereby a number of producers of farmed salmon and sea trout have appointed ISPG to act as an undisclosed agent on their behalf for the purpose of marketing, selling and distributing fish products. The primary purpose of the arrangements is to ensure that ISPG is in a position to guarantee a regular all year round supply of good quality product to its customers in both the export and domestic markets. About two thirds of ISPG sales are directed to export markets and one third to the domestic market. In 1994 there were eleven agency agreements with producers, of whom five were producers members of ISPG. The largest producer member of ISPG, Salmara, sold its fish farms in 1995.

ISPG is recognised by the EU Commission as a producers' organisation for the purposes of Council Regulation 3759/92 (OJ L388,13.12.1992). This Regulation provides for the common organisation of the market in fishery and aquacultural products and sets out requirements for producers' organisations in this regard. These include a requirement that members dispose of their total output through the organisation together with the application of rules of the organisation for production and marketing, which involve effectively joint selling arrangements. Article 85(1) of the Treaty of Rome does not apply to these arrangements.

The Competition Authority considered that the operation of the notified arrangements effectively involved a joint selling arrangement with full authority given to ISPG to decide the selling arrangements, including prices and discounts, and to set production schedules for the joint production of the members of ISPG as well as other producers, while producers covered by the arrangements were prevented from marketing any of their output themselves. The arrangements were found to offend against Section 4(1) of the Competition Act. The Authority licensed the arrangements on the basis that they satisfied the requirements of the EU Regulation.

*Enforcement*

*Opel Ireland*

The only significant action to date under the enforcement powers involved a complaint concerning Opel Ireland. The complaint involved an advertising campaign launched by Opel in late 1996. The campaign referred to Opel's plans to introduce a new pricing strategy entitled "Up Front Pricing" with effect from 1 January 1997. The advertisement advised consumers that it would no longer be necessary to shop around between Opel dealers to obtain a better deal since all Opel dealers would in future sell Opel cars at a uniform price. Investigations revealed that Opel had informed its dealers that they were not to offer any discounts on the advertised price. Dealers were also advised not to discuss discounts with prospective buyers. Following the seizure of certain documents by the Authority, Opel offered to stop its advertising campaign immediately and to subsequently make clear in future advertisements that any prices quoted were suggested prices. They also issued a new circular to dealers informing them that they were free to determine their own prices. The Authority accepted these commitments and took no further action.

***Mergers and concentrations***

*Competition Authority*

*The Statoil/Conoco Merger Proposal*

On 22 December 1995, the Minister for Enterprise and Employment announced that he had decided to refer to the Authority for investigation in accordance with Section 7(b) of the Mergers, Takeovers and Monopolies (Control) Act, 1978, as amended by the Competition Act, 1991, the proposal whereby Statoil Ireland Limited would acquire the entire issued share capital of Conoco Ireland Limited. The Authority transmitted its report to the Minister on 9 February 1996.

The Authority stated in its report that it considered that oil products could be categorised into several different markets based, primarily, on the different uses for such products. In its view, the parties had such small shares of the market for kerosene, fuel oil and lubricants that the arrangements could not be considered likely to have any implications for competition in these markets. Thus, in considering the effects on competition, the Authority was concerned largely with the market for motor fuels and gas oil.

The motor fuels market was already highly concentrated, the combined market share of the top four firms in 1995 being around 70 percent. It was clear that the combined market share of Conoco and Statoil (including Estuary) would increase concentration considerably, resulting in a four firm concentration ratio of between 83 percent and 86 percent. In addition, the number of significant suppliers would be reduced from six to five. If Statoil managed to retain Conoco's market share, it would have a share of around 27 percent, making it the largest supplier in the market.

Evidence was presented which showed that petrol prices in Conoco outlets tended, on average, to be lower while those in Statoil outlets were generally higher than elsewhere. In the Authority's opinion, if the proposal proceeded, the probability was that Statoil would not alter its strategy and that the strong price competition which in the past was offered by Conoco, who had a reputation of being a low price operator, would simply disappear, lessening the competitive pressure on the remaining suppliers. The proposal would reduce the degree of consumer choice by reducing the range of brands available. The Authority did not believe that the increase in Statoil's market size was likely to lead to any increase in the degree of competition in the market. The balance of probabilities indicated that it was likely to diminish competition. In the case of motor fuels, the Authority believed that the proposal would be likely to restrict competition and thus to operate against the common good.



The Authority considered whether it might be possible to reduce or eliminate the adverse effect on competition by approving the proposal subject to conditions, but it concluded that this would not be possible. The Authority recommended that the proposal should not be allowed to proceed. On 16 February, the Minister made an Order under Section 9 of the Act (as amended), prohibiting the take-over absolutely (S.I. No 45 of 1996). The Minister also published the Authority's report, with commercially confidential material omitted, on the same date (Pn. 2405).

On 8 March, Statoil lodged an appeal in the High Court against the Order under Section 12 of the Act. Following a revised proposal submitted by Statoil and after consultation with interested parties, the Minister amended the Prohibition Order on 16 July 1996 (S.I. No. 214 of 1996). This prohibited the merger except on specified conditions, including the sale of a number of company owned and dealer stations to Maxol Ltd, the sale of certain other company owned stations, and the disposal of the Estuary chain of stations. Statoil and Maxol also made proposals regarding the pricing policies which they would follow in the future which were acceptable to the Minister. The Minister also announced a new strengthened Price Display Order for motor fuels. The High Court proceedings were withdrawn on 16 July 1996.

#### *The Lyons Tea/Unilever Merger Proposal*

On 17 May 1996, the Minister for Enterprise and Employment referred to the Authority for investigation, in accordance with Section 7(b) of the Mergers, Take-overs and Monopolies (Control) Act, 1978, as amended by the Competition Act, 1991, the proposal whereby Unilever Ireland Limited would acquire the entire issued share capital of Lyons Irish Enterprises Limited. The Authority transmitted its report to the Minister on 18 June 1996.

In its view, the tea market in Ireland was a highly concentrated one with the two largest firms, one of which was Lyons Tea, accounting for around 75 percent of total sales. Unilever had a small share of the market through its subsidiary Liptons which had entered the market three years earlier. These firms appeared to have earned very high profits over a long period of time.

The merger as originally proposed would have increased the already high level of concentration in the market. The Authority considered that there were indications that competition was already not as strong as it might be, and that, because of entry barriers, there was little threat of entry to the market. Nor did the Authority believe that the level of actual or potential competition from imports was sufficient to ensure competition in the market. The Authority considered that the proposal would be likely to have an adverse effect on competition, primarily at the wholesale level, and would therefore be likely to operate against the common good. It recommended that the acquisition, as originally proposed, should not be allowed to proceed.

During the course of the investigation, Unilever informed the Authority that they had decided to withdraw the sale of the Lipton tea brand in the State regardless of whether or not the proposal went ahead. The majority of the Authority concluded that, after its withdrawal from the market, Liptons was no longer a potential competitor which might at some future stage attempt to re-enter the market. The two members considered that the proposal, in the changed circumstances, was not likely to prevent or restrict competition, and they recommended that the proposed acquisition should be allowed to proceed.

A minority report disagreed with these views, stating that the proposal by the acquiring firm to withdraw its existing brand from the market was not sufficient for a merger, which was otherwise considered likely to restrict competition, to be regarded as no longer likely to restrict competition. It agreed that, where there was already evidence of inadequate competition in a market, a merger between actual or potential competitors posed a high risk that competition would be further diminished. Noting that the withdrawal could have been prompted by strategic considerations, i.e. to reduce the risk of the merger being regarded as anti-competitive, the minority report concluded that the withdrawal of the Lipton brand

from the Irish market did not alter the fact that the proposed acquisition would be likely to restrict competition and operate against the common good, and that it should not be allowed to proceed.

On 18 July 1996, the Minister announced that he had accepted the majority conclusion of the Authority that the proposed acquisition should be allowed to proceed. The report was published on 15 August 1996.

*Blockbuster/Xtra-vision*

The proposed merger between Blockbuster Entertainment (Ireland) Ltd and Ardnasillagh Ltd was referred to the Competition Authority on 17 December 1996 for investigation under the Mergers Acts.

*Statistics on concentrations*

Concentrations notified to the Minister in 1995 and 1996 were:

	<b>1995</b>	<b>1996</b>
Carried forward	2	2
Notified in year	126	171
Outside Act	71	117
Did not proceed / Withdrawn	-	-
Allowed	52	50
Prohibited	-	-
Referred to the Competition Authority	1	2*

\* The Unilever/Lyons case was subsequently allowed to proceed. No decision has yet been made in the Blockbuster/Ardnasillagh case.

### **3. Deregulation and privatisation**

*Telecommunications (miscellaneous provisions) Act 1996*

The Telecommunications (Miscellaneous Provisions) Act 1996 provides for the sale of 20 percent of the shares in the State telephone company, Telecom Eireann to KPN/Telia, with an option for them to take a further 15 percent. It also provides for the creation of an office of Director of Telecommunications Regulation and the introduction of a CPI-x price cap regime for telecommunications services where (a) there is no competition for the service in question or (b) there is a dominant supplier of the service. On 16 December 1996 the Minister for Transport, Energy and Communications issued an Order ("The Telecommunications Tariff Regulation Order 1996"), setting x at six percent from 1 January 1997 for a specified "basket" of telecommunications services. The Order also limits any possible increase in (i) the price of the provision of telephone lines and (ii) the lower quartile telephone bill, to the percentage increase in the consumer price index; and sets a maximum price increase for any individual service at CPI + two percent. The Director of Telecommunications Regulation, when appointed, will have no power to modify the Order on his own initiative for five years. The statutory monopoly of Telecom Eireann for voice telephony is maintained until 2000, as a derogation from the EU deadline for liberalisation. The price cap will be set by the Minister for Transport, Energy and Communications and cannot be altered for two years after it has been made. In the following three years the DTR may only alter the order if directed by the Minister to review it. The DTR will be responsible for the present functions of the Minister including those of taking action to protect the statutory monopoly on voice telephony from infringement. No further steps have been taken in relation to the liberalisation of the market in electricity or other utilities.

**4. Publications on competition**

*Competition law and policy in Ireland*

During 1996 a publication entitled “*Competition Law and Policy in Ireland*” was published by Mr. Patrick Massey, Director of Competition Enforcement and a member of the Competition Authority and Ms. Paula O’Hare, legal adviser to the Competition Authority.



**ITALY\****(1996)***1. Action taken by the Authority: a summary**

In 1996 and in the first three months of 1997, the Authority's workload was considerably higher than in previous years, with rulings on 27 agreements, ten alleged cases of abuse and 425 mergers between independent companies. Nineteen of the 27 agreements were found to restrict competition on the basis of section 2 of the Antitrust Act, and in seven cases the Authority found the alleged abuse of dominant position in violation of section 3. None of the mergers examined by the Authority during the year was prohibited. In three cases the mergers, considered restrictive in the form originally notified, were subsequently authorised on receipt of undertakings by the parties to remove the identified restrictions. The Authority also issued 66 opinions to the Bank of Italy and the Broadcasting and Publishing Authority under section 20 of the Act. Moreover, a general fact-finding survey was conducted into the process of formation of vehicle fuel prices in Italy.

**Decisions taken by the Authority**  
(number of cases)

	<b>1994</b>	<b>1995</b>	<b>1996</b>	<b>Jan-Mar 1997</b>
Agreements	25	31	24	3
Abuse	14	31	10	-
Mergers	342	282	357	68
Opinions	78	54	51	15
Misleading advertising	213	244	423	147

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\* The original language of this document is English.

**Breakdown by type and outcome of proceedings completed**  
(January 1996-March 1997)

	<b>Non violation</b>	<b>Non-violation after amendments to the agreement</b>	<b>Violation</b>
Agreements	4	4	19
Abuse of dominant position	3	-	7
Mergers	425	3	-
Misleading advertising	196	-	374

One of the Authority's particularly relevant activities was reporting and providing consultancy under sections 21 and 22 of the Antitrust Act to identify the measures in statutory provisions, regulations and draft legislation that introduce or are likely to place unjustified restrictions on competition. In 1996 and early 1997, 26 reports and opinions were issued under these sections of the Act. The reports related to a number of different sectors (food, energy, transport). Some opinions were specifically requested in relation to industries where a process of deregulation is taking place, such as telecommunications.

Lastly, 570 reports of alleged violations of Legislative Decree No. 74 of 25 January 1992 were examined, and in 374 cases the advertisement was considered to be misleading.

**Reporting and consulting activities**  
(number of actions: January 1996-March 1997)

<b>Area</b>	<b>Total</b>
Agriculture and manufacturing	3
Electricity and gas	1
Transport and allied services	4
Telecommunications	6
Other sectors	12
<b>Total</b>	<b>26</b>

## 2. Agriculture and food products

### *Agreements in the “protected denomination of origin” ham industry*

In June 1996, the Authority completed its investigation on the voluntary Consortia among producers of San Daniele and Parma ham, which supervise and control the quality of their respective products.

Each Consortium had adopted a production schedule for 1995, setting a ceiling on total production and dividing it among the member companies on the basis of their "historical" market shares. The Authority considered that the definition of production ceilings and quotas were agreements that restricted competition under section 2 of the Act. The fact that the law instituting the system for protecting denominations of origin empowered the Consortia to draw up production schedules and that the schedules were later approved by the relevant Ministries did not appear relevant facts for excluding the restrictive behaviour from the application of the antitrust law. In fact the ministerial approval was merely a subsequent control of the schedules, in no way altering their nature of contractual agreements concluded freely and independently by the members of the Consortia themselves.

However, at the request of the Consortia, the Authority granted for a period of a year a waiver for the agreements under section 4 of the Act. It was pointed out that since other less restrictive instruments for controlling production quality provided by the denomination protection legislation had not yet become operational, quantitative controls over production could be used for another year until other less restrictive instruments for quality control would become operational.

### *Agreements in the “protected denomination of origin” Parmesan cheese industry*

In November 1996 the Authority concluded its investigation into the two Consortia protecting Parmigiano Reggiano and Grana Padano Parmesan cheese. The two voluntary Consortia have statutory function of promoting the products they oversee and protect, and also of programming and control production and marketing. On the basis of their tasks, the Consortia planned production quantities by establishing production schedules indicating the maximum total production target for each specific year, and the individual production quotas for each member.

The Authority reaffirmed that competition legislation applies whenever there is autonomy in the decision making of the Consortia. Since production schedules were discretionary established by the Consortia, the agreements were deemed as restricting competition.

In the wake of the remarks made by the Authority regarding the system of quality control, the Consortia decided to change the regulations to bring them into line with competition law. These changes were designed to convert the planning system based on quantities into one under which the Consortia would retain the right to ascertain whether the cheese has the required quality.

### *Exclusive ice cream distribution contracts*

This investigation was completed in December 1996, and referred to distribution contracts containing exclusive purchase clauses between Italy's main industrial ice cream producers (Unilever Italia, Nestlé Italiana, Sammontana and Gelati Sanson) and a great number of retail outlets.

When analysing the market, the Authority drew a preliminary distinction on the basis of demand-side substitutability between ice cream bought on impulse which is consumed immediately after purchase close to the point of sale, and ice cream bought for home consumption. Taking account of the degree of substitutability of the different products from the viewpoint of the consumers, the Authority ruled that

impulse-bought ice-cream should also be sub-divided into two distinct markets: industrial ice cream and shop-made ice cream.

The agreement regarded the industrial impulse-bought ice cream market. The supply structure of this market is highly concentrated: the two largest industrial ice cream-makers account for 70 per cent of sales in terms of volume, while the largest four companies directly involved in this proceeding account for 89 per cent. The market is also characterised by significant entry barriers. In addition to the huge advertising investment needed to launch products and the very high distribution costs involved, a major barrier to entry arises from the widespread practice adopted both by the large and small manufacturers to loan freezers to retailers, free of charge, to be used exclusively for the manufacturers' range of products (*freezer exclusivity*).

In this context, the four main industrial ice cream manufacturers concluded exclusive distribution contracts with about 70 per cent of all ice cream retailers in the country. The exclusive purchase and the provision of high penalties in the event of breach of the agreement were ruled to be an infringement of section 2(2) of the Act. The changes to the contracts as proposed by the parties during the course of the investigation to shorten their validity from five to three years and to reduce the penalties in the event of failure to honour the exclusivity agreement were deemed insufficient to remove the anti-competitive elements.

#### ***Concentration between Heineken and Moretti***

In May 1996 the Authority examined a merger under which the Heineken Italia company, a subsidiary of the Netherlands-registered Heineken Nv company, took over the Birra Moretti company. Heineken would have become Italy's leading brewery.

Considering consumers' preferences and the different types of distribution channels, two distinct relevant markets were identified: take-away beer consumed at home, primarily sold through shops (traditional retailers or retail chains), and beer consumed on licensed premises (bars or restaurants). With regard to the marketing of beer for consumption on licensed premises, since draught and high quality beers account for a substantial share of the beer sold, the openness of the market to foreign breweries was considered a powerful element of competitive pressure. However, on the retail take-away market, imports only accounted for a small proportion of the beer sold and were limited to the upper price range and the lower price range (which requires no investment in advertising). In the market for take-away beer, following the operation Heineken would obtain the 37 per cent of the market; the second operator, Peroni, has a share of 30 per cent. Furthermore, it was fairly unlikely that a new competitor could enter the Italian market by building new breweries, because of the high initial investment, the long time taken by it to be recovered (15-20 years) and the fact that the market is now mature.

In order to overcome the objections relating to possible competition restraint as a result of the merger, Heineken undertook to sell a brewery in Italy with a production capacity of not less than five per cent of the market to an existing or potential competitor with a market share of not more than 20 per cent. Under these conditions the Authority authorised the merger.



### 3. Petroleum products

#### *Agreements between oil companies*

This proceeding, which began in March 1996, examined a number of bilateral agreements concluded in 1993 and 1994 by Agip Petroli with other oil companies (Shell Italia, Tamoil Italia, Kuwait Petroleum Italia, Anonima Petroli, ERG Petroli, SOM) for the exchange of fuel distribution outlets with the ostensible intention of rationalising the distribution activities of each company involved.

As far as the markets at issue were concerned, the Authority drew a distinction between fuel distribution stations on and off the highways. Account was taken of the fact that even though fuel prices on the highways are usually higher than prices charged on regular roads, it is not generally an economically convenient solution for individual drivers to leave the highway simply to fill up with cheaper fuel. The geographic extension of the relevant markets for the non-highway network was identified with the territory of each province; for the highway network with adjacent stations on the same stretch of road.

At the end of the investigation, which was completed in October 1996, the Authority found that the agreements examined, which were designed to geographically reallocate the fuel distribution facilities on a concerted basis, did in fact limit competition. However, considering the small number of swap operations actually completed and their sporadic and exceptional nature, the Authority ruled that the agreements were not in themselves likely to significantly interfere with competition on the relevant markets.

#### *Agreement between Agip Petroli and Kuwait Petroleum Italia*

Agip Petroli and Kuwait Petroleum Italia notified the Authority under section 13 of the Act their intention to conclude a number of agreements, in relation to refining and logistics.

With regard to refining, the agreement provided for both companies to hold a 50-50 share in the Raffineria di Milazzo company which was previously wholly owned by Agip. The purpose of the agreement, according to the parties, was to increase the refinery's production capacity and competitiveness. Under the logistics agreement the infrastructure facilities owned by both parties in the Naples area would be rationalised, and Kuwait would be able to use Agip's logistical facilities in the Port of Livorno, and perhaps also in the Marghera area. They also planned to conclude contracts for exchanging final products, setting the quantities each year.

The Authority found that the obligations created between the parties by this agreement would make it extremely difficult for them to act independently on the market. The parties therefore submitted a new version of the agreement to the Authority after removing the mutual obligation to exchange products. This new agreement was deemed by the Authority to be unlikely to restrict competition to any substantial degree.

#### *Fact-finding survey and report on vehicle fuel prices*

In October 1996 the Authority completed the fact-finding survey begun in April of the same year on the process of formation of fuel distribution prices. The results of the survey showed that the restrictions on competition in the fuel distribution market are due both to present legislation and the behaviour of the companies

Fuel prices in Italy, after deducting taxes, have grown uniformly over the past five years, especially during the two-year period when government controls had been relaxed (1994-1995). Although the structures of the companies' operating costs differ enormously in terms of level and yearly rates of

change, the retail prices charged by each company were substantially uniform. Companies with lower costs had therefore failed to exploit this advantage by fixing lower prices as an attempt to increase their market share. With respect to other European countries, the Italian market is characterised by the absence of companies not vertically integrated into the petroleum industry (particularly supermarket chains) which elsewhere are playing a major role in stimulating price competition.

As far as legislation is concerned, the abolition in the spring of 1994 of any form of regulation on prices was not accompanied by the elimination of other statutory constraints which continue to restrict market entry. The severe statutory constraints on the opening or enlargement of petrol stations have discouraged companies from pursuing new commercial and investment strategies, hampering any spontaneous restructuring of the network through the reduction in the number of fuel distribution stations.

The Authority has emphasised that unjustified regulatory entry barriers should be dismantled. Moreover, the Authority asked for the elimination of the provision that links the permission for enlarging or improving an existing petrol station (adding other fuels, or installing a self-service system) to the closing down of another distribution station. Furthermore the Authority asked for an extension of the range of products that fuel distribution stations are currently allowed to sell and for the removal of the existing constraints on opening hours.

With regard to corporate behaviour, the fact-finding survey showed that the dependence of all oil-companies on Agip's logistical systems has prevented the adoption of an independent and non-co-operative behaviour on the distribution market. The Authority suggested to retrench Agip's dominant position in logistics through divestments by Agip before its privatisation, or by assigning to a specific joint venture the storage facilities of all existing oil companies. In the latter option the participation to the joint venture should be open to new competitors, in order to facilitate market entry and make storage services available to any operator on a non discriminatory basis.

#### **4. Chemicals and pharmaceuticals**

##### ***Report on the supply of adhesive materials for medicinal specialities***

In November 1996 the Authority submitted a report on possible distortions to competition resulting from a Decree issued by the Minister of Health and concerning the adoption of self-adhesive computer-readable labels for medicinal specialities. In particular, the Decree provides that, for safety and security reasons, pharmaceutical companies must acquire their self-adhesive labels exclusively from the State Press company (Poligrafico dello Stato), which can sub-franchise the production, with a great deal of discretion, to a number of reliable companies.

Recalling the principle of Community directives on public procurement, under which security reasons alone are not sufficient to justify the non-application of tendering rules, the Authority noted that there were other less anticompetitive ways of preventing fraudulent acts. In particular, it would be sufficient for the State Press company to make an initial selection of supplier companies, merely ensuring that they met all the safety and security requirements, and award the contracts through subsequent competitive tenders.

## 5. Cement and concrete

### *Agreements in the concrete market of Sardinia*

In March 1997 the Authority ruled that the agreements concluded between four companies (Unicalcestruzzi, Calcestruzzi, Calcestruzzi Dau and Italccestruzzi), under which the allocation of sales quotas and the fixing of concrete prices on different markets in Sardinia were decided, breached competition law.

The degree of competition on the concrete market turned out to be strongly influenced by the competitive situation in the upstream cement market. In order to prevent any threat by competing firms importing cement into Sardinia, the incumbent cement manufacturer had implemented defence policies, which included control over the sale of concrete. After having managed to discourage cement imports, the cement companies, acting through the controlled concrete manufacturers, had been actively pursuing collusive strategies.

Considering the gravity and the duration of these practices as well as the different roles played by the companies in the agreement, Italccestruzzi and Unicalcestruzzi were fined 857 and 36 million lire, respectively (five per cent of the turnover), and Calcestruzzi was fined 598 million lire (three per cent of the turnover). No fine was imposed on Dau, whose dependence on cement supplies from Italcementi and Unicem (the cement companies controlling, respectively, Italccestruzzi and Unicalcestruzzi), was such as to significantly restrain the autonomy of its market behaviour.

## 6. Other manufacturing activities

### *Report on the current rules and regulations governing ignition devices*

The report referred to current ignition device legislation, which prohibits the manufacture, import, distribution, assignment and sale of cigarette lighters for publicity purposes. Considering that matches and cigarette lighters fall within the same market, because of their substitutability, the Authority emphasised that these statutory provisions created a substantial difference of treatment between companies which manufacture and distribute cigarette lighters and companies which manufacture and market matches, which, on the contrary, may freely bear emblems, logos or trademarks for publicity purposes.

## 7. Electricity and gas production and distribution

### *Agreements on the market for the inspection and maintenance of heating systems in the province of Siena*

In July 1996 the Authority recognised that a consortium company (Gas-Int), which held the exclusive franchise for the provision of non-industrial gas in several municipalities in the province of Siena, and a co-operative society of technicians and tradesmen specialised in plant engineering and heating systems maintenance (Co.S.I.S.) were acting anti-competitively.

The agreement between the parties had been formalised in a contract under which Co.S.I.S. was given exclusive rights to inspect and maintain gas heating systems in the municipalities supplied by the Gas-Int company, charging the customer on the gas bills in instalments. The Authority found that the agreement limited competition, biasing it in favour of operators working in Co.S.I.S., since other operators could not enjoy the same treatment.

## **8. Transportation services**

### ***Agreement on the school bus hiring market***

In October 1996 the Authority completed an investigation into some consortia and companies providing school bus services. It was alleged that they had agreed to share between them the school bus market in the municipality of Rome.

The results of the investigation showed that the parties firstly did not submit tenders to the Rome city authorities for the school transport service and subsequently did not bid against each other when the contracts were defined under private negotiations. It was ascertained that the parties exchanged a great deal of information between them on costs and prices. Furthermore, during private negotiations, the only way of explaining the absence of any competitive bids was that each of the bidders knew the intentions of the others in advance. Any bus company with the necessary production capacity would otherwise have submitted bids for the areas adjacent to those traditionally serviced, at least as a precautionary measure to reduce the risk of being excluded from the market altogether.

In consideration of the severe anticompetitive effects, the Authority decided to impose fines, proportionate to the role of each company in the agreements. CIPAR, the leader of the agreement, was fined 226 million lire, (two per cent of its turnover), while to CIAT, Rossi Autoservizi and Corsi & Pampanelli parties were imposed a fine of 52,9 and nine million lire, respectively (one per cent of turnover).

### ***Abuse by Brindisi Port Company***

In July 1996 the Authority concluded its investigation into the co-operative society of the workers in the port of Brindisi (Brindisi Port Company) to ascertain whether it had restricted competition for the supply of cargo handling services in the port of Brindisi.

In recent years all harbour and port activities have been experiencing a process of liberalisation, culminated in the regulation that makes it possible for any company authorised by the Harbour Authorities to operate port services. However, as a transitional provision whenever an authorised company does not have sufficient manpower to meet its operational requirements, there is the obligation to recruit new personnel from the former "port companies" which - as in the case of Brindisi - are also authorised to provide port services.

In this transitional framework, Brindisi Port Company in the first instance refused to supply its own labour force to a competing company, BIS (Brindisi Imbarchi Sbarchi Srl), and subsequently delayed the completion of hold-cleaning operations of the same company, supplying personnel without the proper qualifications and skills. Considering the statutory monopoly for the supply of labour held by the Port Company, the Authority found no objective justification for refusing to supply the workers requested by BIS, and therefore considered the conduct of the Port Company an abuse of dominant position.

In view of the serious nature of the company's conduct, the Authority fined the Brindisi Port Company one per cent of its turnover (37 million lire).

### ***Abuse in the bunkering service market***

In November 1995 the Authority began an investigation into Compagnia Italtroli, the proprietor of a pipeline-oil storage system in Civitavecchia harbour, following a report by Fina Italiana

alleging abuse of a dominant position by Italtroli in its refusal to grant access to the pipeline that permits to supply fuel to ships berthed in the port.

Italtroli is the franchisee in the port of Civitavecchia to occupy State-owned land to operate a coastal oil depot and an oil pipeline linking the oil depot to the quay in order to provide diesel and fuel oil to ships berthed in the port or at the roadstead (bunkering services). Before the pipeline became operational, the bunkering services were mainly provided using tanker trucks.

In October 1995 the Civitavecchia Harbourmaster's Office announced that for safety reasons under current legislation, once the Italtroli pipeline became operational ships could no longer be bunkered using tanker trucks. Thus, in order to market their products within the area of Civitavecchia, for the oil companies port it was essential to have access to that pipeline.

Considering that the various technical reasons submitted by Italtroli could not justify its refusal to grant access to Fina to its infrastructure, the Authority ruled that Italtroli was committing an abuse.

#### ***Report regarding the exclusive rights of the Port Companies***

Despite the deregulation of all port and harbour operations under Law no. 84/94, the transitional phase in the statutory framework for harbour and port services continued throughout 1996.

The Authority submitted two reports to the Government and the Parliament in June 1996 and in February 1997, emphasising that as a result of the transitional measures the on-going market liberalisation process was being hampered. The companies supplying cargo handling services must frequently use temporary external port workers, which necessarily requires them to take on labour supplied exclusively by the former port companies, which are also their competitors. This situation is likely to restrict free competition between the companies authorised to operate in the port so long as the monopoly for the supply of port labourers is used to prevent the competitive supply of cargo handling services. The Authority therefore expressed the hope that the transitional system would be abolished.

#### ***Abuse of dominant position by Alitalia***

In November 1996 the Authority completed an investigation on the Alitalia company, which was alleged to have abused its dominant position through the discriminatory use of its power to allocate takeoff and landing slots, reacting to competitors moves by resetting its own schedules anticipating by a few minutes those of competing companies, forcing them out of the market. Furthermore Alitalia had been sending notices to travel agents in Puglia and Calabria to persuade them not to issue tickets of competing airlines.

The Community Regulation No. 95/93, governing the allocation of slots for takeoff and landing, explicitly refers to the principle that the Co-ordinator supervising the allocation of slots (airport clearance) must be able to act with total impartiality as a third party. In Italy, however, the implementation of Community regulations is incomplete, since Alitalia was given the role of clearance co-ordinator for all national airports. The Authority found that in performing its duties of co-ordinator Alitalia had adopted strategies to conserve and consolidate its own position on the domestic market by obstructing the entry of new competitors. However in the course of the investigation Alitalia gave up its role as clearance co-ordinator.

With regard to the overlapping in some routes of Alitalia's departure times with those of the new competitors Aliadriatica and Meridiana, the inquiry showed that both these competitor airlines had suffered significant economic damage to the extent of being forced to give up some of the routes. Moreover, examination of relations between Alitalia and the travel agents showed that when Aliadriatica had begun flying on certain routes, Alitalia had sent notices warning the travel agencies not to issue tickets for the

competitor company using the Alitalia mechanical or manual ticketing systems. Since the travel agencies only possessed tickets carrying the Alitalia identification code, these instructions prevented Aliadriatica from expanding its service, which was highly damaging both to the company and to its customers.

The Authority concluded that Alitalia had abused its dominant position violating section 3 of the Act. Considering the gravity and the duration of the offences, it fined the company 450 million lire (one per cent of turnover).

### ***Opinion on the Airport clearance system***

In November 1996 the Authority issued an opinion on the institutional changes demanded by Regulation No. 95/93/EC on slot allocations. Regarding the entity entrusted with slot allocation tasks, the Community regulation did not provide any preferred model, with the result that they could be performed either by a public entity or by a private entity, with the participation of all the parties concerned.

The Authority also noted that competition protection could not be adequately guaranteed either by continuing to allow the national airline to keep a decisive role in the airport clearance, or by setting up entities controlled by the airport management companies. The neutrality of the airport clearance coordinator could be better guaranteed by setting up a neutral agency in which the interests of the national, international and new entrant airlines and airport management companies were harmonised.

## **9. Ancillary transport activities**

### ***Agreement and abuse of dominant position in the highway ancillary services market***

In November 1996 the Authority ruled that Autostrade, a company controlling either directly or through its subsidiaries a great part of the national highway network, had abused its dominant position, and had concluded an anticompetitive agreement with the Autogrill company.

Franchisees of highway sections, like Autostrade, are empowered to issue franchises to use the highway service areas to provide ancillary services. This gives the Autostrade company a dominant position on both the network management market and the highway ancillary services market, which includes the highway retailing, catering and refreshment services market.

The Authority found that some of the clauses in the agreement governing relations between the Autostrade company and the franchisees for catering, refreshment and retailing services had *de facto* distorted competition on these markets. In particular Autostrade undertook not to build new service areas to be put in competition with existing ones, except where the latter were incapable of meeting the demand, and granted the right of pre-emption over any new service area to the franchisees of adjacent areas, hindering the entrance of potential competitors. This was ruled to be an offence under section 3 of the Act.

### ***Abuse by Autostrade in the market for tow away cars***

In July 1996, the Authority issued a ruling in relation to alleged anti-competitive behaviour by the Autostrade company on the emergency breakdown service market. Since 1964, the Autostrade company had given the Italian Automobile Club Company (ACI) the exclusive right to provide emergency breakdown services throughout the whole of its highway network under an annual contract which was tacitly renewed upon expiry.

The inquiry showed that the Autostrade company had abused its dominant position by refusing to authorise any emergency breakdown service suppliers to its highway network other than ACI, thereby excluding any possible competition on the highway emergency services market.

As a result of this decision, in November 1996 the Autostrade company proposed to introduce a series of new measures to encourage the entry of new companies into the emergency breakdown service market on its highway network.

## **10. Local public services**

### ***Report on the organisation of waste disposal services in the Latium Region***

This report regarded the anti-competitive effects of some of the provisions of the Latium Region's Waste Disposal Law Act.

The Authority pointed out that reserving an exclusive right to the municipal authorities to build and manage waste disposal facilities, either directly through special municipal-owned companies or through joint stock companies in which the municipality is a shareholder, limited market access by private companies, and substantially restricted competition as a result.

### ***Report regarding tenders for the collection, storage and disposal of hospital waste***

In November 1996 the Authority expressed an opinion on the procedures under which hospitals invite tenders for the provision of hospital waste collection and disposal services.

In the regulations governing the collection and disposal of toxic and special waste in hospitals, if certain categories of waste can be collected and treated either by public entities or by licensed private companies, other categories can be handled exclusively by the municipal authorities. Consequently, private companies cannot tender for all waste disposal activities in hospitals unless they are associated to a municipalised company, or participate in a joint venture together with a municipal authority. In view of these statutory constraints, the specifications for tenders relating to all waste disposal activities result in the identification of only one operator, namely, the municipalised company able to bid for all the services, eventually associated to a private company, with negative repercussions not only on the prices charged but also on the quality of the service provided.

## **11. Telecommunications and information technology**

### ***Developments in Italian legislation and the state of competition***

During the past year, both the Government and Parliament have taken a number of important steps towards telecoms liberalisation. The rapid succession of Community deadlines for deregulation, and the approaching total opening-up to competition in this industry have made it urgent for Italy to adjust its own legislation to the new competitive scenario.

In Law no. 650 of 23 December 1996, Parliament enacted three major Community directives regarding the liberalisation of cable television networks (Directive 95/51/EC), the regime for supplying voice telephony with an ONP open network (Directive 95/62/EC) and the total liberalisation of the telecommunications industry (Directive 96/19/EC). The Government also issued Legislative Decree No. 55/96 to implement Directive 94/46/EC for the liberalisation of satellite communications and terminals. This Decree lays down procedures for requesting authorisation to manage satellite communications networks and provide satellite communications services, taking account of some of the observations submitted by the Antitrust Authority in a January 1996 report, particularly with regard to conditions of access to earth stations belonging to the public carrier in the transition period from monopoly to competition.

In 1996 the second operator in the GSM cellular phone market started its operation competing vigorously with the former monopolist and bringing substantial benefits to consumers in terms of pricing, quality and range of commercial services supplied.

### ***Opinion on the proposal to reform the communications industry***

In September 1996 the Authority submitted an opinion to the Parliament and the Government regarding two Government Bills: one regulating the communications system, and the other instituting the Communications Authority.

Endorsing the stated objectives pursued by these two Bills, i.e. introducing a comprehensive reform of all regulations governing communications, the Authority expressed the hope that this reform would fully take on board without any further delay the principles of liberalisation and deregulation, according to EC directives.

With regard to giving market access to new operators, the Authority pointed out that in the Telecommunications Reform Bill, the liberalisation of telecommunications infrastructure seemed to be partly hampered by the requirement that new infrastructure facilities could only be installed under government franchise, while the full exercise of the right to free enterprise should require that all telecommunications carriers be only subject to the issue of a permit.

With reference to connection conditions, the Authority expressed the hope that the right to a connection would be expressly acknowledged, and that the public telecommunications infrastructure managers would notify the economical and technical conditions for connections according to Community legislation.

As far as universal service obligations are concerned, the Authority emphasised the need to introduce into the Bill a more specific indication regarding the features and the substance of the universal service. It noted, furthermore, that in any event the financing of universal service should be proportional to the revenues of each network operator, avoiding introducing any mechanism which might *de facto* hamper market entry. Moreover, new market entrants and operators already supplying a public universal service using innovative technologies should not be required to finance universal service. Lastly, it emphasised the need for the public carrier to introduce an accounting system that would identify any additional costs connected with the provision of universal service and enable the regulatory authorities to verify them.

### ***Reports regarding the Dect technology services***

In October 1996 and January 1997 the Authority submitted a report to Parliament and the Government regarding the potential obstacles to the proper development of competition on the mobile and personal communications services market using the pan-European DECT (*Digital Enhanced Cordless Telecommunications*) standard technology.

Telecom Italia held the statutory monopoly over the fixed land-line telephone market and another company belonging to the same group, Telecom Italia Mobile, held the statutory monopoly over the TACS cellular telephone market and occupied a dominant position on the duopolistic GSM cellular telephone market. The Authority was therefore concerned that the introduction of DECT by Telecom as the first and, for the time being, sole operator, in the absence of any regulation of access, could hamper the development of competition. This applied to both the mobile telephone market, which had now been fully liberalised by Community Directive 96/2/EC, and the voice telephone market, for which Community Directive 96/19/EC required total liberalisation by 1 January 1998.

The Authority hoped that open, transparent and non-discriminatory procedures would rapidly be introduced in order to provide access to the frequency band reserved to the DECT technology. Even



though the services associated with the DECT technology had been expressly liberalised since February 1996 when Directive 96/2/EC came into force, Italy had failed to incorporate such provisions into Italian legislation, and had never implemented the liberalisation of alternative networks that EC Directive 96/19/EC required to become effective as from July 1996. As a result, private operators were prevented from experimenting with or providing the services.

Particularly important was to guarantee that operators could be linked to the public network with tariffs aligned to costs, to ensure the provision by the switched public network of certain functions to all DECT operators (including transmission speed conversion, call routing and charging) with transparent costs and to oblige the public carrier to provide separate accounts for services based on DECT technology.

#### ***Alleged agreement between Motorola and Telecom***

In June 1996 the Authority concluded an investigation into the Telecom Italia, Telecom Italia Mobile and Motorola Italia companies which had been started to see whether these companies had committed offences under sections 2 and 3 of the Act. The procedure began as a result of a complaint, from a number of TACS mobile telephone users, that Motorola Italia had stopped marketing its own TACS handset which was fitted with an internal telephone answering system. Such a refusal was benefiting Telecom Italia Mobile, who was also a distributor of Motorola handsets, because cellular phone customers would have to purchase the answering machine services from Telecom Italia Mobile itself.

During the investigation it emerged that the internal telephone answering function was liable to damage the TACS cellular telephone network and breach privacy. The agreement between Telecom and Motorola to temporarily halt marketing of handsets with an internal telephone answering system was therefore considered not to be anti-competitive.

#### ***The constitution of Telecom Italia Mobile's GSM dealers' network***

In May 1996 the Authority completed its investigations to ascertain whether the exclusive rights and other loyalty clauses in the distribution contract between Telecom Italia Mobile (TIM) with the network of dealers for subscriptions to the GSM service were likely to infringe competition law.

In the course of the investigations, the Authority found that TIM held a dominant position on the GSM mobile telephone market, with a large market share (over 80 per cent), in addition to its statutory monopoly over the adjacent and even broader market of TACS analogue mobile service. It therefore ruled that the organisation of an exclusive distribution system, and the conditioning in the subscription of TACS distribution contracts on acceptance by the dealer to distribute TIM's own GSM service exclusively, increasing market access costs to competing service providers, was an abuse of dominant position.

Moreover, the Authority, after having ascertained that the GSM subscriber distribution contracts were agreements between independent parties, declared these agreements to be anti-competitive because they were likely to prevent access by TIM's competitors to the distribution channels and rejected TIM's application for a section 4 waiver.

#### ***The acquisition by Telecom Italia of Video on line***

In June 1996 the Authority resolved not to oppose the acquisition by Telecom Italia of the Video On Line (VOL) business for the supply of Internet access services and ancillary services such as e-mail services to households and small firms. This decision was preceded by specific commitments undertaken by Telecom Italia.

The Authority had ruled that as originally notified the acquisition might have interfered with competition on the computer network services market, particularly the Internet, mainly because of the twin

role played by Telecom Italia on the deregulated services market as the public carrier and sole supplier of leased lines, and the supplier of telecommunications services in competition with other operators. Telecom Italia's undertakings were the following: to give advance notice to all the other providers regarding the development of the telecommunications public network to enable them to programme their own activities; to maintain all the connection agreements concluded by VOL; to ascertain with totally independent organisations the feasibility of a connection system, which would be open to all market operators; to ensure separate accounting for the Internet access services.

## **12. Financial services**

### *Carinord joint venture*

In January 1997 the Authority submitted an opinion to the Bank of Italy regarding a project to set up a joint venture by Cariplo and the Fondazioni Cassa di Risparmio di Alessandria, Cassa di Risparmio di Carrara and Cassa di Risparmio della Spezia. This joint venture, to be called Carinord Holding, was to be given control over the Cassa di Risparmio di Alessandria, Cassa di Risparmio di Carrara and Cassa di Risparmio della Spezia banks.

Since the main purpose and effect of the operation was not to co-ordinate the founding companies, because only Cariplo was acting as a bank, the Authority evaluated it as a merger. Particular attention was devoted to the effects that the operation might have on the bank deposit markets in the provinces of La Spezia and Massa Carrara whose savings banks accounted for a very high market share (49 per cent and 30 per cent, respectively) and which would have reached 57 per cent and 35 per cent, respectively, following the merger.

While noting that the territorial areas concerned were attractive to possible new entrants or other banks wishing to further extend their area of influence, in the opinion expressed to the Bank of Italy, the Authority emphasised the need to take steps to prevent a dominant position on the relevant markets from being created or strengthened. The Bank of Italy authorised the operation on condition that Cariplo and Carinord did not set up any new branches in the province of La Spezia for a period of five years.

## **13. Insurance services**

### *Agreement in the hail damage crop insurance market*

In 1996, the Authority continued to investigate the hail damage crop insurance market. In 1994 it had taken action against Consorzio Italiano Rischi Agricoli Speciali - CIRAS, which is a mandatory consortium to which virtually all the hail damage insurers belong. It had found that even though recent legislation removing monopoly rights from the market was being honoured, in that several mandatory consortia for this same purpose had been established, the commercial co-ordination of the associated insurance companies' behaviour carried out by CIRAS was thwarting the liberalisation process in the industry, substantially restricting competition in violation of section 2(2) of the Act. The Authority, however, considered that CIRAS should be given a one-year waiver because the restriction on competition seemed to be closely connected with the transitional nature of the statutory situation at the present time.

In 1995 CIRAS had requested the Authority to renew the waiver, on the grounds that it was still waiting for the sector to be reformed. In its April 1996 decision, the Authority firstly pointed out that CIRAS's previous operations had restricted competition without any tangible improvement in the conditions of supply or any substantial benefits to consumers. Furthermore, it stressed that the law governing the hail damage insurance market has changed substantially, since it was no longer requested to

insurance companies to work through mandatory consortia. Therefore, the Authority ruled that there were no reasons for renewing the waiver.

### ***Reconstitution of Ciag***

In March 1997 the Authority completed its investigation into CIAG, a voluntary consortium of hail damage insurance companies, in order to see whether it had concluded agreements restricting competition by co-ordinating the conduct of the member companies relating to central aspects of the insurance business.

The structure of the hail damage insurance market seemed to have changed considerably since the liberalisation that had encouraged two other competitor companies to join CIAG and another operating consortium on the relevant market. Despite this, the CIAG consortium still held a particularly large market share in 1996, accounting for almost 66 per cent of total premiums paid for hail damage insurance.

CIAG introduces itself to the member companies as a "services consortium", supplying at the request of its members, certain services which include the computerised management of all their insurance documents, a loss and damage adjustment service and administrative services for them. The investigation showed that some provisions of the consortium's internal regulations, contributing towards the standardisation of the commercial behaviour of member companies, were in violation of section 2(2) of the Act. Therefore, the Authority required CIAG to change these provisions, but it decided not to impose any fines on it because, since both the consortium's Statute and internal regulations had recently been changed, they had been in force only for a short period of time.

## **14. Recreational, cultural and sports activities**

### ***Agreement between the Association of Italian Booksellers and several book publishers***

The Authority began investigating a protocol agreement concluded in June 1995 between the association of booksellers "Associazione Librai Italiani" (ALI) and the main four publishing companies - with an aggregate market share in excess of 50 per cent of the Italian book market, excluding school text books - to curb the practice of discounting the book cover prices. The agreement required the publishers to stop supplying any books to chain stores which offered price reductions beyond a certain limit and also cancelled any favourable conditions (in terms of discounts, payment terms and the return of unsold books) for any bookshops offering discounts.

To ensure compliance with the agreement, ALI undertook to take disciplinary actions against any of its bookshop members that failed to comply with the pricing conditions imposed under this protocol agreement. The policing of the multiple retailing companies to ensure compliance with the terms of the agreement fell mainly to the wholesale book distribution company, Mach 2 Libri, which was controlled by the four publishing companies with exclusive distribution rights over their own publications through the chain retailing network.

The Authority considered that these agreements substantially restricted competition between the four publishing companies, encouraging the co-ordination of their marketing policies. In particular, the grant to Mach 2 of exclusive rights was likely to remove any form of competition in the supply of the multiple retailing outlets. Furthermore, the agreements in the protocol limiting discounts that retailers might wish to offer prevented competition between the retailers, including small bookshops and the retailing networks.

In the final phase of the proceedings, which were completed in 1996, Associazione Librai Italiani, the four publishing companies and the Mach 2 company cancelled all of the above mentioned

agreements between them and the wholesale distribution companies competing with Mach 2 were no longer denied direct access to the four publishing companies' supplies. Since these anticompetitive practices had been voluntarily removed by the parties before the conclusion of the proceedings, the Authority did not impose any fines upon them.

#### ***Agreement in the school text books market***

In March 1997 the Authority completed its investigations to see whether the market for the printing and sale of school textbooks had been subject to co-ordinated commercial strategies by the publishing companies associated to Associazione Italiana Editori (AIE) in such a way as to constitute an infringement of the ban on agreements restricting competition.

According to the evidence, AIE had set up, starting from the early Eighties, a School Textbook Commission responsible for analysing cost developments in the industry and refer back to its members one month before the new price lists were drawn up by the publishers. As a result of this exchange of information, average cost increases were identified and the percentage price increases for school books were set accordingly, to ensure profitability to all publishers.

The Authority observed that the decisions adopted by AIE were designed to standardise different aspects of the commercial behaviour of member companies, by deciding on the percentages of price increases, determining the price structure and setting the profit margin earned by booksellers. Moreover, AIE's members made up some two-thirds of all the publishing houses operating in Italy, and the publishers following the Association's instructions had more than 70 per cent of the market share for school textbooks. The Authority therefore ruled that the agreements examined had substantially restricted competition on the school textbook market in violation of section 2(2) of the Act.

#### ***Opinion on the adoption of school textbooks***

In June 1996 the Ministry of Education requested the Authority for an opinion regarding the compatibility with Competition Law of a number of measures contained in a Ministerial letter relating to the procedure to be used for the adoption of textbooks in secondary schools. The circular specified that when choosing textbooks it was not only necessary to assess their educational character, such as the quality and comprehensiveness of the contents, but also such factors as the weight (in order to minimise the burden for the carrying students) and the price. In particular, the letter invited teachers to choose less expensive text books having an equivalent educational value, and to drop a particular textbook if the selling price had been raised since its adoption.

In its opinion delivered in July 1996, the Authority firstly emphasised the particular features of the school textbook market. Whereas the list of textbooks for adoption in the schools was drawn up by the teachers, the textbooks were actually purchased by the students. Two different parties were therefore involved in choosing the books and paying for them. This being so, the Authority considered that the provisions of the Ministerial circular induced the teachers to prefer cheaper books, of the same quality, which is exactly what consumers do in terms of their budgetary constraints, without thereby placing any unjustified restrictions on competition. The other provision, namely, to strike off textbooks adopted if the prices were subsequently raised was not considered to be in contrast with competition protection, because teachers were rightly given the possibility to change their original choices if the quality-price mix worsened. The Authority therefore considered that the Ministerial letter did not contain any provisions that unduly restricted competition.

#### ***Exclusive agreement for the use of soccer players' images***

The proceeding, which was completed in October 1996, related to two agreements, concluded in 1992 and 1995, between the Panini Spa company and the Associazione Italiana Calciatori (AIC), the trade

association of the professional soccer players taking part in Italian championships. According to the two agreements, AIC had assigned to Panini the exclusive right to use of the images of the soccer players wearing their team colours by publishing and marketing them on self-adhesive stickers, together with albums for stickers and other published items for collection.

The relevant market, after a thorough analysis, was identified as the soccer players' picture collection market. Assessing the economic impact of the agreements, the Authority noted that, since AIC holds the exclusive right to use the soccer players' pictures in their team colours, it could exercise a substantial market power. Consistently with Community case law, it stated that competition rules apply to the exercise of intellectual property rights. Evaluating that the assignment to one single entity of the exclusive right over the images of soccer players items was not justified by the need to guarantee a full remuneration of any creative effort or of other investments, and considering the very limited effect of the incentives on the parties involved, the Authority ruled that both the 1992 and 1995 contracts were to be considered prohibited agreements under section 2(2) of the Act.

### ***Merger in the horse-race betting market***

In January 1996 Snai Servizi notified the Authority that it intended to acquire control of the Trenno company through the company San Siro, specifically constituted for this purpose. Snai Servizi, to which 281 horse-racing betting shops belong, accounting for about 50 per cent of the total racing betting market, is the carrier for the television signal for horse races to be shown in race betting centres throughout the country. Trenno's main activity is to acquire and manage participations in racecourses, and to organise and run racing events and competitions. The company manages the San Siro and Montecatini Terme racecourses, and possesses minority interests in the companies managing the Roma Capannelle and Pisa San Rossore racecourses.

The Authority focused particularly on the effects of this merger on the horse-race betting market and the market for the organisation and management of horse shows and events. On the horse-racing betting market, Snai Servizi has a 62 per cent share of all bets placed, compared with 20 per cent by Sisal and the remaining 18 per cent by several other companies. As far as the organisation and management of horse shows and events are concerned, the fact that one single company would be able to choose the races to be transmitted by television and at the same time would own two main national racecourses - San Siro and Montecatini - seemed likely to encourage discriminatory behaviours that might interfere with the distribution of the bets.

During the investigation, Snai Servizi notified the Authority that it wished to implement specific measures to limit its ability to make strategic use of the television signal. More specifically, it undertook to lease the broadcasting studios, the direction of the broadcasts and television signal management to a third party characterised by independence and impartiality. The Authority considered that the changes made to the operation with these undertakings by Snai Servizi were sufficient to remove any risks that competition might be restricted as a result of the merger, and therefore closed the proceedings.

### ***Report on the procedures for awarding the management of lottery betting***

In July 1997 the Authority submitted a report to the Minister of Finance relating to the procedures used to assign the management of the Enalotto betting system. Under current practice, the Ministry of Finance was responsible for managing games of skill, football pools and other lottery-type betting systems. It could do it directly, or commission it to other natural or juridical persons. The Authority emphasised the need to interpret this in the light of the latest developments in legislation governing public service contracts under Directive 92/50/EC which Italy had incorporated into national legislation by Legislative Decree No. 157/95.

According to public service contract legislation, when selecting the person or legal entity to which to entrust the management of the Enalotto betting system, the Finance Ministry should have followed an open tendering procedure so that all the interested parties could compete for the service. The Authority expressed the hope that a competitive invitation to tender would be published for the award of that service.

### ***Report on ski coaching***

The subject of the report were the regional and provincial laws and bills relating to ski coaching. The Authority pointed out the distortions to competition caused by provisions imposing territorial limits on ski coaching and the compulsory fees charged by ski instructors. As far as access to the profession was concerned, regional legislation not only required ski instructors to be registered on the regional or autonomous province-authorized list for the territory in which they intended to work, but also made provision for instructors to be struck-off whenever they transferred to the list of another region or autonomous province. In other words, ski instructors could only work on a permanent basis in one single territorial area. This was likely to make it impossible to rapidly match supply and demand conditions, and limiting the territorial mobility of ski instructors could raise entry barriers and ultimately distort the market.

On the subject of the regional laws setting compulsory fees, the Authority ruled that laying down mandatory fees further restricted possible competition between ski instructors. It then suggested that the prices for the services provided by ski instructors should be left to negotiation between the parties, so that users could choose ski instructors on the basis of quality and prices.

### ***Report on the opening of new movie theatres***

This report related to the procedures for the opening up of new movie theatres. It pointed out that the changes recently introduced into the Italian legislation had not completely removed the statutory restrictions on competition in the film theatre market. The law continued to subject the construction, transformation and conversion of buildings to be used as cinemas and arenas for cinematographic entertainment, and the extension of those already in operation, to authorisation from the competent authorities, after ascertaining compliance with certain criteria demand oriented. These included, in particular, keeping a specific ratio between the number of cinemas operating in a particular municipal territory and its resident population, and the guarantee of a minimum distance between one theatre and the next.

The Authority pointed out that a structural regulation on the supply side had no real economic justification and as the market was presently evolving any restriction on the opening of new cinemas or the conversion of those already in operation could only encourage the creation of dominant positions, impeding competition.

### ***Opinion on tour guide services***

In January 1997 the Authority pointed out the restrictions on competition imposed by a number of provisions in regional legislation governing the profession of tour guide, including fee-setting and procedures for obtaining a license to practise.

As far as fees were concerned, in some cases regional legislation laid down both the minimum and the maximum fees, while others only laid down the maximum fees. Most regional authorities set the fees in the form of an administrative measure, after hearing the opinions of the professional associations; in other Regions, however, the fees were laid down directly by the professional associations themselves. With regard to access to the profession, regional legislation provided that the profession should be subject to a license to practise issued by the municipality of residence, after ascertaining certain eligibility criteria

and on the basis of an examination before a regional or provincial commission. Some Regions also made it possible to balance supply and demand at the administrative level in advance.

The Authority emphasised the fact that the only possible reason to justify the regulation of the profession was to guarantee a high quality of service and professional competence by guides. However, minimum fee-setting obviously do not prevent poor quality services from being supplied and maximum fee-setting usually induce the service providers to align their charges to the maximum. Regional legislation requiring prices to be set not by some public authority but directly by the local associations of tour guides would at all events be prohibited as restraint on competition under section 2 of the Act.

With regard to the entry to the tour guide profession, the Authority emphasised that any rapid matching of supply and demand might be jeopardised if examinations for future candidates were not held at brief intervals, above all when market entry was predetermined. Barriers to entry, easing competition pressure, would discourage tour guides to improve the quality and price of their services.

## **15. Other areas of activity**

### *Agreement between advertising agencies*

In December 1996 the Authority completed its investigation into the main associations of advertising, public relations and communications companies (ASSAP, OTEP, AIPAS, ASSODIRECT, ASSOREL and ASP), the Association of companies which purchase advertising services (UPA), and the Federazione Italiana della Comunicazione, to see whether there were any agreements restricting competition designed to co-ordinate prices and tendering.

On price co-ordination, the Authority ruled that the charges set by the associations were prohibited agreements because they were likely to encourage co-ordination between the agencies regarding remuneration for their services. It also reiterated the fact that any agreement designed to set minimum prices constituted a restriction on competition, whether or not the suggested prices were binding.

As far as tendering was concerned, the Authority found evidence of rules of conduct regarding tendering for private users in violation of competition rules, with which the member companies were required to comply. No sanctions were imposed because, being the parties Associations of enterprises, they have no actual turnover.

### *Agreement in the market of security guard services in Sardinia*

In December 1996 the Authority completed an investigation into the four main security guard companies operating in the province of Cagliari which had a market share of over 94 per cent of the security guard services in the Cagliari province, to ascertain possible violations of section 2(2) of the Act.

The evidence that emerged showed that none of these companies had exerted any competitive pressure in tendering for any of the contracts awarded in the period 1990-1995. Over time, it was found that there was a total client stability among the leading security guard companies. Moreover, comparing the invitations to tender for contracts of similar value, the Authority found that for those contracts awarded to other companies, each company had submitted higher bids than those usually charged. Lastly, it emerged that two leading companies, Sicurezza Notturna and Vigilanza Sardegna, when competing against smaller companies, had offered prices below cost to prevent these smaller competitors from being awarded the contracts.

The Authority pointed out that this price-setting conduct could not have been the result of an autonomous choice by the single company. Considering the gravity and the duration of these restrictions

on competition the Authority fined Vigilanza Sardegna and Sicurezza Notturna 1.5 per cent of their turnover, and Sicurvis and Cannas the equivalent of one per cent of their turnover, totalling 476 million lire. The difference in the percentage of the fine was based on the different ways in which these security guard companies had taken part in the agreement.

***Report on regulations regarding the development and printing of photographs***

This report related to a number of statutory obstacles to developing and printing photographic film. The law currently requires a license for developing and printing photographic films. Even shops which do not directly develop and print film themselves but merely collect films for subsequent developing and printing in outside laboratories are required to apply for a license, regardless of the fact that they already possess a standard license for the sale of photographic materials.

The Authority found that the licensing requirement for shops which are not equipped to develop and print photographic material in order to use outside film developing laboratories was a form of public control over market entry, which could not be justified by the pursuit of any general interest.



## JAPAN\*

(1996)

### Executive Summary

The main features of the activities of the Fair Trade Commission of Japan were as follows:

An amendment of the Anti-Monopoly Act (AMA) to strengthen the Fair Trade Commission's organisation and powers was approved by the Diet (Parliament).

This is expected to ensure even more vigorous enforcement of the AMA by the Fair Trade Commission.

The Fair Trade Commission amended its notification regarding the regulation regarding prizes and premiums to clarify and up-date the regulation.

Regarding the abolition of AMA exemption clauses in various laws, the cabinet decided that an omnibus bill would be presented to the Diet for their abolition. This decision was taken in March 1996 as part of the Government's Deregulation Action Plan. The Fair Trade Commission will be in charge of drafting the bill. The same cabinet decision also declared that the remaining exemption clauses would also be thoroughly reviewed. The Fair Trade Commission is expected to play a principal role in the review.

Certain commodities designated by the Fair Trade Commission are exempted from the prohibition by the AMA on resale price maintenance (RPM). The Fair Trade Commission took steps to abolish certain types of exemptions by the end of March 1997. After that, copy-righted works will be the only commodities exempted from the AMA prohibition of RPM. The Fair Trade Commission has begun studies on how to deal with this exemption, and intends to reach a conclusion by the end of March 1998.

It was felt necessary to carry out studies on the present regulations on combinations of enterprises from the viewpoint of achieving more efficiently the aims of the regulations, of lessening the burden on enterprises, and of bringing about harmonisation with international practices. For this purpose, the Fair Trade Commission organised a study group called "The Sub-Committee on the Review of Regulations on Combinations of Enterprises". The group began studies mainly on the procedures for regulating combinations provided for in Chapter 4 of the AMA. The subjects of the study include pre-merger notification procedures, the system of reporting to the Fair Trade Commission on the state of holding of other companies' shares, etc.

The Fair Trade Commission continued to take rigorous measures against AMA violations. In 1996, it took legal measures against 30 cases of such violations. It issued warnings regarding 22 cases. It imposed administrative surcharges on 16 cases, including price cartels and bid-rigging cases. Total surcharges amounted to Y2 572 750 000 (approx. US\$ 22 million).

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\* The original language of this document is English.

The number of merger and acquisition cases notified to the Fair Trade Commission in 1996 was 3 888 (2 420 mergers and 1 468 acquisitions).

The Fair Trade Commission continued to play a major role in the Japanese Government's deregulation efforts. In addition to taking the initiative in abolishing exemptions from the AMA, the Fair Trade Commission organised experts' study groups in such fields as electricity, gas, and domestic air services. The groups are expected to propose basic directions for reform of each field, as considered appropriate from the competition point of view. In December 1996, the Fair Trade Commission organised, jointly with the OECD, an international seminar on the role of competition authorities in regulatory reform.

In 1996, the Fair Trade Commission began research on the actual conditions relating to transactions of photographic film and paper among enterprises concerned. In September, it made public the results of a survey on the activities of Japanese trade associations from the perspective of foreign-owned enterprises.

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

### *Outline of new regulations in competition law and related legislation*

#### *Amendment of the Anti-Monopoly Act*

Japanese competition policy is based upon the Act Concerning Prohibition of Private Monopolisation and Maintenance of Fair Trade (law No. 54 of 1947, hereafter the Anti-Monopoly Act); the Act against Delay in Payment of Subcontract Proceeds, etc., to Subcontractors (law No. 120 of 1956, hereafter the Subcontracting Act); the Act against Unjustifiable Premiums and Misleading Representations (law No. 134 of 1962, hereafter the Premiums and Representations Act).

Within the period of this report, the Anti-Monopoly Act was amended in June 1996 to strengthen the organisation of the Fair Trade Commission. As a result of this amendment aimed at a fundamental strengthening of the staff office organisation, the former Executive Office was replaced by a General Secretariat, which consists of a Secretariat, an Economic Affairs Bureau and an Investigation Bureau. Also, under the Economic Affairs Bureau, a Trade Practices Division was established; and under the Investigation Bureau, a Special Investigation Department was established. Further, in order to appoint people from a wider sphere, the retirement age of the Chairman and the Commissioners was raised from 65 to 70 years.

#### *The review of regulations on premiums and prizes*

The Fair Trade Commission has decided to revise and clarify the regulations on premiums and prizes from the viewpoint of promoting fair competition in the Japanese market. The Fair Trade Commission made public in June 1995 a draft outline of amendments to the regulations, and invited comments from various sectors of Japanese society. In December 1995, the Fair Trade Commission publicised a draft text of amendments to the notifications and guidelines regarding the regulations on premiums and prizes, and held hearings to which were invited scholars, experts, consumers and entrepreneurs concerned. Based on these hearings, the Fair Trade Commission finalised the text of the amendments. In February 1996, the amendments were announced in the official gazette. The amendments have been in force since April 1, 1996. The main points of the amendments are as follows:

The upper limit of premiums offered by lotteries or prize competitions was raised from Y50 000 to Y100 000, and in the case of lotteries jointly held by stores in an area, the amount was raised from Y200 000 to Y300 000.

The upper limit of Y50 000 on premiums offered to purchasers and shoppers, excluding those offered by lotteries or prize competitions, was abolished.

The notification concerning premium offers to firms was abolished.

Premium offered by department stores were subjected to the same regulations as premium offers by general retailers, by deleting the specific rule on unfair trade practices by department stores.

The maximum amount for open lotteries was raised from Y one million to Y ten million.

In order to reduce and clarify the scope of application of premium regulations, the related guidelines were revised.

*Proposal of new legislation*

*Revision of exemptions from application of the Anti-Monopoly Act*

The Anti-Monopoly Act, generally, prohibits cartels involving firms or trade associations. Some cartels, however, are exceptionally permitted under conditions prescribed by relevant laws. In the formation of cartels that are exempted from application of the Act, as a general rule, approval from or notification to the Fair Trade Commission or the relevant Ministers, is necessary.

Historically, these exemptions were introduced from the late 1940s to the 1960s, to attain such policy objectives as the development of industry, the stability of corporate management and maintenance of employment. However, due to changes in the economic situation in Japan, the necessity for such exemptions has markedly decreased. .

There are three types of exemptions: i.e. .

- those based on the Anti-Monopoly Act itself;
- those prescribed in the Anti-Monopoly Act Exemption Act; and
- those that are stipulated in individual laws (laws other than the two Acts mentioned above).

In the Deregulation Action Plan, adopted by the Cabinet in March 1995, it was decided to review exemptions from the Anti-Monopoly Act under individual laws with a view to abolishing them in principle by the end of FY 1998, and to forming a definite conclusion on the matter by the end of FY 1995. The exemptions under individual laws amount to 47 systems based on 28 laws as of the end of March 1996 (see Appendix 1).

As a result of reviewing these exemptions, the following decision has been made: 33 systems will either be abolished or amended by the end of FY 1998; the scope of four systems will be limited by the end of FY 1998; and an ongoing review will be effected of ten systems. It was decided that in order to realise the abolition of exemptions, an omnibus bill would be presented to the Diet (Parliament). (March 1996 Cabinet Decision on the Revised Deregulation Action Plan).

Furthermore, with regard to other exemption systems (categories 1 and 2 above), it was decided that the necessary review will continue to be conducted and that a final conclusion will be reached as soon as possible. (March 1996 Cabinet Decision on the Revised Deregulation Action Plan).

*Revision of the exemption system for resale price maintenance*

Regarding exemptions on resale price maintenance (RPM), successive Cabinet decisions have announced a policy of reviewing such exemptions. Based on this policy, the Fair Trade Commission has taken the following review measures:

*Abolition of the RPM exemption on designated products*

There are certain commodities designated by the Fair Trade Commission as commodities exempted from the prohibition of RPM. At present, 14 items of non-prescription medicine for general use and 14 items of cosmetics with a price of lower than Y1 030 are listed as designated items. Currently, the Fair Trade Commission is conducting research as to the actual situation concerning these items. In FY 1996, the Fair Trade Commission intends to take measures, in line with the Revised Deregulation Action Plan, in order to abolish the exemptions on all of these items. The abolition is scheduled to take effect by the end of March 1997.

*Dealing with copy-righted works exempted from the RPM prohibition*

The Fair Trade Commission has organised a Sub-Committee to Study RPM-related Problems under the Study Group on Government Regulations and Competition Policy. This Sub-Committee is studying how best to deal with copy-righted works which are exempted from the RPM prohibition of the Anti-Monopoly Act. The study has been carried out mainly from the theoretical point of view. The Sub-Committee issued an interim report on the matter in July 1995. At the same time, the Fair Trade Commission issued a report on the actual situation concerning the distribution of copy-righted works.

After the interim report was published, opinions were expressed by many segments of the population. At present, public hearings from related sectors are being effected. Also, studies are being carried out on trading practices and the actual situation regarding transactions within related sectors, with a view to clarifying these issues. After completion of the studies, the Study Group on Government Regulations and Competition Policy is to review the matter. The conclusion by the Fair Trade Commission is expected to be reached by the end of March 1998.

*Revision of the regulation on combinations of enterprises*

In the Revised Deregulation Action Plan, adopted by the Cabinet on 29 March 1996, the following policy was announced: regarding pre-notification of mergers and acquisitions, reporting on the state of share-holding of other companies, and reporting on interlocking directorates, several modifications will be introduced from the viewpoint of achieving more efficiently the aims of such procedures, of lessening the burden on enterprises, and of bringing about harmonisation with international practices. The modifications are expected to include the introduction or raising of a minimum threshold for notification and reporting.

In June 1996, the Fair Trade Commission organised a Sub-Committee on the Revision of Regulations on Combinations of Enterprises under the Study Group on Issues relating to Chapter 4 of the Anti-Monopoly Act. This Sub-Committee is carrying out studies on the procedures stipulated in Chapter 4, such as pre-merger notifications, the reporting of share-holdings, etc.

*Other related measures**Expansion and strengthening of investigation system*

In order to strengthen investigation capability, an Investigation Bureau was newly established and under this a Special Investigation Department was established. Two investigation units have been added to some of the local offices of the Fair Trade Commission. The number of officials engaged in investigation increased from 220 in FY 1995 to 236 in FY 1996. The above-mentioned expansion of the organisation and of the number of personnel involved in investigation is all the more remarkable considering the very rigorous efforts being made to reduce the budget in all government agencies. Regarding the number of investigation staff, this increased from 129 in FY 1989 to 236 in FY 1996 (see Appendix 4).

*Dissemination of guidelines*

In order to enforce the Anti-Monopoly Act effectively, transparency of enforcement is of crucial importance. This will enable entrepreneurs and consumers to understand the purpose of the Anti-Monopoly Act, the contents of the regulations, and the policies of implementation. On this basis, the Fair Trade Commission has been making efforts to formulate and publish various guidelines regarding the specific matters dealt with by the Anti-Monopoly Act.

In formulating guidelines, the Fair Trade Commission makes it a policy to elicit opinions on draft guidelines from related authorities, consumers, entrepreneurs, and associations both inside and outside Japan. In some cases there is provision for a system of consultations. Even in the case where there is no such provision, the Fair Trade Commission has willingly engaged in consultations with parties concerned.

The Fair Trade Commission has made efforts to make the Guidelines on Trade Associations better known among the people concerned. The Guidelines were drastically modified in October 1995. Also, in FY 1996, the Fair Trade Commission made public cases in which it had given advice relating to activities of trade associations and major cases of corporate combinations which had taken place in 1995.

**2. Enforcement of competition law and policy***Measures against violations**Investigation*

The number of cases that the Fair Trade Commission investigated in 1996 was as follows:

-- carried over from the previous year	78
-- newly taken up in 1996	132
<b>total</b>	<b>210</b>
-- investigation completed	144
-- carried over to the next year	66
<b>total</b>	<b>210</b>

The Fair Trade Commission has been making major efforts to eliminate bid-rigging. In 1996, the number of cases in which the Fair Trade Commission took measures was 30, out of which 15 cases involved bid-rigging. The Fair Trade Commission will continue to pay special attention to bid-rigging. In

order to set up a co-ordinative relationship with the commissioning agencies, the Fair Trade Commission organised the 4th meeting of liaison officers on the bid-rigging problem in September 1996. The local offices of the Fair Trade Commission also organised liaison officers' meetings and seminars for the officers in charge of tenders. The Fair Trade Commission also helped the commissioning agencies to organise anti-bid-rigging seminars by sending lecturers and helping to compile texts.

The Fair Trade Commission considers it particularly important that Anti-Monopoly Act violations be eliminated in those economic sectors where government regulations are still influential, because such violations could nullify the benefits of deregulation. Accordingly, the Fair Trade Commission has been paying special attention to the economic fields where regulations play a dominant role. It was found that the trade association of road haulage companies decided to increase the transportation fees charged by its members. The association then let its members notify the increases to the government authority in charge. In February 1996 the Fair Trade Commission issued in a decision against such activities for being violations of the Anti-Monopoly Act. The Fair Trade Commission also found that a public testing organisation for food for patients in hospitals and a related entrepreneur worked together to monopolise the market. The Fair Trade Commission issued a decision against such activities in May 1996. It also issued warnings against anti-competitive practices in the fields of taxi and air transport.

*The situation regarding measures*

Of the 144 cases for which the Fair Trade Commission completed investigations, cease and desist orders were issued in 30 cases; in 26 cases, recommendation decisions were issued. In the remaining four cases, orders to pay surcharges without a recommendation decision were issued. In addition, warnings were issued in 22 cases where Anti-Monopoly Act violations were suspected, but not substantiated.

*Legal measures*

The breakdown of the 30 instances in which legal measures were taken is as follows:

Private Monopolisation	1
Bid-rigging	15
Price Cartels	7
Unfair Trade Practices	2
Others	5

Trade associations were involved in eight of the 30 above cases.

*Orders to pay surcharges*

The Anti-Monopoly Act provides that when cartels are formed by entrepreneurs or trade associations, surcharges will be levied in the following cases:

- those related to prices of products or services; and
- those that affect prices of products or services through restricting the volume of supply.

The amount of surcharge is calculated by multiplying the amount of sales during the period of the cartel by a certain percentage. In the case of trade associations, the surcharges are levied on the entrepreneurs constituting the association. In 1996, the Fair Trade Commission issued surcharge payment orders to 321 entrepreneurs involved in 16 cases of price cartels and bid-rigging. The total amount of surcharges was Y2 572 750 000. (approx. US \$23 400 000)

*Criminal accusation*

The Fair Trade Commission adopts a policy to actively bring accusations in order 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-riggings, and boycotts which:

- constitute serious violations that are likely to have a widespread influence on people's lives; or
- 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 Fair Trade Commission are not considered to fulfil the aims of the Anti-Monopoly Act.

In accordance with the above-mentioned policy, in March and June 1995 the Fair Trade Commission filed criminal accusations with the Prosecutor General against nine electrical equipment manufacturers, including Hitachi, Ltd., Toshiba Corporation, Mitsubishi Electric Corporation, etc. that had used bid-rigging for tenders commissioned by the Japan Sewage Works Agency. In May 1996, the Tokyo High Court issued a judgement against those nine companies, which has been finalised. In this judgement, the nine companies, 17 individual offenders belonging to the companies, as well as one official of the above-mentioned Agency who aided those offences, were judged guilty. According to the High Court judgement, the total fines imposed on the nine companies amounted to Y460 million (approx. US \$4.1 million). The individual offenders were sentenced to ten months' imprisonment suspended for two years, and the official who aided was sentenced to eight months' imprisonment suspended for two years. Apart from the fines imposed on the companies, the Fair Trade Commission has ordered payment of surcharges by those nine companies amounting in total to Y1 036 million (approx. US \$9.2 million).

#### *Hearing procedures*

In 1996, the Fair Trade Commission started a hearing procedure (quasi-judicial procedure under the Anti-Monopoly Act) for one case that involved a price cartel formed for the supply of guard-rails. In the same year, the Fair Trade Commission issued decisions, after hearing procedures, on the following six cases:

- a case regarding a surcharge payment order by the Fair Trade Commission against a cartel on prices of paint thinner for ships and of paint itself.;
- a case regarding the restriction of trade in gasoline, light oil and kerosene by a trade association;
- a case regarding a surcharge payment order by the Fair Trade Commission against a cartel on the price of layered sheets made of paper, phenol and copper (parts of electronic appliances); and
- three cases regarding bid-rigging of seal-papers commissioned by the Social Security Agency to be used for its payment notices.

Regarding a case for which the hearing procedure was on-going (a case regarding a price cartel for corned beef), a consent decision was issued. The number of cases for which the hearing procedure is ongoing is seven, as of the end of December 1996.

#### *Main cases*

The main cases in which the Fair Trade Commission took legal measures during 1996 are as follows:

*Case against a sole agent for porcelain tableware*

Hoshi Co., Ltd. is the sole agent of Herend porcelain tableware in Japan. The company was found to have unreasonably obstructed transactions between Japanese parallel importers and Herend's sole agents abroad. The Fair Trade Commission issued a recommendation on February 29, 1996, to eliminate the acts, which violated Section 19 (unfair trade practices) of the Anti-Monopoly Act. A recommendation decision was rendered on 22 March 1996.

*Case against bid-rigging by department stores regarding goods purchased by the Tokyo Metropolitan government*

The Tokyo Metropolitan Government and public foundations affiliated to it have been commissioning tenders from department stores for the purchase of gift items, clothes, furniture, goods for disaster prevention etc. Tokyo Department Store Co., Ltd. and twelve other department stores conspired to nominate the winners of tenders and made arrangements to ensure that the nominated persons won the tenders. On March 28, 1996, the Fair Trade Commission issued a recommendation to those department stores to eliminate the acts, which violated the latter half of Section 3 (unreasonable restraint of trade) of the Anti-Monopoly Act. A recommendation decision was rendered on April 23, 1996.

*Case against a sole agent for pianos*

Matsuo Musical Instrument Trading Co., Ltd. is the sole agent of Steinway Pianos in Japan. The company was found to have unreasonably obstructed transactions between its competitors (parallel importers of the pianos) and their trading partners (sales agents of the Hamburg branch of Steinway Piano Company). The Fair Trade Commission issued a recommendation on April 5, 1996, to the effect that the company eliminate the acts, which violated Section 19 (unfair trade practices) of the Anti-Monopoly Act. A recommendation decision was issued on May 8, 1996.

*Case against suppliers of medical food*

Under Japan's health insurance system, hospitals are entitled to an additional allowance on top of ordinary allowances for supplying food to in-patients when the nutritional elements of such food have been analysed and examined by a certain body designated by the Government. Under such a situation, the public foundation designated by the government (Japan Medical Food Foundation) and a major dealer in medical food (Nissin Medical Food Co., Ltd.) conspired to exclude those entrepreneurs who wanted to enter into the market of medical food. They also restricted medical food manufacturers' selection of purchasers of their products, as well as medical food dealers' selection of suppliers and purchasers. In such a way, those two bodies were found to have controlled the business activities of those entrepreneurs. The Fair Trade Commission issued a recommendation on April 9, 1996, to those two bodies to eliminate the acts, which violated the first half of Section 3 (private monopolisation) of the Anti-Monopoly Act. A recommendation decision was rendered on 8 May 1996.

*Case against Maruzen Co., Ltd. and six others*

Tsukuba University and five other national universities have been purchasing foreign books on a voluntary contract (contract without tenders) basis from specifically designated companies including Maruzen Co., Ltd. and six other companies. Those seven companies were found to have conspired to fix the minimum rate of mark-up (an amount allegedly corresponding to distribution cost) in determining particular exchange rates between the Japanese Yen and six foreign currencies. The Fair Trade Commission issued on April 26, 1996, a recommendation to those seven companies to eliminate these acts, which violated the latter half of Section 3 (unreasonable restraint of trade) of the Anti-Monopoly Act. A recommendation decision was rendered on May 31, 1996.



*Case against dealers in X-ray film for medical use*

Kyushu University Hospital and other four medical institutions have been purchasing X-ray film for medical use through international tenders, etc. Chiyoda Medical Co., Ltd. and three other companies were found to have conspired to determine the winner of the tender and to fix the minimum price for the tender. The Fair Trade Commission issued a recommendation on December 4, 1996, to those companies to eliminate the acts, which violated the latter half of Section 3 (unreasonable restraint of trade) of the Anti-Monopoly Act. Also, Shinshu University Hospital has been purchasing X-ray film for medical use through international tenders, etc. Shinetsu-Wakita Co., Ltd. and three other companies were found to have conspired to determine the winner of the tender and to fix the minimum price for the tender. The Fair Trade Commission issued a recommendation on December 4, 1996, to those companies to eliminate the acts, which violated the latter half of Section 3 (unreasonable restraint of trade) of the Anti-Monopoly Act.

*Judicial proceedings**Case against a Fair Trade Commission decision raised by Tokyo Mochi Co., Ltd.*

In March 1993, the Fair Trade Commission issued a cease and desist order against Tokyo Mochi Co., Ltd., whose representation of the quality of its rice cake printed on the package violated Item 1 of Section 4 of the Premiums and Representations Act. Since the company rejected the recommendation, a hearing procedure was instituted. Upon completing the procedure, the Fair Trade Commission issued a decision similar to the above-mentioned cease and desist order. The company rejected the decision and brought the matter to the Tokyo High Court to repeal the decision. The Court issued a judgement on March 29, 1996, dismissing the claim of the company. The company made an appeal on April 12, 1996, to the Supreme Court.

*New Case against a Fair Trade Commission decision raised by Dai-Nippon Printing Co., Ltd. and two others*

In March 1993, the Fair Trade Commission issued a surcharge payment order to Dai-Nippon Printing Co., Ltd. and two other companies for committing bid-rigging in relation to tenders commissioned by the Social Security Agency to procure seal-papers to be used for the Agency's payment notices. Since those three companies rejected the order, a hearing procedure of the Fair Trade Commission was instituted. Upon completion of the procedure, the Fair Trade Commission issued a decision similar to the above-mentioned order. The three companies rejected the decision and brought the case to the Tokyo High Court in August and September 1996.

*Pending cases seeking damages based on Section 25 of the Anti-Monopoly Act*

As of the end of 1996, there is one pending case seeking damages based on Section 25 of the Anti-Monopoly Act. No new case of this nature was brought to court in 1996.

***Mergers and acquisitions****Statistics relating to mergers and acquisitions*

According to Sections 15 and 16 of the Anti-Monopoly Act, all planned mergers and acquisitions of businesses have to be notified to the Fair Trade Commission in advance. The Fair Trade Commission examines the content of the notifications. If a planned merger or acquisition is found likely to substantially restrict competition, the Fair Trade Commission is empowered to prohibit it. In 1996, 2 420 planned mergers were notified to the Fair Trade Commission in accordance with Section 15 of the Anti-Monopoly Act, and 1 468 planned acquisitions of businesses, in accordance with Section 16 of the Anti-Monopoly Act.

Number of Notified Mergers and Acquisitions			
	FY 1994	FY 1995	FY 1996
Mergers	1 983	2 262	2 420
Acquisitions	1 224	1 426	1 468
Total	3 207	3 668	3 888

In 1996, there was no case in which the Fair Trade Commission took legal measures against planned mergers or acquisitions.

In Japan, when a proposed merger may raise concerns under the Anti-Monopoly Act, it is normal practice for the parties concerned to consult with the Fair Trade Commission before filing the merger notification. The Fair Trade Commission closely examines the case to see if it involves a possible violation of the Anti-Monopoly Act. If the Fair Trade Commission 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 Anti-Monopoly Act.

***Major cases of mergers***

Major cases of mergers in 1996 were as follows:

*Merger between the Mitsubishi Bank Co., Ltd. and the Bank of Tokyo Co., Ltd.*

A merger was planned between the Mitsubishi Bank Co., Ltd. and the Bank of Tokyo Co., Ltd. If the merger is effected, the new bank's share among banks with nation-wide operations would be 14.2 percent in terms of deposits and 14.7 percent in terms of lending; it would rank No. 2 among such banks. In terms of the number of branches, it would rank No. 4. The merger would unite a bank (the Bank of Tokyo) having rich human resources and know-how in the field of foreign exchange businesses with one of the highest ranking banks with nation-wide operations (the Mitsubishi Bank). This could lead, among others, to a marked increase in the share of the new bank in foreign exchange business.

Regarding the proposed merger, the Fair Trade Commission considered that it would not necessarily lead to substantial restriction of competition in the relevant market for the following reasons:

- market share would not exceed 15 percent both in terms of deposit and lending. The difference in market share between the new bank and the bank ranking third would only be two percent;
- no extraordinary increase in share in specific geographical areas is expected;

- the share of the new bank in the foreign exchange businesses in Japan is less the 15 percent in terms of both inter-bank transaction and transaction with customers. Moreover in the field of foreign exchange transactions, the extension of business hours of foreign exchange markets as well as the development of communication technology will lead to increased interactions between the Tokyo market and overseas markets. This will heighten global competition in the businesses.

*Merger between the New Oji Paper Co., Ltd. and the Honshu Paper Co., Ltd.*

This is a proposed merger between a leading paper manufacturer (the New Oji Paper) and a leading cardboard manufacturer (the Honshu Paper). Few problems arose since this was a merger between manufacturers of different kinds of products. However, there were certain points to be considered such as:

- the share of medium grade products among non-coated printing papers would be 33.4 percent and therefore the highest;
- the new company would own a large percentage of the shares of the leading paper distributors: i.e., 21.4 percent of the shares of the Nippon Paper & Pulp Trading Co., Ltd. which is the largest company in paper distribution, and 34.1 percent of the shares of the Daiei Paper Trading Co., Ltd. which is the second largest. The new company would be the No. 1 shareholder of those two companies.

With regard to this case, the parties of the merger offered the following:

- a larger portion of the facility currently used for producing medium grade printing paper would be used for producing other kinds of paper;
- the new company would sell some of its shares of the two above-mentioned paper distributing companies within five years so that its shares would be similar to those of the second largest shareholders.

The Fair Trade Commission decided that taking into consideration the relevant elements, including the above-mentioned offers, the merger would not necessarily lead to a substantial restriction of competition in the relevant market.

### **3. The role of competition authorities in the formulation and implementation of other policies- Recent moves to review government regulations**

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). However, as a result of major changes in the economy and other circumstances occurring since they were introduced, some of these objectives have lost their *raison d'être*. It may also be the case that government regulations and the exemption systems of the Anti-Monopoly Act sometimes obstruct economic vitality and efficiency.

The Fair Trade Commission has reviewed government regulations from the viewpoint of competition policy in the medium- to long-term. In accordance with the recommendations of the OECD Council in 1979, the Fair Trade Commission first published its views on this issue in 1982 on the basis of factual surveys conducted. Since then the Fair Trade Commission has requested the ministries and agencies concerned to review their respective systems.

The Fair Trade Commission has been carrying out a number of research activities on the issue of government regulations and issues related to competition policy. Since 1985, the Fair Trade Commission has organised a study group composed of scholars and experts and entrusted to the group the examination on the results of the above-mentioned Fair Trade Commission's research. The contents of this examination have been published in successive reports of the group. The Fair Trade Commission has paid due attention to the views expressed in those reports, and has worked with relevant government ministries towards a review of the regulations concerned. As of January 1997, the study group has been working on the sectors of electricity, town gas, and domestic air transportation.

It is indispensable that, even in deregulated industries, effective competition be brought about. The Fair Trade Commission is making efforts to find out the actual effects of deregulation in those industries as well as remaining problems in the industries. It is also important to make sure that when government agencies resort to administrative guidance, free and fair competition is not hindered, and acts violating the Anti-Monopoly Act are not triggered. For this purpose, the Fair Trade Commission published in June 1994, its Views Based on the Anti-Monopoly Act regarding Administrative Guidance. In the Revised Deregulation Action Plan adopted in March 1996, it was decided that ministries concerned should fully bear in mind the above-mentioned Views and enter into consultation in advance, when necessary, with the Fair Trade Commission so that government regulations are not replaced by anti-competitive administrative guidance.

***Fair Trade Commission-OECD joint seminar on the role of competition authorities in regulatory reform***

On December 3, 1996, a seminar on the role of competition authorities in regulatory reform was jointly organised by the Fair Trade Commission and the OECD. Participants from overseas included Prof. Frédéric Jenny, Chairman of the Committee on Competition Law and Policy of the OECD, and other distinguished experts on competition policy. From the Japanese side, were representatives of the Federation of Economic Organisations of Japan, the Administrative Reform Committee, the Fair Trade Commission, and the Ministries of Foreign Affairs and International Trade & Industry. Active and informal discussions centred on ways for competition authorities to contribute to regulatory reform and through it to the promotion of competition. The main points of the discussions were as follows:

- both the abolition of exemptions from competition laws and the vigorous enforcement of competition laws are indispensable if regulatory reform is to succeed. Without vigorous competition law enforcement, regulatory reform could decrease efficiency;
- competition authorities should stress to regulatory authorities the need to reform anti-competitive regulations, and should present proposals for the promotion of competition.

Moreover, competition authorities should be in a position to review the laws and regulations which contain anti-competitive provisions. They should also stimulate public debate by making their views public through issuing reports, etc.

***Surveys related to competition policy***

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 a view to examining transactions among firms in individual industries from the perspective of competition policy, the Fair Trade Commission, since 1990, has been conducting surveys of Japan's major industries regarding transactions among firms from the viewpoint of competition policy (see Appendices 2 and 3).

*Survey on the actual situation regarding transactions among firms in the photographic film and paper market*

In April 1996, the Fair Trade Commission began a survey on the actual situation regarding transactions among firms in the photographic film and paper market. The markets concerned are oligopolistic, and long-standing trade relationships are observed there. They are attracting considerable attention from both inside and outside Japan. These are the reasons for conducting this survey.

*Survey on the activities of Japanese trade associations from the perspective of foreign-owned enterprises*

The survey was aimed at finding out how companies of foreign origin in Japan are involved in the activities of the relevant trade associations, and what problems exist in relation to the business of the companies in this respect.

The results of the survey indicate that the openness, non-discrimination, and transparency of the trade associations' activities has increased. However, on the part of government agencies, there is a tendency to use trade associations as an easy way to convey information for the purpose of achieving administrative objectives. Among the Anti-Monopoly Act violations by trade associations established in individual industries, those committed in connection with governmental regulations or administrative actions represent a high proportion. Hence, in order to prevent such violations by trade associations, it is necessary that not only trade associations themselves but also administrative authorities take necessary steps. The Fair Trade Commission is going to make efforts to make the Trade Association Guidelines and other guidelines better known among the general public, and also to make the administrative authorities concerned fully understand the essence of the Anti-Monopoly Act.

*Appendix 1*

***Revision of exemptions from application of the Anti-Monopoly Act***

*Exemption systems to be abolished by the end of FY 1998: 33 systems*

Ministry of Finance

Law Concerning Foreign Insurance Groups

- insurance cartels

Securities Investment Trust Law

- acquisition or possession of shares by companies with entrusted assets
- Law Concerning Liquor Business Associations and Measures for Securing Revenue from Liquor Tax
- cartels to prevent excessive competition
- rationalisation cartels
- resale price maintenance contracts

Tobacco Cultivator's Union Law

- economic business by co-operatives

Ministry of Health and Welfare

Law Concerning Co-ordination and Improvement of Hygienically Regulated Business

- special contracts

Ministry of Agriculture, Forestry and Fisheries

Sericultural Industry Law

- price cartels of cocoons

Law Relating to Promotion of the Export Business of principal raw Fisheries Products

- purchase cartels of material
- cartels to prevent export competition
- certain activities by designated organisations

Law on Co-operatives for Fisheries Production Adjustment

- cartels to adjust hauls of fish

Law relating to Stabilisation of Sugar Price

- designated cartels

Law of Production of Fruit Agriculture

- cartels on trading of materials for processed fruits

Temporary Measures Law for Adjustment of Pearl Culture

- cartels to prevent excessive competition
- cartels to improve and maintain quality
- cartels to restrict production facility

Wholesale Market Law

- mergers and acquisitions among wholesalers
- cartels to prevent excessive competition

Law of Special Measures for Rebuilding the Fisheries Industry

- plan to reduce number of fishing vessels

Ministry of International Trade and Industry

Export-import Trading Law

- cartels on domestic trading of exports by exporters and exporters' trade associations
- cartels on domestic trading of exports by producers and distributors
- cartels on import by importers and importers' trade associations
- cartels on domestic trading by importers and importers' trade associations
- cartels for adjustment of export and import by exporters, importers and export-import trade associations
- activities by trade unions
- activities by designated organisations

Laws Relating to Organisation of Small- and Medium-Sized Business Associations

- special contracts

Law on Co-operatives for the Promotion of Shopping Areas

- economic business by co-operatives

Ministry of Transport

Maritime Transportation Law

- port-related cartels
- Port Transportation Business Law
- port-related cartels

Warehousing Business Law

- warehousing cartels

Automobile Terminal Law

- transportation cartels

Freight Automobile Transportation Business Law

- transportation cartels

*Exemption systems of which the scope of application will be reduced by the end of FY 1998: four systems*

Ministry of Finance

Insurance Business Law

- insurance cartels

Ministry of Transport

Maritime Transportation Law

- Maritime transportation cartels

Road Transportation Law

- Transportation cartels

Civil Aeronautics Law

- Aviation cartels

*Exemption systems the review of which will be continued: ten systems*

Ministry of Justice

Co-operation Reorganisation Law

- acquisition of shares of companies under rehabilitation



Ministry of Education

Copyright Law

- cartels on fees for commercial usage of music records

Ministry of Health and Welfare

Law Concerning Co-ordination and Improvement of Hygienically Regulated Business

- cartels to prevent excessive competition

Ministry of International Trade and Industry

Export-import Trading Law

- cartels on exports by exporters and exporters' trade associations

Law Relating to Organisation of Small- and Medium-Sized Business Associations

- business stability cartels
- rationalisation cartels
- Economic business by co-operatives

Law on Investment Companies for the Development of Small- and Medium-Sized Companies

- underwriting and possession of shares of small- and medium-sized companies

Ministry of Transport

Coastal Shipping Association Law

- coastal shipping cartels
- joint shipping businesses

*Appendix 2*

*Surveys and Reports Relating to Competition Policy Made Public in 1996*

- January: Interim report on the examination of measures relating to deregulation
- February: Statement on the commencement of a survey on the actual situation regarding transactions among firms in the photographic film and paper market
- March: Statement on active development of competition policy together with the Revised Deregulation Action Plan
- May: Report on trends in mergers, acquisitions of business, etc. in FY 1995
- May: Report on the major cases of corporate combinations in FY 1995
- June: Survey on the distribution system and business practices for chilled drinking water, processed meat products and women's clothing
- June: Survey on transactions of materials and equipment for construction of houses
- July: Report on the advisory cases relating to activities of trade associations in FY 1995
- September: Survey on the activities of Japanese trade associations from the perspective of foreign-owned enterprises
- November: Survey on the supply of goods bearing the brand of large-scale retailers

*Appendix 3*

*No. 24, March 1996*

- Handling of Copyrighted Works under the Resale Price Maintenance System
- Regarding the Publication of the Antimonopoly Act Guidelines concerning Activities of Trade Associations
- Issues relating to Competition Policy in the Telecommunications Industry

*No. 25, October 1996*

- On Recent Investigations
- Trends of Mergers, etc., in Fiscal Year 1995
- Major Cases of Corporate Combinations in Fiscal Year 1995

*No. 26, November 1996*

- Strengthening the Structure of the Fair Trade Commission of Japan - The Implementation of the General Secretariat System and Priority Issues
- Precedents for Consultations on Unfair Trade Practices
- Committee on Competition Law and Policy Annual Report on Developments in Japan (January - December 1995)

*No. 27 December 1996*

- Report Concerning the Activities of Japanese Trade Associations from the Perspective of Foreign-owned Enterprises
- Guidelines for Notification Concerning Designation of Premiums, etc.

*Appendix 4*

**Trends in the Number of Officials and the Budget of the Fair Trade Commission**  
**Trends in the number of officials of the General Secretariat of the Fair Trade Commission (sunit: persons)**

Fiscal Year	1989	1990	1991	1992	1993	1994	1995	1996
Number of officials	461	474	478	484	493	506	520	534
Number of officials engaged in investigation	129	154	165	178	186	203	220	236

(Note) Up to FY 1995, the secretariat office was called the General Executive Office.

**Trends in the budget of the Fair Trade Commission (unit: Y100 million; %)**

Fiscal Year	1989	1990	1991	1992	1993	1994	1995	1996
Budget for the Commission								
--Budget amount (Y100 million)	35.2	37.6	40.8	44.1	46.2	52.4	52.4	53.8
--Change over previous year (%)	8.4	6.7	8.6	7.9	4.9	13.4	-0.1	2.7
General Expenditures Budget								
--Change over previous year (%)	3.3	3.8	4.7	4.5	3.1	2.3	3.1	2.4

Notes:

1. In the FTC budget for FY 1994, costs of relocation of offices were included (Y230 million).
2. General Expenditures Budget refers to the total budget of the Japanese Government and is the amount of General Account Budget Expenditures less National Debt Service and Local Allocation Tax Grants.

## KOREA\*

(1996)

### Summary

The government of the Republic of Korea has reinforced its role of competition advocacy by strengthening the Fair Trade Commission as an organisation. To be more specific, the chairman of the commission has been appointed as head of the Economic Regulatory Reform Committee, which places him in full charge of regulatory reform. Therefore, the Fair Trade Commission's role has become stronger from an indirect role of improving anti-competitive laws and decrees to a direct competition stimulation role covering the entire economy.

The reason that the Fair Trade Commission has been placed in charge of regulatory reform is that since the commission does not oversee a certain industry, it can hold a neutral position in regulatory reform efforts. Moreover, the cabinet felt that the original role of the commission-competition advocacy was closely related to regulatory reform, placing the Fair Trade Commission in a position in to most effectively pursue regulatory reform. In the first half of 1997, the Fair Trade Commission identified 28 tasks in eight sectors which called for urgent reforms due to their restraints on business activities. To give a few examples, the commission relaxed restraints on entry to energy markets, including electricity and gas, which were widely acknowledged as natural monopolies, and introduced competition. Also, the commission eased regulations relating to the procurement of funds by firms, including restraints on the issuance of corporate bonds. Moreover, with a view to reducing costs in firms, the commission intends to integrate the numerous regulatory impact assessments, such as those for environment, transportation, population, disaster, and scenery, and unify them into one regulatory impact assessment. Furthermore, the commission improved various policies relating to the quality evaluation and certification as well as regulations pertaining to the business activities of trade associations. In 1996, the Fair Trade Commission revised its competition law--the Fair Trade Act--and revised its enforcement decree in the first half of 1997. Through such revisions, the commission strengthened its authority to correct anti-competitive provisions in various laws and decrees; improved monopolistic and oligopolistic market structures; enhanced the efficiency of policies designed to alleviate economic concentration; and sought general improvement in policies relating to business combination. At the same time, the commission reinforced sanctions against undue collaborative acts and unfair business practices by improving means of imposing surcharges and strove to raise the efficiency of operation by adopting the subcommittee system.

In 1996 alone, the Fair Trade Commission made impressive achievements by enforcing the Fair Trade Act. They included prohibiting abuse of market-dominating position, correcting undue collaborative acts, examining anti-competitive business combinations, rectifying unfair business practices and unfair representations and advertisements.

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\* The original language of this document is English.

## **1. Major changes in the Competition Law and policy of Korea**

### ***Reinforcement of competition advocacy role***

In March 1996, the role of the Fair Trade Commission was strengthened following the elevation of the status of the chairman of the commission to ministerial level. Moreover, In August 1997, the commission's role in government efforts to pursue regulatory reform in the economy grew. Furthermore, the commission underwent a reorganisation following the decision by the cabinet that the Fair Trade Commission should be in full charge of regulatory reform in the economy. To cope with the rapid increase in violations of competition law, the commission reinforced its organisation and staff with a view to expediting the processing of cases.

The reinforcements in the organisation include the establishment of three divisions in charge of regulatory reform tasks, elevation of the status of the general counsel and the expansion of the relevant divisions (from one to three), and the establishment of a planning and management office aimed at strengthening the role of the secretariat. As a result of the reorganisation, the number of staff at the commission grew from 382 to 422, and its budget grew from \$14 096 000 (of which salary took up \$9 268 000) in 1996 to \$18 147 000 (of which salary takes up \$12 756 000) in 1997.

Following the recent reorganisation, the Fair Trade Commission is now in a position to stimulate competition in earnest throughout the economy. That is, in the past, the corrections of anti-competitive provisions were only possible through co-operation from the relevant ministries; however, through the functions of the Economic Regulatory Reform Committee under the Fair Trade Commission, the competition agency can now eliminate the anti-competitive elements, such as restrictions on entry, withdrawal, and price throughout the economy. The Economic Regulatory Reform Committee, composed of 19 experts from the private sector, and vice-minister level officials from five ministries-namely, Ministry of Finance and Economy; Ministry of Trade, Industry, and Energy; Ministry of Government Administration; Ministry of Legislation; Office of the Prime Minister-is actively pursuing regulatory reform.

### ***Major revisions of the Fair Trade Act and its enforcement decree***

In December 1996, the Fair Trade Commission revised its Fair Trade Act, the detailed feature of which have already been described in the 1996 annual report. Therefore, only the major features will be described in this paper.

First, the commission's function of improving anti-competitive provisions has been strengthened. That is, the clause on prior consultation covers not only laws, decrees, and measures expected to be enacted or revised, but also guidelines and notifications. At the same time, the commission may present its opinion with respect to the existing laws, decrees, and measures, if they contain anti-competitive elements.

Second, the exemption of financial and insurance firms from application of the competition law has been reduced, and those firms are now subject to examination of anti-competitive business combinations.

Third, laws and policies relating to the rectification of monopolistic and oligopolistic market structures and alleviation of economic concentration have been improved to enhance efficiency. In order to phase out debt guarantees among affiliates of large business groups, the commission has ordered that firms reduce the amount of debt guarantees to 100 percent of paid-in-capital by March 1998. Furthermore, in consideration of the growth in size of the Korean economy, in designating market-dominating firms, the standard has been raised from 50 billion Won in annual total supply of domestic market to 100 billion Won. As a result, the number of items designated as those of market-dominating firms is expected to fall

from some 166 to 129. In addition, if the likelihood of a firm engaging in abuse of market-dominating position is very low—that is, if there are no entry barriers and if the firm has no records of raising prices or engaging in abuse of market-dominating position or undue collaborative act over the two previous years, that firm would be eliminated from the designation of market-dominating firms.

Fourth, the Fair Trade Commission also overhauled laws and policies relating to business combinations. In principle, corporate mergers are subject to post-merger reporting (as opposed to pre-merger reporting) and mergers between small firms with little restraint on competition are subject to the Simplified Reporting System, which reduces the amount of time spent and documents submitted. In addition, the threshold for firms subject to reporting mergers has been raised. In the past, those with more than five billion Won (one\$=915Won) in capital or 20 billion Won in total assets were subject to reporting; now, however, those with more than 100 billion Won in both capital or assets are subject to reporting. However, in the past, only those exceeding certain size (five billion Won in capital or 20 billion Won in total assets) and engaging in anti-competitive mergers were prohibited. Now, however, all anti-competitive mergers, regardless of the sizes of the parties involved, are prohibited.

Fifth, regulations imposed on undue collaborative acts and unfair business practices have been improved. For one, the commission introduced a policy of alleviating sanctions under which a voluntary reporter of undue collaborative acts becomes exempt from sanctions or becomes subject to lighter sanctions, such as lower surcharges. For another, while only interference in the business activities of the counterpart was regulated as unfair business activities in the past now includes such interference against competitors.

Sixth, the Fair Trade Commission improved various rules and regulations with a view to enhancing the operation efficiency of the commission and strengthening the protection of the rights of the injured party. In order to raise efficiency in the review of reported cases, the commission introduced a subcommittee, composed of three commissioner from the Fair Trade Commission, which deliberates and decides on the relatively common and lighter cases. In addition, the statute of limitations on requesting compensation for damages pertaining to violation of the Fair Trade Act has been extended from one year to three years. Furthermore, if a person who has received a corrective order from the commission files an objection, the commission may temporarily suspend the execution of the order if it is likely that the execution of the order may cause irreparable damages.

#### ***Major features of the newly enacted and revised guidelines and notifications***

In order to reflect the revised Fair Trade Act and to enhance transparency of the enforcement of the Act, in 1996, a total of 11 guidelines and notifications were revised. The major feature are as follows:

##### *Enactment of guidelines for representations and advertisements relating to financial products by banks*

Investigations of some investment trust companies' advertisements regarding Return On Investment (ROI) and local banks' advertisements regarding ROI and conditions for loans. Thus, the commission established specific standards for unfair advertisements of savings, trusts, and loans by banks and based on such standards, the commission promotes fair competition, protects consumers, and even enhances efficiency and transparency of its reviews regarding representations and advertisements.

##### *Enactment of guidelines on the types of and criteria for special unfair business practices relating to newspaper businesses*

Beginning in April 1995, competition in sales among newspaper businesses became fierce with the establishment of numerous newspaper companies and printing of morning editions by major newspapers. At the same time, unfair business practices, including offering of gifts, distribution of free

papers, and unwanted delivery became rampant. Thus, the commission further specified the types of unfair business practices and prohibited the offering of gifts and distribution of free paper. In addition, if newspapers continued to be delivered even after a subscriber expressed his/her wish to stop or reject subscription, it would be considered unwanted delivery and prohibited by law.

*Enactment of guidelines for representations and advertisements relating to environment*

With the flooding of environment-related products, there was a need for the establishment of specific standards for unfair representations and advertisements relating to environment which were in violation of the "Types of and Criteria for Unfair Business Practices relating to Representations and Advertisements relating to Environment" (Fair Trade Commission Notification No. 1996-3). Thus, the commission prepared special rules for the representations and advertisements relating to environment, so that consumers would not be misled or damaged with respect to the environmentally-friendly attributes and efficacies of a product when selecting, using, or disposing it. In addition, such measures were aimed at differentiating environmentally-friendly products from ordinary products in the market. The major standards presented in the guideline were; *a*) the representation or advertisement shall be based on true facts and should be clear and accurate; *b*) they should be based on the latest and the most objective and scientific proof that can be reproduced; and *c*) when referring to special terminology or expression in representations or advertisements, they shall meet the terminology or expression.

*Enactment of guidelines for the types of and criteria for unfair business practices relating to the offering of gifts*

As a means of ensuring free business activities, the commission exempted certain small businesses (manufacturers with less than ten billion Won in annual sales turnover or other businesses with less than one billion Won in annual sales turnover) operating in certain areas from application of the Types of and Criteria for Unfair Business Practices relating to the Offering of Gifts. Moreover, the commission abolished the ceiling on the total value of public prize gifts and also exempted businesses giving out new products with the launch of a new business from application of the above guideline.

***Agency fully responsible for regulatory reform in the economy.***

*Background*

Since the inauguration of the current administration in 1993, the government has placed policy priority on regulatory reform as a key national goal and pursued reforms by establishing the Economic Deregulation Committee, the Presidential Commission on Administrative Reform and Industrial Deregulation Review Committee. Such efforts have not been without achievements; however, the business circles and the general public complained that they were not able to feel any tangible results. The reason is that reform efforts focused on cutting red-tape rather than on improving the substance of regulations. At the same time, it was often the case that the agencies enforcing the regulations were also in charge of bringing about reforms.

Thus, in order to pursue regulatory reform with a stronger drive, in March 1997, there was a general overhaul of the regulatory reform system. Instead of having numerous agencies in charge of such efforts, however, as the highest decision-making body the Regulatory Reform Council (co-chaired by the Prime Minister and Head of the Korea Chamber of Commerce and Industry) was established as the highest decision-making body, while an Economic Regulatory Reform Committee placed in charge of reforms in the economy and the Presidential Commission on Administrative Reform was placed in charge of regulatory reforms in general administrative affairs.

The Chairman of the Fair Trade Commission was appointed Chairman of the Economic Regulatory Reform Committee, which placed the commission in full charge of regulatory reform



pertaining to the economy. The reason that the commission was placed in charge of such efforts was that the agency did not oversee a certain industry and therefore could maintain a neutral position. At the same time, based on its original function of promoting competition, the competition agency would be able to carry out regulatory reform which is closely related to competition promotion.

### *Achievements in regulatory reform*

In the first half of 1997, the Fair Trade Commission identified some 28 tasks pertaining to eight different areas which required special urgency due to their serious restraint on business activities. They included regulatory reform relating to factory sites, simplification of various examinations relating to architecture, overhaul of regulations to reduce burden on businesses, easing of entry barriers, improvement of regulations relating to logistics, distribution, trade associations, various certifications and investigations, and those relating to procurement of funds by businesses. Below are descriptions of the major results, focusing on cases:

#### *Reducing entry barriers*

Competition was introduced in such natural monopoly markets as the energy market, including electricity and gas. First, in the electricity sector, since 1995, private firms were authorised to participate in the generation of electric power, which used to be a monopoly by the state-run Korea Electricity Power Corporation (KEPCO). However, they were only authorised to sell the electricity they produced to KEPCO, which gave rise to serious inefficiency due to KEPCO's monopoly in the electricity retail market. In order to address this problem, the commission gave limited authorisation to private firms to directly supply electricity. These electricity generators with special authorisation would be in charge of electricity retailing to certain customers in certain areas, thereby introducing competition in the electricity retail market. In the gas industry, Korea Gas Corporation had monopoly over the import of LNG upon authorisation of the Ministry of Trade, Industry, and Energy. However, the rapid increase in demands gave rise to chronic shortage of supply due to the lack of storage facilities. Thus, beginning in 2001, the government plans to completely abolish the policy of granting authorisation to the import of LNG, making it possible for those with large demands to directly import it.

#### *Relaxing regulations to facilitate procurement of funds*

Based on the Securities Exchange Act, the Korea Securities Dealers Association controlled and determined the monthly limit for issuance of corporate bonds. However, this policy entailed many problems, including restraints on direct procurement of funds by businesses through the financial market. Therefore, with the exception of the ceiling on monthly issues (that is, 100 billion Won per month/firm), the commission removed restrictions on the issuance of corporate bonds and facilitated such issuance.

#### *Overhauling regulations to reduce burden on firms*

In order to prevent development projects from producing negative effects on the environment, traffic, population, disaster, and scenery, various impact assessment policies are enforced. They include the environmental impact assessment, traffic impact assessment, population impact assessment, disaster impact assessment, and scenery impact assessment. However, the separate conduct of similar impact assessments cause excessive burden on businesses and elongate the time involved. They also result in delay of projects and even undermine systematic and comprehensive evaluations and analyses. Thus, the commission intends to integrate such impact assessments and unify them into one beginning in the year 2000.

#### *Improving quality evaluation and certification policies*

According to the Automobile Management Act, both locally produced cars and imported cars are subject to *a*) safety tests at the type approval stage before manufacture, *b*) inspections at the manufacturing

stage and inspection after assembly, and c) inspections of manufacturing defects after sales, initial check-ups, and regular check-ups. However, inspections after assembly, which are conducted on all cars following safety tests and inspections at the manufacturing stage are thought to be redundant considering the quality inspections conducted by the manufacturer itself. On top of that, it causes unnecessary costs on producers, while the regular check-ups of non-commercial passenger vehicles have little effect and are a matter of mere formality. Thus, if the quality inspections conducted by the manufacturer meets safety standards, inspections after assembly should be omitted. Also, regular check-ups of non-commercial passenger vehicles were improved so that regular check-ups would be conducted every two years following the first four years, rather than every two years following the first three years.

*Easing regulations pertaining to trade associations*

Among the 623 trade association (headquarters trade associations) registered at the Fair Trade Commission, the commission started to overhaul the rule of some 57 trade associations which forced membership and payment of membership fees under their own statutes. Consequently, the commission abolished provisions enforced by some 11 trade associations, including the Korea Chamber of Commerce and Industry, which forced the establishment, membership, and membership fees of trade associations.

By doing so, the commission liberalised the establishment of trade associations, and if a trade association determines the prices of the goods and services of its members under entrustment stipulated by law, the prices are to be determined by the agreement of a group with the joint participation of representatives of consumers and public interest representatives. In addition, if trade associations monitor the business activities of individual businesses, for example, trade association of medical doctors, pharmacists, and so forth, the relevant provisions are to be abolished. Furthermore, if entrustment of administrative power is impractical, as was the case with some eight groups including the Korea Electrical Contractors Association, that power is to be executed by the relevant administrative agency, and regulations in entrusted projects that excessively restrain business activities are to be abolished.

**2. Enforcement of competition policy**

*Regulation of abuse of market-dominating position*

Based on Article 4 of the Fair Trade Act, the Fair Trade Commission designates market-dominating enterprises every year. The main objective of the policy is to designate businesses which wield strong influence in the market and prevent them from abusing their dominant position. The policy also has the effect of determining the scope of the market so that those subject to the regulation have a frame of reference based on which they can make predictions. In the process of revision of the Fair Trade Act and its Enforcement Decree in 1996, the growth in the size of the Korean economy was taken into account and the standard for designation of items that belong to market-dominating enterprises was raised from 50 billion Won in total annual local supply of the relevant good or service to 100 billion Won. The standard for market share remained the same that is, one enterprise taking up 50 percent or more of market share or three or fewer businesses jointly accounting for 75 percent or more (enterprises with less than ten percent market share shall be excluded) of market share are designated as market-dominating enterprises. According to the above criteria, in 1997, the commission designated 166 items of 386 enterprises (when overlapping enterprises are accounted for 226 enterprises), which is an increase of 26 items and 60 enterprises (when overlapping enterprises are accounted for, 37 enterprises) compared to those of the previous year.

Market-Dominating Items  
(number of items)

Year	Monopolistic items of a single company	Oligopolistic items of two companies	Oligopolistic Items of Three Companies				
			Total	75-79*	80-89*	90-99*	100*
96	28 (20.0)*	45 (32)*	67 (47.9)*	14 (10)*	26* (18.6)*	23 (16.4)*	4 (2.9)*
97	24 (18.6)*	45 (32.1)*	64 (49.6)*	8 (6.2)*	30 (23.3)*	22 (17.0)*	4 (3.1)*

Inside ( ) : Share of the items in the relevant market.

\* percent

As market-dominating enterprises assume a superior position in the market in which it can influence the decisions on the prices, volume, and trading terms of goods and services in the relevant market, their violations constitute unfair business practices (pursuant to Article 23 of the Fair Trade Act), as any other ordinary enterprise would, as well as abuse of market-dominating position (pursuant to Article 3 of the Fair Trade Act). There are five types of practices that constitute abuse of market-dominating position: abuse of prices such as unfairly setting, maintaining, or altering prices; control of volume by unfairly controlling the sales of goods or rendering of services; unfairly interfering in the business activities of other businesses; unfairly interfering in the participation of competing businesses; and other activities that are likely to substantially restrain competition or substantially undermine consumer interests. The above practices are subject to stronger regulations than ordinary unfair business practices, and the number of corrections made with respect to violations by market-dominating enterprises since 1981 are as follows:

Corrective Measures against Violation by Market-Dominating Companies  
(case)

Classification	Total	81-92	93	94	95	96
- Abuse of Market Dominating Position	24	17	2	1	3	1
- Unfair Business Practices	506	304	58	39	72	33

***Regulation of business combinations***

The Fair Trade Act (the Act) provides for five types of business combinations including acquisition of shares of another corporation, interlocking directorate, merger with another corporation, take-over of business, and participation in the establishment of a new corporation. Also, if a business combination meets a certain criteria, it is to be reported to the FTC. Since 1994, the number of business combinations have steadily grown, and the trend continued in 1996, resulting in a total of 393, which is an additional 68 combinations compared to the previous year. The reason for the increase in business combinations can be attributed to business restructuring in line with the rapid progress toward global economy and abolition of various regulations and stronger desire to pre-empt promising new markets, such as those of information, communication, finance, and distribution. In 1996 in particular, there was a steep increase in the number of business combinations due to the lowering of entry barriers to the participation of the private sector in SOC projects, including power generation and road construction, and granting of permission to mobile communications service providers.

The total number of violation of restrictions on business combinations was among them, as much as 37 were violations of reporting procedures, such as failure to report within the deadline due to lack of knowledge or simple carelessness. With respect to such violations, only warnings were given by the FTC.

An examination of the method of combination in 1996 reveals that acquisition of shares (159, 40.9 percent) and establishment of new corporation (130, 33.1 percent) are the most common methods

employed. However, the general trend this year shows a downward trend in acquisition of shares and establishment of new firms, while an upward movement is detected in mergers and transfer of business. Nevertheless, the establishment of new business continue to take up the largest proportion, probably because most businesses choose business diversification into promising areas over improvement of financial structure and rationalisation of manufacturing process. Moreover, the slight increase in mergers is mainly due to mergers aimed at business innovation.

### *Rectification of undue collaborative acts*

The method of imposing surcharges on undue collaborative acts was modified to enhance effectiveness of law enforcement. In the past, the calculation of surcharge was on the basis of "the sales revenue posted between the date the violation occurred and the date the violation ceased"; however, considering that it is often difficult to calculate the exact period, a new method of calculation was adopted: No more than five per cent of the average turnover of the concerned enterprise in the three years immediately preceding the date of violation is the new standard. Furthermore, if there is no turnover, or if it is difficult to calculate surcharges based on turnover, a fixed amount of surcharge, which should not exceed one billion Won, can be applied.

Since the enforcement of the Fair Trade Act in 1981, a total of 286 undue collaborative acts have received corrective recommendation or stronger sanctions (three filing of complaints, 24 imposition of surcharges, 65 corrective orders, 34 corrective recommendations, and warnings and etc. for the rest from the FTC). When they are categorised by types of violations, collective setting of prices amounted to 116 cases outnumbering the rest, while restriction of area of transaction and transaction counterpart numbered 23, followed by 20 cases of control of ex-factory volume. Due to price liberalisation in 1993, many collaborative acts were relating to prices since then.

Corrective Measures by Types of Violations (cases)

Classification	81-92	93	94	95	96	Total
Joint fixing and maintaining of prices	45	11	13	20	27	116
Joint determination of terms for sales of goods	8	-	1	1	1	11
Restriction of business activities	-	1	1	-	3	5
Restriction of production and shipment of goods or services	16	1	2	1	-	20
Restriction of territory or customer	14	2	2	2	3	23
Limitation on types of goods	8	-	-	1	-	9
Establishment of joint corporations	-	1	-	1	2	4
<b>Total</b>	<b>91</b>	<b>16</b>	<b>19</b>	<b>26</b>	<b>36</b>	<b>188</b>

Note: There can be more than two types of violations for one case.  
Between 1981 and 1992, the corrections are corrective recommendations or stronger measures. Beginning in 1993, they are warnings or stronger measures.

### *Correction of unfair business practices*

As a means of strengthening regulations on unfair business practices, in revising the Fair Trade Act in 1996, the commission included "the act of unreasonably providing Special Related Persons or other corporations with temporary payment, loans, manpower, real estate, commercial papers, or intangible property rights, etc., or aid Special Related Persons or other Corporations by trading at extremely favourable terms" in unfair business practices. At the same time, the definition of interfering in the business activities of other businesses was extended to include not only interfering in the business activities of the transaction counterpart, but also those of a competing business.

The number of unfair business practices reported to the Fair Trade Commission grew substantially in 1996 in comparison to 1995. As shown in the table, the number of cases registered at the

commission in 1996 was 845 (650 reported cases, 195 detected by the commission in its own investigation), which is a 72.4 percent increase from 490 (299 reported cases, 191 detected by the commission in its own during investigation) in 1995.

#### Number of Unfair Business Practices Registered and Processed by Types

Year	95		96	
	Registered	Processed	Registered	Processed
Types				
Refusal to deal	33	35	93	62
Discriminatory treatment	18	18	25	20
Foreclosure of competitors	4	3	24	18
Unfair offering of gifts	56	56	97	66
Unfair special discount sales	13	14	19	19
Coercive transaction	27	29	19	18
Transaction under binding conditions	21	21	15	11
Abuse of dominant position	134	135	253	179
Interference in business activities	2	2	23	17
Unfair representations and advertisements	169	159	251	182
Others	13	8	26	23
<b>Total</b>	<b>490</b>	<b>480</b>	<b>845</b>	<b>615</b>

The types of unfair business practices reported at the commission include abuse of dominant position (253 cases, 29.9 percent), unfair representations and advertisements (251 cases, 11.5 percent), unfair offering of gifts (97 cases, 11.5 percent), and unfair refusal to deal (93 cases, 11 percent).

#### *Correction of unfair representations and advertisements*

Unfair representations and advertisements are regulated as unfair business practices and measures that can be taken under the Fair Trade Act to correct them, which include suspension of the unfair representations and advertisements, public announcement of law violation, public notice of correction (pursuant to Article 24 of the Fair Trade Act), and imposition of surcharges (pursuant to Article 24-2 of the Fair Trade Act).

In 1996, the total number of unfair representations and advertisements that were issued warnings or stronger sanctions from the commission was 130, and as shown in the table below, marking a 34 percent increase from 97 such cases in 1995.

#### Number of Corrections Issued against Unfair Representations and Advertisements by Year

81-89	90	91	92	93	94	95	96	Total
175	29	52	25	100	142	97	130	750

There can be more than two types of violations for one case.

Between 1981 and 1992, the corrections are corrective recommendations or stronger measures. Beginning in 1993, they are warnings or stronger measures.

The measures taken against unfair representations and advertisements in 1996 are characterised by corrective measures against those that have a significant bearing on the daily lives of the general public, such as financial products of banks or investment trust companies, sales of commercial shops, and foods

and beverages. In other words, the effects of the corrective measures were focused on areas which would most effectively enhance the convenience and interests of the general public.

The measures taken against unfair representations and advertisements in 1996 that had the biggest impact were corrections of unfair advertisements by seven investment trust companies. Towards the end of 1995, it was announced in newspapers and on TV that some investment trust companies had engaged in illegal acts, including distribution of memoranda on ROI with a view to attracting customers, which developed into a serious social issue. Thus, the Fair Trade Commission conducted investigations, upon its direct authority, of false and exaggerated advertisements by local investment trust companies regarding their guarantees on ROI of their investment packages. With respect to seven companies (Bank of Korea, First Bank, Kookmin, Hanil, Dae Han, Hannam, and Joongang banks), which were found to have engaged in such acts, the commission issued an order to suspend the unfair advertisements and to publicly announce their violation of law. Meanwhile, newspapers and TVs placed great weight on their reports of the measures taken by the commission. This was followed by petitions from consumers who were victims of the unfair advertisements, and YMCA prepared to institute a class action for the victims of the false advertisements on ROI guarantees and memoranda of the investment trust companies. Newspapers continued to report on the issue and the management of the investment trust companies reached a resolution to compensate all individuals with the memoranda. The Securities Supervisory Board reprimanded the investment trust companies along with the officers and employees held accountable by issuing warnings and so on. Through such corrective measures, the commission eradicated unfair advertisements of investment trust companies regarding their ROI guarantees and prevented individuals from becoming victims of such unfair conduct.

## THE GRAND-DUCHY OF LUXEMBOURG\*

(1996)

No changes were made to competition law and regulations in 1996, though discussions and developments at EU and international level in the area of competition policy were carefully observed.

Luxembourg is in the process of redefining its position, in light of its particular economic structure and geographical position. As Luxembourg is not a major manufacturing country, it has to import most of its consumer goods. Furthermore, its economic fabric consists essentially of small enterprises, which find it difficult to compete individually with foreign firms. For this reason, the objectives of competition policy cannot be the same as in neighbouring countries. For example, Luxembourg is very tempted to promote associations of retailers to enable independent retailers to attain the size they need to obtain satisfactory conditions of purchase. This has become a hotly-debated issue since the arrival of a new foreign supermarket chain. The interpretation which the courts give to the grand-ducal regulation of 9 December 1995 on retail price maintenance is bound to move forward case law in this area, which up to now has been relatively undeveloped.

The Ministry of Economic Affairs referred a complaint to the Restrictive Business Practices Commission concerning an alleged abuse of dominant position in the market for the collection and disposal of the hazardous waste of small and medium-sized enterprises.

The Ministry of the Environment had placed a contract with a private company with a view to organising the environmentally-safe disposal of the waste produced by SMEs, and to provide the latter enterprises with the services needed to store, sort and convey waste to waste disposal plants. It was argued, firstly, that this arrangement was not justified by any general economic interest. Secondly, it was alleged that the company derived the bulk of its turnover from the activity in question, and that it had made exorbitant profits out of public money allocated to the protection of the environment.

The Commission met eight times before rejecting the complaint unanimously. It considered that there could not be a dominant position since the market shares were not large enough and that the services provided by the enterprises in question were necessarily conducive to better environmental protection.

The Ministry of Economic Affairs endorsed the Commission's conclusions and decided to file the complaint on 28 November 1996. This decision is currently being appealed before the new administrative tribunal.

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\* The original language of this document is French.





## **MEXICO\***

*(July 1995-December 1996)*

### **Executive Summary**

Between July 1995 and December 1996, the number of cases concluded by the Commission increased by 91.4 percent compared with the previous 18-month period. This substantial rise can be explained by the following factors: *a)* the business community's growing awareness of competition legislation and the Commission's functions; *b)* the *ex officio* investigations that were initiated, *c)* the upward trend in mergers and acquisitions; *d)* the privatisation of state companies; and *e)* the Commission's new preventive authority in connection with public permits and concessions and with the granting of rights granted under these titles in ports, telecommunications and natural gas distributions.

#### ***Actions against anti-competitive practices and other restrictions to competition***

The number of cases decided increased significantly in comparison with the preceding period. Worthy of particular note are the lower number of cases dismissed, the variety of cases investigated, and the determinations of relative monopolistic practices not specifically defined in the Federal Law of Economic Competition (FLEC). Of special interest are the measures taken against barriers to interstate trade and the recommendations made to state governments to eliminate administrative procedures affecting competition.

#### ***Mergers and acquisitions***

There was a substantial increase in the number of cases resolved (85 percent). Among the reasons for this increase are the greater openness of the domestic economy, the globalization of the world economy, the deregulation of economic activities, the divestiture of state-owned companies, and the problems faced by companies as result of the economic crisis. Some of the significant cases are: the international merger between Kimberly Clark Corporation and Scott Paper Inc., a series of merger that took place in the telecommunications, natural gas, and ports sectors; the concentration involving CINTRA, Aeroméxico, and Mexicana, and several asset acquisitions within the financial sector.

#### ***The advocacy role of the Commission***

This institution played an active role in the discussion and implementation of the competition issues dealt with the Aviation Law, the regulations for natural gas and railroad services, the radio frequency allocations program and the privatisation of railroads, ports, and Almacenes Nacionales de Deposito, S.A.

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\* The original language of this document is English.

### *Consultations*

The number of inquiries from economic agents rose 58 percent compared with the previous period. In addition, new mechanisms enabling the public to consult with the Commission were implemented.

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

At present, Mexico's competition legislation comprises the Federal Law of Economic Competition (FLEC) and the Internal Regulations of the Federal Competition Commission. Nevertheless, since 1995 several laws and regulations have been enacted containing provisions to protect competition, the application of which corresponds to the Federal Competition Commission (FCC). These are the Federal Telecommunications Law, the Railroad Service Regulatory Law, the Civil Aviation Law, the Airports Law, and the Natural Gas Regulations. Within the scope of their respective sectors, these laws empower the Commission to evaluate and, when appropriate, give its approval to parties that have expressed an interest in obtaining concessions and permits or in obtaining the rights granted by those instruments on a transfer basis. In addition, as stipulated by these laws, the Commission must appraise the prevailing conditions of competition prior to the introduction or elimination of official prices by the regulatory authorities.

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

### *Resources of Competition Authorities*

Since 1993, the Federal Competition Commission has had 165 employees. This total breaks down into five Commissioners (including the President of the FCC), 16 senior officers, 66 medium-level officers, 33 technicians, and 45 clerical staff.

### *Actions against anti-competitive practices and other restrictions to competition*

#### *Statistics*

Over the 1995-1996 period the Commission studied 38 cases. Twenty one of these were investigated on an *ex officio* basis, the remainder arising from complaints filed with the Commission. A total of 38 cases were brought to a conclusion, of which 24 were resolved, eleven were dismissed, and three were withdrawn. Of the 24 cases resolved, eight dealt with state government's administrative provisions restricting competition.

#### *Description of significant cases*

Baramin, S.A. de C.V., Baricosta, S.A. de C.V., Minerales y Arcillas, S.A. de C.V. Barita de Sonora, S.A. de C.V., and Barita de Santa Rosa, S.A. de C.V.

The Commission conducted an *ex officio* investigation into possible absolute monopolistic practices by the above mentioned companies. The practices involved an arrangement between competitors for the sale of their products to Pemex Exploracion y Produccion (Pemex).

The aim of the arrangement was to fix sales terms and conditions and to cancel the bidding process organised by Pemex for its purchases of barium oxide. In this context, the companies reached an agreement among themselves and presented Pemex with the following proposals:

- the tonnage of barium oxide to be supplied by each producer;
- a single price for all producers at the delivery site;
- the cancellation of the bidding process to prevent unsuccessful bidders from being left without orders. This was an attempt to protect those companies from the risk of closure.

Absolute monopolistic practices are automatically subject to penalties. Thus, fines were imposed on all the companies involved in the collusion.

*Singer Mexicana, S.A. de C.V., Manufacturera Electronica Sim, S.A. de C.V., and Grupo Bler de Mexico, S.A. de C.V. vs. Vitro, S.A., Distribuidora Cónsul, S.A. de C.V., and Mabesa, S.A. de C.V.*

Singer Mexicana, S.A. de C.V., Manufacturera Electronica Sim, S.A. de C.V., and Grupo Bler de Mexico, S.A. de C.V. filed a complaint against Vitro, S.A., Distribuidora Cónsul, S.A. de C.V., and Mabesa, S.A. de C.V., charging them of the following anti-competitive practices:

- several actions by Mabe (a subsidiary of Mabesa) intended to displace Singer from the market, for example, by its refusal to sell refrigerators to Singer;
- commercial agreements (which were neither described nor specified) between the accused companies and different US manufacturers of domestic appliances;
- contracts entered into by Cónsul and Vitromatic (subsidiaries of Mabesa and Vitro, respectively) with retailers (Salinas y Rocha, S.A. and Errsa), granting the retailers a two percent discount provided they refrained from selling appliances produced outside the North American Free Trade Agreement (NAFTA) area.

Singer and Sim distribute imported Korean refrigerators and stoves. In addition, Singer has its own brands (Singer and Premier by Singer) which were manufactured at Mabe's plants (a subsidiary of Mabesa).

Cónsul and Vitromatic import and distribute refrigerators and stoves from the United States. They also sell units manufactured by companies associated with Mabesa and Vitro.

Except for the contracts referred to under point *c*), the facts alleged took place before the Federal Law of Economic Competition (FLEC) entered into force in June 1993. Nevertheless, the investigation covered also some preceding years in order to avoid omitting possible systematic and intentional anti-competitive practices related to illicit practices persisting after the enactment of the FLEC. Thus, the Commission ruled that:

- there were no grounds to support the allegations described under points *a*) and *b*) as being aimed at unduly displacing other economic agents, imposing barriers to access, or establishing collusion between competitors. Furthermore, Mabe did not have a major presence in the refrigerator and stove markets and it was therefore improbable that it could affect competition in those markets on its own by means of the actions indicated under point *a*);

- the contracts referred to under point *c*) were signed in July and August of 1992, to remain in force for six months. They were renewed for further six-month periods in January and July 1993 and, finally, in January 1994 they were extended for another year. Salinas y Rocha, S.A. falsely claimed not to have signed them for that last period.

The Commission ruled that the contracts were clearly anti-competitive for the following reasons:

- the similarity between the terms and discounts offered by Cónsul and Vitromatic required an agreement between the two companies. This (an agreement between competing economic agents in order to manipulate the sales prices of their products) constitutes an absolute monopolistic practice;
- the discounts, which were granted provided that no appliances produced outside the NAFTA area were sold, could not be justified as an attempt to build customer loyalty. In fact, Cónsul offered its discounts even if the retailers sold articles produced within the NAFTA area by its competitors. The same was true of the discounts offered by Vitromatic.

It was therefore obvious that the aim of the contracts was to unduly displace Singer and Sim from the relevant markets.

Such contracts constitute a relative monopolistic practice when the contractors enjoy substantial power in the relevant market. This is true of Mabe and Vitro taken together in the refrigerator and stove markets, whose joint market shares account for 86.1 percent and 83.3 percent of total volumes.

Contracts signed before the FLEC came into force are not subject to the terms of that law.<sup>1</sup> However, the FLEC does apply to contracts signed or in force after its enactment. The Commission therefore resolved:

- to order the companies to remove from their contracts those clauses constituting the monopolistic practice described above;
- to fine Salinas y Rocha, S.A. for having made false statements during the proceedings.

*Chicles Canel's, S.A. de C.V. vs. Chicle Adams, S.A. de C.V.*

Chicles Canel's, S.A. de C.V. (Canel's) filed a complaint against Chicle Adams, S.A. de C.V. (Adams). The activities of both companies include the manufacture, distribution, and sale of chewing gum. The former owns the brand Canel's while the latter owns several brands, including Chiclets-4 and Clarks. Canel's alleged that the pricing policy for Clarks adopted by Adams was intended to unduly displace Canel's from the market. The following facts are worthy of note:

- in 1984, Adams launched Clarks, a product similar to Chiclets-4. Both are produced in similar facilities and with comparable production costs. Moreover, both are distributed in the same markets through similar mechanisms and channels. The two products are marketed with a price differentiation policy that allocates Chiclets the higher value;
- between August 1990 and April 1994, the price of Clarks-4 fell in comparison with the price of Chiclets-4;
- between 1991 and 1993, Adams considered purchasing Canel's.

The Commission ruled that an analysis of events during the years prior to the introduction of the FLEC (22 June 1993) was in order. This background is necessary for analysing events after that date since, firstly, it provides a viewpoint that allows any confusion between predatory acts and normal practices to be avoided, and secondly, it provides information to help clarify the behaviour and conduct of the economic agents involved. The following results were drawn from those investigations:

- the relevant market is that of chewing gum at the national level;
- expert accounting studies indicate that between 1991 and the first four months of 1994, Clarks was being sold at a loss that cannot be explained as a promotional effort. It also shows that Canel's-4 made a profit over the 1991-93 period;
- Adams has substantial power in the relevant market. In this regard:
  - Adams's market share was 53 percent, which, together with its diversification and distribution capacity, allowed it to exert a detectable influence over the chewing gum market;
  - Adams had substantially raised the prices of Chiclets-4 and other of its brands compared with Clarks and Canel's-4. Moreover, the Chiclets-4 price increases were introduced in spite of reductions in production costs and demand for that brand;
  - with the sole exception of Canel's, no significant new competitors have entered the market. This is in spite of the substantial profit margins Adams enjoys on all its products except Clarks.

The Commission ruled that the accumulated losses on Clarks between 1991 and April 1994, together with the positive results of Canel's-4 over that same period, did not disallow the hypothesis that the losses on Clarks were due to factors other than the alleged predatory pricing. It also ruled that the dangerous possibility of Adams displacing Canel's from the market could not be inferred from the performance of Canel's. These conclusions notwithstanding, the Commission found that the losses on Clarks, together with the other evidence revealed by the investigation, made it necessary for it to remain alert to the possibility of anti-competitive practices.

In order to protect competition, the Commission decided:

- not to impose a penalty on Adams, since the existence of relative monopolistic practices was not proven;
- to warn Adams to refrain from any action that could unduly harm or hinder competition in the chewing gum market;
- in order to avoid accounting problems in detecting predatory practices, the excess of costs over sales price should be determined by establishing criteria that take the following into consideration: (a) historical costs and not the standard costs used internally by the company under investigation should be considered; (b) preferably, the cost of sales structure as a reference point in the division of indirect costs; and (c) the exclusion of specific cost concepts when so established by the expert studies ordered by the Commission, or by those presented by the company under investigation, provided that they are deemed reliable by the Commission.

*Actions against barriers to interstate trade*

The Commission conducted an *ex officio* investigation into the possible imposition of restrictions on the entry of flowers from other states into the state of Sinaloa. The measures introduced by the Sinaloa state government were intended to minimise the external supply of flowers just before All Souls' Day (Nov. 2), when demand increases considerably. The state authorities based the restrictions on the need to comply with standard NOM-EM-009Fito-1994, issued by the Ministry of Agriculture, Livestock, and Rural Development (SAGAR).

The Commission's investigations revealed that:

- NOM-EM-009Fito-1994, an Official Mexican Standard dealing with phytosanitary requirements for imports of cut flowers and fresh flora from certain countries, did not apply in this case;
- there was no agreement with the SAGAR to support the inspections and phytosanitary certificates required by the state government.

The phytosanitary control measures imposed by the Sinaloa state government were in breach of Article 117, Section V, of the Constitution, which prohibits restrictions on trade between the states. In those circumstances, Article 14 of the FLEC stipulates that such restrictions shall have no legal effect.

Furthermore, Article 15 of the FLEC empowers the Commission to declare publicly the existence of such restrictions. In fulfilment of this provision, the Commission published the corresponding declaration in the Official Journal of the Federation. It also issued a resolution stating that the Sinaloa measures, and other similar provisions, were void of legal effect.

***Mergers and acquisitions***

*Statistic*

Between July 1995 and December 1996, 310 new cases were analysed: 177 from notifications submitted under the Federal Law of Economic Competition, 20 *ex officio* investigations, three complaints, and 110 notifications regarding auctions of public companies, state assets (radio frequencies), and transfers of concession rights (ports). Over the same period, 272 cases were resolved: 252 were approved, 18 were subjected to conditions, and two were objected.

*Summary of Significant Cases*

1. Kimberly Clark de Mexico, S.A. de C.V. / Compañía Industrial de San Cristóbal, S.A.

The merger in the United States of Kimberly Clark Corporation (KCC) and Scott Paper Company (Scott) would cause high levels of concentration in certain Mexican markets, given those companies' stockholdings in Kimberly Clark de Mexico (KCM) and Compañía Industrial de San Cristóbal (Crisoba).

KCM and Crisoba have a major share in the production and marketing of feminine hygiene products, tissue paper derivatives, writing and printing paper, and disposable baby wipes. As filed the merger could have had the following implications:

- feminine hygiene products - KCM and Crisoba had a joint market share of 63 percent. The remainder was covered by Procter & Gamble (22 percent) and by other manufacturers and imports (15 percent). The prevailing technology and promotional expenses raise entrance

costs for new companies. As for competition from foreign articles, domestic production is more advantageous as a result of import costs. On these basis the Commission found that the market power that would arise from the merger would facilitate monopolistic practices;

- tissue paper derivatives - KCM and Crisoba cover more than two-thirds of domestic sales of tissue paper products. This volume, while important for Mexico, is not significant in terms of the large global companies. The following facts are relevant to this matter: (a) KCM has a 70 percent market share in facial tissues and paper towels; (b) in the facial tissue market, Kleenex and Scotties (belonging to KCM and Crisoba, respectively) account for 98 percent of domestic demand; (c) in paper napkins, KCM's Regio brand covers 12 percent of demand; (d) the brands of absorbent paper towels with the largest market shares are KCM's Kleenex and Vogue and Crisoba's Petalo; and (e) most of the two companies' business comes from toilet tissue, where they handle the two major brands sold domestically (Petalo and Regio), each of which accounts for slightly over 20 percent of total market volume.

KCM/Crisoba would have the advantages of a high level of integration, a wide distribution network, and high penetration by its brands. To equal this edge, major investment would be necessary to establish a nation-wide industry and to introduce new brands. As a result of these facts KCM/Crisoba would acquire substantial power over the relevant market., threatening competition:

- writing and printing paper. KCM and Crisoba have a 36 percent share of this market, with imports supplying another 50 percent. To meet foreign competition, the Mexican industry must increase its quality standards and efficiency levels. The merger could improve KCM/Crisoba's efficiency without threatening competition in this market. However, competition could be affected in the notebook segment. In these products KCM and Crisoba cover 80 percent and 6.5 percent of domestic demand, respectively. On these basis, the Commission found that the merger would raise the concentration ratios, but not drastically modify, the structure of the writing and printing market. Nevertheless, the market power arising from the merger would hinder competition.
- disposable baby wipes. KCM and Crisoba supply 38 percent of the market through imports. Moreover, 70 percent of domestic demand is covered by imports from the United States, where KCC and Scott are major producers. Considering this, the Commission determined that the merger would obstruct the development of competition.

The Commission found that the merger between KCM and Crisoba could facilitate displacement of competitors and unilateral price fixing. To impede this, the Commission established provisions to reduce KCM/Crisoba's market power and to expedite immediate participation by new competitors. The conditions imposed were the following:

- feminine hygiene products. Divestiture of Crisoba's stake in Sancela and Comercializadora Sancela, and also of the brands produced and marketed by those companies (Saba, Confort, Evax);
- tissue paper derivatives. a) Sales of all rights over Regio brand toilet tissue and napkins; b) 25-year transfer under license, extendible indefinitely in 25-year terms, of all rights over Scotties brand disposable tissues; c) cease to use of Suavel brand napkins. These conditions were reinforced by the divestiture of the assets required to produce a minimum 67 000 tons of tissue paper, and the converters necessary to manufacture toilet tissue, facial tissues, and paper napkins in proportions equal to the market shares of Regio and Scotties. In addition, the purchasers of those assets would be offered the option of entering into a supply contract for 13 000 tons of tissue paper a year;

- notebooks. Sale of all rights over Crisoba's Shock brand;
  - disposable baby wipes. 25-year transfer under license, extendible indefinitely in 25-year terms, of all rights over Baby Fresh brand.
2. Corporación Internacional de Aviación, S.A. de C.V./Aerovías de México, S.A. de C.V./Corporación Mexicana de Aviación S.A. de C.V.

The above mentioned companies notified the acquisition of the stocks of Aerovías de México (Aeroméxico) and Corporación Mexicana de Aviación (Mexicana) by Corporación Internacional de Aviación (CINTRA). This operation would give CINTRA control over the two other companies and their subsidiaries.

Before the enactment of the FLEC, Aeroméxico (with the authorisation of the Ministry of Communications and Transport (SCT)) acquired control over Mexicana. The worsening of the airlines' economic and financial situation led to their being taken over by creditor banks. Thus, the banks held more than 60 percent of Aeroméxico's capital, which in turn controlled 54.6 percent of Mexicana's stock.

CINTRA was incorporated at the initiative of the creditor banks in order to put Aeroméxico and Mexicana's finances on a sound footing. Following the acquisition, CINTRA would strictly be a holding company, registered at the Mexican Stock Exchange. The operation would allow the corporate restructuring necessary to strengthen the two airlines and guarantee their survival. The operation implied no modifications to the vertical and horizontal integration of Aeroméxico and Mexicana, which had interests in different airlines and auxiliary services.

The relevant market of the operation was that of regular cargo and passenger air transportation services within Mexican territory. Aeroméxico and Mexicana's share of the international market is negligible.

The following facts are relevant to Aeroméxico and Mexicana's market power :

- combined share of 65.3 percent in terms of passengers carried. Over recent years, other competitors have significantly increased their involvement in the relevant market;
- following the deregulations of air transportation services, the number of market participants and supply of air-travel services increased notably;
- the prevailing conditions of competition have allowed significant reductions in airfares on such routes as Mexico City-Guadalajara, Mexico City-Monterrey, Mexico City-Mérida, Monterrey-Cancún, and Guadalajara-Tijuana. The continuation of competition requires the number of suppliers and the services they offer to be maintained. The withdrawal of either Aeroméxico or Mexicana would have a negative effect on competition. The commercial integration of the two companies would have a similar result.

The Commission ruled that competition would be affected by the weakening or closing down of either of these two airlines. It therefore decided to allow their financial and administrative restructuring in order for them to attain adequate levels of efficiency and for capitalised debts to be recovered. Nevertheless, to avoid anti-competitive risks, measures to safeguard the independence of Aeroméxico and Mexicana's commercial activities were deemed necessary. The conditions imposed by the Commission included the following:



- separate accounts and independent management for each of the two companies through their respective Boards of Directors;
  - issuance of periodical reports on the fulfilment of the conditions imposed and the functioning of the markets by a consultant to be appointed by the Commission;
  - the timely correction of any anti-competitive practices that may arise, by means of: 1) the setting of rates by the Commission and the SCT, in cases in which the Commission rules competition to be inexistent; 2) the immediate suspension of any unlawful practices detected by the Commission; 3) the setting of measures agreed between the Commission and the SCT to protect or re-establish conditions of competition; 4) CINTRA, Aeroméxico, and Mexicana to co-operate in preserving and improving the competitive environment; and 5) the partial or total deconcentration in case of substantial damage to competition.
3. Auction of Aseguradora Mexicana, S.A. de C.V.:
- offered by: Grupo Financiero Asemex-Banpaís, S.A. de C.V.;
  - bidders: Grupo Nacional Provincial, S.A. de C.V., Seguros Comercial América, S.A. de C.V.; Valores Monterrey Aetna, S.A., and Liberty de México Seguros, S.A.

Asemex-Banpaís (Banpaís) notified its intent to sell 70 percent of the total capital stock of Aseguradora Mexicana, S.A. de C.V. (Asemex). The remaining 30 percent belongs to Petróleos Mexicanos (Pemex) and the Federal Electricity Commission (CFE) - two state- owned corporations that are also major clients of the company's insurance services. The sale was to be carried out by means of a public auction.

On account of several financial problems, in March 1995 the National Banking and Securities Commission (CNBV) intervened Banpaís. That same month, Banpaís obtained a loan from Fobaproa,<sup>2</sup> secured with stock equal to 70 percent of Asemex's capital. To conclude this operation aimed at putting its finances back on a sound footing, Banpaís proceeded to sell this 70 percent holding.

The relevant market of the proposed operation is that of life, accident, health, and liability insurance offered within Mexico. The following facts are relevant to the case:

- the bidders<sup>3</sup> and Asemex are the country's four largest insurance firms, with a joint market share of 64.1 percent;
- the individual market shares of the three largest bidders ranged between 11.4 percent and 20.7 percent before the operation. Should Asemex be acquired by the largest bidder, its market share would increase to 32.1 percent;
- the three largest bidders had shares of between 8.9 percent and 18.4 percent of the liability insurance market. With the purchase of Asemex, the upper bound might become 42.3 percent, provided that the successful bidder managed to retain the public sector's market, which had been exclusive to Asemex.

Competition has intensified over recent years as a result of amendments to the law of insurance Institutions. Some of these amendments took into account provisions of NAFTA. The changes have facilitated the entrance of new companies, both Mexican and foreign, and have eliminated regulations that hindered the functioning of the market. This pressure will be felt more strongly in the medium term, thereby affecting the insurance companies' market power.

The Commission resolved not to object the purchase by any of the bidders. Nevertheless, it also gave notice that it would take the steps necessary to guarantee that insurance purchases by the public sector be carried out giving the same opportunities to all market players.

4. Sercotel SA de C.V./Editora Factum S.A. de C.V.

Editora Factum, S.A. de C.V. (Factum) gave notice of its intent to sell its 51 percent holding in the capital stock of Empresas Cablevisión, S.A. de C.V. (Empresas) to Sercotel, S.A. de C.V. (Sercotel). Following this operation, Sercotel's share of Empresas' capital stock would rise from 49 percent to 100 percent.<sup>4</sup>

Sercotel and Factum are subsidiaries of Teléfonos de México, S.A. de C.V. (Telmex) and Grupo Televisa, S.A. (Televisa), respectively. At the same time, Empresas holds 99.9 percent of the stock of Millar, S.A. de C.V. (Millar), which in turn controls: *a*) a company with a concession for providing cable television services (Cablevisión, S.A. de C.V.) and other companies that filed for concessions for providing that service, and *b*) several companies that requested concessions for UHF and MMDS television transmissions. The notified operation would also involve the sale of the companies referred to under *b*) to Factum. Thus, after the operation, Telmex would, through Sercotel, control Empresas, along with Millar and its subsidiary cable TV companies. At the same time, Televisa would retain ownership of Factum and, through it, control over the TV companies that made requests for UHF and MMDS concessions.

On account of the complexity of the notified operation and its impact on the evolution of subscription TV and basic local telephone markets, particularly in the Mexico City metropolitan area, the Commission consulted with the Ministry of Communications and Transport and held several meetings with the companies involved in the operation and the companies that stood to be affected by it. The elimination of threats to competition required exploring conditions that could have substantially altered development plans of Telmex and Televisa. In light of this, Sercotel and Factum decided to withdraw the planned operation prior to the conclusion of the investigation.

*Railroad privatisation*

The sale of railroad companies to the private sector began with the auctions of Ferrocarril Chihuahua al Pacífico, S.A. de C.V. (FCP) and Ferrocarril del Noreste, S.A. de C.V. (FN). FCP provides services from the north of the state of Sinaloa to the border between the state of Chihuahua and the United States. FN mainly operates along the country's north-east trunk line, with branch lines serving ports on the Pacific and Gulf coasts.

Both auctions were carried out in accordance with the Railroad Service Regulatory Law and the strategy for restructuring and privatising the sector established by the federal government. In this way, the sale fully observed the provisions for promoting and protecting competition contained in that Law and in the privatisation plans approved by the Inter-Ministerial Commission on Privatisation's, with the involvement of the Federal Competition Commission. Chapter III of this report (Railroad Restructuring and Privatisation Strategy) offers a general description of those issues.

The Commission received notice of the participation of three and five groups and companies in the FCP and FN auctions, respectively. In addition to the competition issues included in the divestiture strategy, the evaluation of the effects on competition that would follow the awarding of the railroad companies took into account:

- the bidder's interests in the transport sector and railroad services;
- the appropriateness of awarding the railroads to different companies or groups;

- the establishment of trackage rights to promote competition between participants.

Considering all these factors, the Commission resolved to make no objection to the purchase of the railroad companies up for auction by any of the bidders involved.

#### *Mobile radio-Paging services*

The Commission received notifications from 24 parties interested in obtaining frequency concessions for providing mobile radio-paging services. Presenting proposals to the Commission and obtaining its approval are prerequisites for participating in auctions and for obtaining concessions.

A total of 27 concessions with regional coverage (three per each of the nine zones into which the country has been divided) using the 929-929.7 MHz band and nine concessions with national coverage in the 931.2-931.9 MHz band were offered. The sale took place through a simultaneous ascending auction.

In order to prevent anti-competitive risks, the allocations were subjected to the following conditions:

- a maximum equal to four national concessions or its equivalent of regional concessions, in terms of market share. Alternatively, a number of regional and national concessions with a market no greater than one corresponding to the four national concessions;
- no region of the country to be serviced by more than four concessions (regional, national, or a combination of both) belonging to one single economic agent. Concessions granted prior to the auction in the frequency bands referred to were included in this maximum;
- no bidder to be awarded more than two concessions of the three regional concessions offered in each region of the country.

The Commission extended these conditions to apply to groups of companies interrelated by means of common shareholders and corporate links.

The relevant markets were those of paging services offered at the regional and national levels. As a result of the restrictions imposed, the new concessions always reduce market concentration rates. This is because they encourage the entry of new participants and prevent current concessionaires (with holdings equal to the maximum allowed) from obtaining additional concessions.

The telephone network is an input in the provision of paging services. Non-discriminatory access to this network is essential in establishing conditions of competition. In order to guarantee such conditions, the Commission subjected the participation of Buscatel, S.A. de C.V. (a subsidiary of Teléfonos de México, S.A. de C.V., which owns the telephone network), in the relevant market to the establishment of an agreement for interconnection fees between Telmex and the paging service companies. The other bidders were all approved, with the exception of Comunicaciones MTEL, S.A. de C.V., which already held four national concessions.

### **3. The role of Competition Authorities in the formulation and implementation of other policies**

Over the 1995-1996 period, the Commission participated in government efforts aimed at implementing private involvement in the provision of public utilities and in the exploitation of resources under the nation domain. It also helped restructure the public sector's economic functions. Particularly

worthy of note are the reviews of the regulatory frameworks for airports and for the distribution of natural gas, the policy of allocating radio frequencies on a concession basis, and the design of the strategy for privatising public companies within different sectors. The Commission's opinions helped to establish conditions that encourage the development of efficient markets in those sectors recently opened up to private participation, prevent anti-competitive practices, and implement mechanisms for co-ordination between competition and regulatory authorities.

These opinions were presented to the Ministries with specific responsibilities over the sectors in question and at the Inter-Ministerial Commission on Expenses and Finance and Inter-Ministerial Commission on Privatisation's.<sup>5</sup> The FCC is represented in these bodies; which allows it to give its recommendations on a timely basis.

FCC's involvement in the Foreign Trade Commission and National Standards Commission<sup>6</sup> has allowed competition policy to be co-ordinated with industrial development, trade, consumer protection, and environmental protection policies.

### *Regulations for natural gas*

The Commission contributed to the preparation of the draft of the Natural Gas Regulations. The regulations, as issued by the executive in November 1995, includes the following provisions to develop competition:

- removal of restrictions on natural gas imports, in order to promote the functioning of market forces at the primary sales level;
- unbundling of the industry's transportation, storage, distribution, and marketing activities. Services must be provided independently, without the sale of one service depending on the acquisition of another;
- prohibition of vertical integration of transport and distribution within a single region, except when greater efficiency results;
- promotion of a wide infrastructure, in order to establish a platform for the development of a market and competition within this sector. On account of the lack of infrastructure in this area and the high amount of investment required to overcome it, a period of exclusivity for the first distribution concession in each specific region was established. However, the market power conferred by these exclusive rights is limited by the free access to the concession area to be enjoyed by resellers and by the granting of self-supply permits;
- auctions for exclusive distribution permits, to be awarded on the basis of the best service and price conditions. This is an attempt to foster competition through setting up a competition for the market rather than competition in the market;
- participation in auctions for exclusive distribution permits, subject to the approval of the Federal Competition Commission;
- notification to the Commission of permit transfers;
- removal of price and rates regulations when, in the Commission's opinion, conditions of competition exist.

### *Airports Law*

The Airports and Civil Aviation Laws constitute the new legal framework for air transportation services. Both laws seek to boost the modernisation of the sector through greater private participation, regulated by an efficient functioning of the market. Because of the close relationship between those activities, the laws complement each other in promoting and establishing conditions of competition. Starting in early 1995, the Commission played an active role in the discussion and preparation of the drafts for both laws, in conjunction with the Ministry of Communications and Transport. The Commission's opinions on civil aviation matters were presented in its previous report.

The provisions related to competition in the Airports Law include the following:

- the granting of concessions and permits for managing, operating, and building airports, based on transparent criteria;
- the allocation of concessions through public auctions open to all economic agents who meet the technical requirements necessary to provide the service;
- the regulation of mergers and acquisitions in order to prevent any effect that could diminish, impair or impede competition;
- the obligation of providing all users with airport and auxiliary services, without discrimination;
- firms granted concessions are required to provide open access to suppliers of auxiliary services, except when restricted by technical or safety considerations;
- the establishment of guidelines for regulating rates and prices when, in the FCC's opinion, conditions of competition do not exist.

### *Railroad service regulations*

The Railroad Service Regulations came into force on 1 October 1996. These Regulations establish concepts, criteria, and transparent administrative procedures that strengthen the enforcement of the Railroad Service Regulatory Law. The Commission was actively involved in dealing with the competition issues in the regulations. Among them:

- the precise definition of trackage and haulage rights. Also, the definition of procedures for applying for those rights, and the definition of procedures for setting the applicable terms, conditions and fees. In any event, concessionaires must provide obligatory trackage and haulage rights when so required;
- the procedures to be followed to establish official fees when, in the Commission's opinion, conditions of competition do not exist. In this regard, the following points are worthy of note:
  - the procedures can be initiated at the request of the affected user or at the initiative of either the Ministry of Communications and Transport or the Commission;
  - the establishment of official fees equal to those that would be charged by an efficient carrier, using a method previously submitted to the Commission.

- granting third parties concessions to provide a specific transportation service when the original concessionaire ceases to provide that service. In such an eventuality, the railroad concessionaire is obliged to grant the necessary trackage and haulage rights.

### ***Radio frequency concessions***

The allocation of radio frequencies for specific purposes is of key importance in establishing conditions of competition within telecommunications markets. To this end, the Federal Telecommunications Law provides for: *a)* the periodical publication of a program specifying the frequency bands available for concessions for particular purposes, their geographical coverage, and intended use; *b)* the granting of concessions through public auctions; and *c)* the need for the Commission's approval prior to participation in those auctions.

The program published in June 1996 included auctions of frequency bands for mobile aeronautical radio communications,<sup>7</sup> point-to-point microwave links,<sup>8</sup> and mobile personal paging.<sup>9</sup> With regard to the allocation of concessions through public auctions the Commission has made efforts to include therein measures to rationalise their allocation, facilitate the entry of interested parties, and prevent anti-competitive practices. Thus, it has supported the establishment of simultaneous ascending auctions, the imposition of spectrum caps, the establishment of clauses to discourage collusion between competitors, and the application of the "use it or lose it" principle to deter speculation.

The frequency auctions for mobile aeronautical radio communications and point-to-point microwave links were the least complicated cases as regards competition. The bands offered for the former are shared by all providers. The auction winner is allocated an exclusive channel. In addition, the auction rules excluded economic agents who already held a concession or permit to provide services of this kind. In this way, the presence of a minimum number of competitors was guaranteed.

As a result of the nature of point-to-point links and the frequencies allocated to this service by the SCT, the bands intended for such uses can be considered an unlimited resource for the coming years. Therefore, and because of the number of concessions expected, the Commission resolved to automatically approve all bidders involved in the auction, while still analysing in detail those proposals that could endanger competition. Nevertheless, the Commission pointed out that over the long term, administrative costs and the value of the frequency bands allocated for these purposes could rise as a result of overcrowding and the introduction of new technologies allowing better use to be made of them. To address this problem, it recommended exploring the possibility of granting the frequencies to a given number of administrators, who would then market them among the final users.

Simultaneous ascendant auctions were used because of the advantages they offer in efficiently allocating frequency bands for paging services. In addition, due to the characteristics of this market, the following conditions were imposed on the allocation of concessions: *a)* a maximum market share; *b)* no more than four regional or national concessions; *c)* a maximum of two new regional concessions in a single area; and *d)* the restrictions that would establish the Federal Competition Commission in order to protect competition. These restrictions prevent operations that could threaten competition.

### ***Railroad restructuring***

The Commission participated in studies of the different options available for railroad restructuring and privatisation. During this process, it submitted several recommendations aimed at encouraging the development of competition within the sector.

The privatisation plan includes, inter alia, the following elements and conditions:

- the incorporation of a railroad company for each of the three trunk lines - Pacific-North, Northeast, and Southeast (regional companies) - together with the creation of a company for the Vale de México terminal;
- the incorporation, when appropriate, of companies for the shorter routes;
- the granting of limited-period concessions for operating, exploiting and, when applicable, building railroads in the aforesaid regions and routes;
- the establishment of obligatory trackage and haulage rights for given sections, in accordance with the needs detected in each case;
- FCC's approval for all bidders in concession auctions.

The privatisation plan involves the following elements aimed at promoting competition: firstly, it promotes competition with road transport by eliminating the possibility of cross subsidies between railroad regions and by stimulating the efficiency of the network; secondly, it promotes competition within the network, by allowing regional comparisons of costs and prices; finally, the balanced access of the regional companies to major markets, as well as to border cities and seaports, will encourage competition.

In order to strengthen the plan's promotion of competition, the FCC made the following recommendations:

- regional railroad concessions should be granted to different companies;
- the possibility of including additional trackage rights after the end of the period necessary for the companies to develop their markets and consolidate their positions.

## NOTES

1. As stated by article 14 of the Mexican Constitution, no law shall be applied retroactively.
2. Fondo Bancario de Protección al Ahorro. A deposit insurance trust.
3. With the exception of Liberty.
4. In February 1995 Sercotel gave notice of its purchase of 49 percent of Empresas' stock. On June 20 of that year, the Commission resolved not to object to the operation, but did impose certain conditions on it.
5. Comisión Intersecretarial Gasto-Financiamiento y Comisión Intersecretarial de Desincorporación.
6. Comisión de Comercio Exterior y Comisión Nacional de Normalización.
7. Uplink: 849-851 MHz. Downlink: 894-896 MHz.
8. 225-233 MHz and 12.3-13.2 Ghz.
9. 929-932 MHz.



## THE NETHERLANDS\*

(June 1996-June 1997)

### Changes to competition policy and legislation

#### *Competition Act adopted by Parliament*

Competition policy is on the eve of a drastic transformation in the approach to competitive relationships. The aim is to promote an effective policy that controls competitive restraints imposed by businesses and provides for a stimulating business climate. The forthcoming introduction of a new Competition Act, scheduled for 1 January 1998, is a key element in this process. The economic motives for the new Competition Act, progress with the introduction process and the arrangements for its implementation are the subjects covered in this Chapter.

The new Act is based on the principle that competition benefits the functioning of the national economy. The Competition Act therefore aims to eliminate the undesirable economic effects of competitive restraints. The application criterion is the nature, not the legal form, of restraints to competition. Competitive agreements and abuse of dominant positions are prohibited. Because certain forms of partnership between companies can give rise to social benefits, even when such co-operation involves some elements that restrict competition, the Act provides for a system of exemptions and the possibility of dispensation. It also includes a 'Bagatelle provision' for competition agreements of clearly minor significance from a competitive point of view.

Unlike the current Economic Competition Act (WEM), the new Act includes concentration controls. In view of the progressive integration of European markets, the Act complies with the European Community (EC) system of competition rules as far as possible. This will also benefit legal equality and legal security. For example, the term 'undertakings', to which the Act applies, is drawn from the EC Treaty (Articles 85 and 86): it covers every entity that takes part in the economic process with the aim of producing or distributing goods or providing services, regardless of its legal form, method of financing or whether it has a profit motive.

During the year under review, important steps were taken towards new legislation in the field of competition. The new Competition Act has been passed by both Chambers of Parliament and will take effect on 1 January 1998.

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\* The original language of this document is English.

The main points of the new Competition Act are:

- the abuse system of the current WEM is replaced by a prohibition system very similar to that of Articles 85 and 86 of the EC Treaty;
- a system of preventive concentration controls will be introduced in two phases, again in line with the EC model;
- establishment of an enforcement agency, the Netherlands Competition Authority (NMa), which is similar to the Bundeskartellamt in Germany, for example;

The Competition Act will apply to all sectors in the economy, with the following exceptions:

- an exemption will be introduced for partnerships between retailers for maximum prices for short-term advertising campaigns and for take-up commitments relating to certain reciprocal actions by the partnership (e.g. loans or collateral).
- a temporary exemption will be introduced for individual resale price maintenance agreements for non-subscription daily newspaper sales;
- the NMa will closely monitor potential predatory pricing through sales below cost-price;
- instructions will be issued for the health care sector;
- an exemption for joint tendering agreements, in which undertakings can bid jointly for tenders;
- an exemption for sectoral protection measures in which shopping centre operators guarantee retailers that no similar outlets will be established in the centre during its first year of operation.

The Bill was adopted by the Second Chamber on March 20, 1997 and by the First Chamber on May 20, 1997. The Competition Act was issued in the Statute Book on 24 June 1997 (Statute Book 1997, No. 242).

#### ***Enforcement: the Dutch Competition Authority***

A prohibition system means that prohibited agreements for which no dispensation is granted are legally null and void. The nullity of prohibited competition agreements can be invoked in the civil courts. The same applies for the nullity of concentrations realised in breach of the reporting and licensing requirements. It is also possible to open legal proceedings on the grounds of unlawful action and to claim compensation in the event of violations of the prohibition on competition agreements or abuse of a dominant position, or in the event of non-compliance with the reporting and licensing requirements for concentrations.

The Competition Act will also be enforced under administrative law: i.e. by an administrative body with the aid of administrative sanctions. Administrative enforcement is a good option in the case of enforcement of competition rules. Application of the material prohibitions of the Competition Act will often require special expertise and this can be provided effectively by entrusting enforcement to a specialised administrative body, the Dutch Competition Authority.

It is of major importance that the supervisory authority provided for in the Act, the NMa, has organisational autonomy and is positioned at arm's length from the Ministry. The NMa must have high standards of professionalism and knowledge, offering justiciaries the assurance of objective, effective and procedurally correct case handling. The NMa must build up a reputation and image of irreproachable conduct, reliability and independence, and must meet the usual Dutch standards for supervisory authorities in the financial sector or the standards of the Bundeskartellamt in Germany.

In order to realise all of this, intensive efforts were made for the preparation of the NMa during the year under review, simultaneously with the passage of the Competition Bill through Parliament. The principle was that as soon as the Competition Act came into force, the NMa had to be able to start operations as a specialised, well-equipped and professional service of the Ministry.

The preparations have now reached a highly advanced stage. In a sense, the NMa (in formation) is already operational. It has moved into separate offices in The Hague and a Director General has been appointed (Mr. A.W. Kist). The NMa will be staffed with 70 personnel at the outset.

The NMa consists of one staff section and three operational sections, under the overall responsibility of the Director General, Mr. A.W. Kist. The Investigations, Supervision and Dispensations (OTO) section is the largest. Supervision of compliance with the Act and investigations of possible breaches of the statutory provisions constitute an important part of the OTO's work. Investigations relate to prohibited competition agreements for which no application for dispensation has been submitted and to abuses of dominant positions, in response to complaints submitted to the NMa or on the section's own initiative. The OTO section also handles applications for dispensation.

The second section, Control of Concentrations (CoCo) is responsible for determining whether concentrations require licenses, within strict statutory periods. The conditions on which licenses can be issued are then considered together with the parties subject to the licensing requirements.

The third section, Decisions, Objections and Appeals (BBB), is responsible for handling objections and for issuing decisions on (breaches of) sanctions. The BBB sections also represents the NMa Director General in appeal hearings.

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

This chapter provides a description of the main cases which were handled during the period under review. Firstly, a progress report is given on requests for dispensation from the general prohibitions on resale price maintenance agreements, horizontal price-fixing agreements, market-sharing agreements and tendering agreements. This is followed by a review of the individual cases in which the current act on competition (WEM) was applied against agreements between undertakings and practices by undertakings, on the grounds that these were contrary to the general interest. Often, these decisions were based on complaints from the private sector. The number of cases handled during the period under review shows a substantial increase. This is strongly related to the increased focus on competition policy in the media, partly as a result of the new Competition Act. In some cases, no infringement of the WEM was found. These cases are also discussed in some detail.

*Action against anticompetitive practices: prohibited competition agreements*

*Price fixing*

Resale price maintenance on books

A decision on the request for dispensation for the Regulations on Book Trading in the Netherlands, submitted by the Royal Society for the Promotion of Book Retailers Interests (KVB), was granted on 10 May 1997. Dispensation was granted until 2005. In the year 2000, the effectiveness and efficiency of the instrument will be evaluated by the relevant Ministries. In view of the Second Chamber pledge, dating from 1985, it was considered desirable from the point of view of administrative consistency to grant dispensation, after the KVB had made the Regulations less stringent and disproportionate. In particular, curtailing the professional skills requirements for book retailers to a one-year training course and weakening collective exclusive transactions have helped to lower access barriers in this sector. The Free Record Shop and Threma Art, Books and Collectibles submitted objections to the decision. However, the decision leaves no doubt as to the fact that, had the Trading Regulations proved to be null and void, wholly or in part, pursuant to Article 85 of the EC Treaty, the grounds for dispensation would lapse in respect of the provisions of the Regulations that were nullified. The European Commission recently reported that it had not yet taken a decision on the Regulations, but was still investigating them. Furthermore, European competition rules play a key role in the interim injunction proceedings between KVB and Free Record Shop (see the court rulings relating to the WEM in this case). If the Amsterdam District Court finds that (parts of) the Trading Regulations do not enjoy 'provisional validity', it can apply Article 85, Clause 1 of the EC Treaty. The European Commission has the sole right to apply Article 85, Clause 3 (dispensation).

Horizontal price fixing

During the period under review, the Economic Competition Commission (CEM) presented its recommendations on the application for dispensation of the Dutch Newspaper Press (Nederlandse Dagblad Pers (NDP)). The CEM was also asked to advise on the proposal to grant dispensation to the Invalidity Insurance Exchange. A number of new applications for dispensation were submitted during the period under review, among which one from the Royal Netherlands Football Association (KNVB). The dispensation application of the Vereniging Zand- en Grindschippers for an agreement on charges for the transport of sand and gravel was declared inadmissible.

Daily newspaper cartel

The NDP applied for dispensation for the following horizontal price-fixing agreements:

- collective price increases for newspaper subscriptions;
- reduction in the size and duration of discounts for new and free subscriptions;
- collective increase in advertising rates;
- the margin for registered advertising agencies.

The content of the request for advice sent to the CEM on 10 July 1996 was discussed in the preceding report. In its advisory report of 21 March 1997, the CEM unanimously found that the NDP had not provided enough evidence in support of the view that agreements 2, 3 and 4 contribute to maintaining pluriformity. The CEM therefore recommended that no dispensation be granted for these agreements. The CEM did not present a unanimous view on the binding decision on collective price increases for

subscriptions (agreement 1). The majority of the members took the view that in the long term, this price-fixing agreement does not constitute an effective instrument for promoting sustained pluriformity. These members do not recommend that dispensation be granted for this agreement. Two Commission member, however, took the view that the latter NDP agreement is essential for maintaining pluriformity in the daily newspaper sector and therefore recommend that dispensation be granted for this agreement.

By agreement with the State Secretary for Education, Culture and Sciences, the Minister of Economic Affairs plans to permit the horizontal price-fixing agreement between publishers on collective increases in subscription charges (agreement 1) until 1 July 1999. The other price-fixing agreements will be prohibited. The reason for the temporary facilitation of the subscriptions agreement is that immediate termination of all agreements that restrict competition in the daily newspaper market would involve a drastic change in the existing situation. This could lead to shock effects. Because this could be detrimental to the pluriformity of the press, it was decided that a transitional situation should be created to allow the daily newspaper sector to prepare for the new market situation with no agreements that restrict competition. The gradual discontinuation of competition agreements in the daily newspaper sector not only relates to horizontal price-fixing agreements, but also to individual vertical resale price maintenance for Dutch-language newspapers. During the debates on the Competition Bill in the Second Chamber of Parliament, the Minister promised to promote an exemption for these vertical competition agreements until 1 January 1993.

The intention is to facilitate the binding decision on collective increases in subscription charges by means of a dispensation from the Horizontal Price-Fixing Decree until 1 January 1998, followed by an exemption until 1 July 1999. The need for this operation arose because the Horizontal Price-Fixing Decree to which the application for dispensation relates will expire in mid-1998. The Cabinet has agreed that the decision will be sent to the Council of State for advice.

#### Football broadcasting rights

In response to a complaint from Feyenoord football club on the collective sale of television broadcasting rights for football matches to Sport7, an investigation was opened during the period under review. Feyenoord and a number of other clubs took the view that they hold these rights and therefore, were themselves entitled to sell them. The investigation led to the conclusion that the KNVB acted as a central sales office in the sale of the rights, which is prohibited under the Horizontal Price-Fixing Decree.

After the failure of Sport7, a situation arose in which the broadcasting rights could be resold. Talks were then held with the KNVB on what was and was not possible under competition law. The KNVB consequently decided to change its methods. It first applied for dispensation from the Horizontal Price-Fixing Decree for the collective sale of broadcasting rights for summaries of league matches. This application is now being processed. The activities of a number of clubs in relation to the formation of the NV Eredivisie represents a potential complicating factor here.

Secondly, the KNVB decided that it would no longer act as a seller of rights for live or full broadcasts of league football matches, but as an agent for 33 of the 36 clubs. The question of whether this agency construction meets the requirements of competition law is now under investigation. Finally, it should be noted in this respect that an audiovisual production company has filed a complaint regarding the collective sale of TV production rights for football matches by the KNVB. This complaint is also now being processed.

The following table shows the position in processing of applications for dispensation.

**Progress with applications for dispensation from the Horizontal Price-Fixing Decree**

Applications submitted	58
Applications under consideration	15
- Provisional decision	4 <sup>1</sup>
- Request for advice of CEM	1 <sup>2</sup>
- Pending EC decision	4 <sup>3</sup>
- Pending statutory regulation	2 <sup>4</sup>
- Other	4 <sup>5</sup>
Applications settled	43
- Withdrawn	9
- Inadmissible	6
- Rejected	25
- Granted	3

Objections and appeals

CUPO

The Minister of Economic Affairs, on behalf of the Minister of Finance, rejected the objections filed by the Private Law Consultative Commission (CUPO) and the Life Insurance Agents Association against the refusal to grant dispensation for a pricing agreement regulating the remuneration of insurance agents. An appeal has now been filed with the Industrial Appeals Court.

Maaszand and Maasgrind

On 16 August 1996, the Industrial Appeals Court handed down its ruling in the appeal case described in the preceding Annual Report. The Court rejected the appeal filed by the two sand and gravel production companies. The ruling means that their competition agreements are now non-binding.

Credit card companies

The Industrial Appeals Court rejected Eurocard's objection to the Court's ruling that a Eurocard appeal was inadmissible due to the company's failure to pay court registry fees. The appeal was filed against a decision by the Minister of Economic Affairs to refuse dispensation from the Horizontal Price-Fixing Decree, even after an objection had been filed. The Court rejected appeals filed by VSB, American Express and Diners Club against similar decisions on objections. The issue in each case was the prohibition imposed by the credit card companies on additional customer charges for acceptance of credit card payments. The rulings of the Appeal Court make these regulations non-binding. The Court took the view that the Dutch government is empowered to act in this matter, now that the European Commission has expressed an opinion, without instituting formal proceedings. The Dutch government was required to comply with the EC position. As a result, companies will be free in future to impose extra charges on customers who wish to pay by credit card. The companies concerned may introduce such additional charges in order to persuade their customers to use relatively cheap methods of payment.

## BeaNet

MKB-Nederland filed an appeal with the Industrial Appeals Court against a decision on an objection, upholding the decision of 15 March 1995 to the effect that BeaNet did not apply price-fixing and therefore did not require dispensation from the Horizontal Price-Fixing Decree. The Court ruled the appeal inadmissible due to failure to pay the court registry fees on time.

## Ship brokers and stevedores: minimum prices in Rotterdam port

The objection filed by the Rotterdam Ship Brokers Association against the refusal of dispensation for minimum prices for ship brokerage services was declared unfounded on 5 August 1996. The Rotterdam Ship Brokers Association filed an appeal against this decision with the Industrial Appeals Court on 13 September 1996.

## Pharmacists

The Pharmacy Federation Foundation Pharmacon withdrew its appeal against the refusal to grant dispensation for price-fixing by pharmacists for sales of non-prescription drugs. Member companies can now determine their own prices for non-prescription drugs.

## *Market-sharing agreements*

During the year under review, requests for advice were sent to the CEM on three occasions. The first request concerned dispensation applications submitted by five alarm services. The second concerned a dispensation application from the Royal Netherlands Association for the Promotion of Pharmacy (KNMP) and the third, an application from the Maatschappij tot Verwerving van Industriezand BV. A number of applications for dispensation were declared inadmissible during the period under review. The Pig Slaughterhouses Reorganisation Foundation withdrew its application for dispensation for a capacity management agreement.

## Alarm services

The applications for dispensation were submitted by five alarm companies: Groupe Européen SA, Verzekeraars Hulpdienst BV, Coöperatie Omnicare Reishulp UA, Schade Alarm Service SAS BV and SOS International BV. The applications related to national market-sharing agreements. The alarm services operating in the Netherlands had agreed a national district allocation in consultation with the Association of Salvage Specialists, and had selected salvage companies which would be used for these salvage activities in the various districts. The alarm regulations were laid down in standard agreements contracted between the alarm companies and the selected salvage operators. As a result, the alarm services all apply the same district allocation and use the same salvage operators in each district. The request for advice sent to the CEM on 2 July 1997, on behalf of the Minister of Transport and Public Works, gave notice of plans to reject the applications for dispensation, because the competitive restraints go far beyond what is necessary for the effective operation of the current salvage system. The salvage operators are called in only after the police have arrived at the scene of the accident and have verified whether the relevant cars are insured, on the basis of the registration number. In this case, it is in principle possible to determine which insurance company is involved when the registration number is checked, and which salvage company has been contracted by that insurer. For this reason, collective selection and district allocation is not essential. The request for advice also outlines an alternative system for emergency assistance, such as that permitted by the Minister of Transport and Public Works for roads where tailbacks are common. In this system, salvage operators are called in immediately when an accident is first reported, without further controls.

This realises a substantial time saving, averaging 15 minutes per salvage operation. From the point of view of road safety and of tailback prevention, such a time saving is of considerable importance. The request for advice states that central selection of salvage companies does appear to be essential in order to realise such time savings, which could satisfy an important condition for dispensation.

#### KNMP

In August 1997, the CEM will be asked to advise on the application for dispensation submitted by the pharmacist association (KNMP) , for two provisions in its 'Professional Code and Rules of Conduct'. The request for advice gives notice of plans to refuse dispensation for the provisions, which state that public pharmacies may not make direct approaches to individual patients that are not their own customers, and that it is forbidden to accept patients/customers during service or observation.

#### Earth removal

Three partnerships for production of sand and gravel applied for dispensations in 1994. The applications were made by Centrale Industriezand Voorziening BV, Maatschappij tot Verwerving van Industriezand BV and Panheel BV. The key issue in the assessment of these applications is whether and if so, to what extent the relevant forms of partnership can be regarded as competition agreements or market-sharing agreements. Where a partnership relates to a single quarry, there would appear to be no question of market-sharing within the meaning of the Decree, partly in view of the fact that only one licence is issued per quarry under the earth removal policy based on the Earth Removal Act. However, if a partnership concerns more than one quarry, then in principle, this involves prohibited sharing of the relevant production market. The dispensation application from the Maatschappij tot Verwerving van Industriezand BV appears to relate to the latter situation. In August 1997, the CEM will be asked to advise on a proposal to refuse dispensation. The other two applications have now been declared inadmissible.

#### Urban heating

Intergas BV submitted a dispensation application for an urban heating project in Oosterhout, and NV Warmtedistributiemaatschappijen for a similar project in Helmond. Both applications were declared inadmissible during the period under review. The main reason was that the agreements for which dispensation was requested were imposed de facto by local authorities. Therefore, there appeared to be no question of agreements reached on a voluntary basis.



The following table shows the position in processing of applications for dispensation:

**Progress with applications for dispensation from the Market-Sharing Agreements Decree**

Applications submitted	27
Applications under consideration	10
- Request for advice of CEM	6 <sup>6</sup>
- Pending EC decision	1 <sup>7</sup>
- Other	3 <sup>8</sup>
Applications settled	17
- Withdrawn	3
- Inadmissible	12
- Rejected	1
- Granted	

*Tendering agreements*

The Association of Cooperating Price-Regulating Organisations in the Construction Industry (SPO) withdrew the dispensation application submitted in 1994, following a European Court of Justice ruling that made the European Commission's infringement decision against the SPO regulations irreversible. In July 1997, the CEM was asked to advise on the applications for dispensation from the Registration of Greenhouse Horticulture Supplies Foundation (RTG), the Central Office for Representation of Plumbers Interests Association (CEBULO), the Association for the Representation of Painters and Decorators Interests (BBS), the Netherlands Shipbuilding Industry Association (VNSI), the Federation of Steel Construction Interest Groups (FBS), the Association of Collaborating Roofing Businesses (VSD), the Association of Environmental Technology and Water Management Enterprises (VOMW) and the Association of Professional Interest Offices (VEVA). Further details are given below.

Because the above applications for dispensation lent themselves for joint assessment, it was decided that they should be presented to the CEM in a single request for advice (with draft decisions in Appendix 8). The request for advice gave notice of the intention to reject all the applications. It was observed that the key features of all agreements were the same as parts of the SPO agreements, which the European Commission found to be in breach of Article 85, Clause 1 of the EC Treaty as long ago as 1992, and consequently null and void. Because it has not been shown that the applicants qualify for dispensation from the European Commission on the grounds of Article 85, Clause 3 of the Treaty, the request for advice states that an agreement cannot be permitted in national competition law if it is prohibited by Community competition law.

Pursuant to Article 10 of the Tendering Agreements Decree, dispensation can be granted only if required in the general interest. The Notes to this provision show that the intention is to create a stringent dispensation criterion that must be applied on the basis of the criteria drawn from Article 85, Clause 3 of the EC Treaty. Because the European Commission has already found provisions in the regulations for which dispensation is requested to be in breach of Article 85, Clause 1 of the Treaty, and did not see sufficient grounds for dispensation based on Article 85, Clause 3, there are no grounds and no scope to grant the requested dispensation on the basis of Article 10 of the Tendering Agreements Decree. This applies all the more because there is no evidence of special circumstances that could necessitate a different

opinion. Perhaps superfluously, and regardless of European law, the request for advice notes that the applications for dispensation also fail to show that the requested dispensations are necessary in the (Dutch) general interest.

Shortly after the request for advice was sent to the CEM, the VNSI withdrew its application. The sections of the request for advice relating to the VNSI were therefore also withdrawn. Formal settlement of the applications is planned in the autumn of 1997, after the CEM has issued its recommendations. This will complete processing of all requests for dispensation from the Tendering Agreements Decree submitted under the WEM regime, with the exception of the application from the Construction Industry Market Function Foundation (SMB).

#### Construction Industry Market Function Foundation (SMB)

As explained in the preceding Annual Report, no final decision can be given on the SMB's application for dispensation for its General Registration Conditions (AIV) until a decision has been issued on an application for dispensation submitted to the European Commission. The European Commission had not yet reached a view at the time when this Annual Report went to press.

The following table shows the position in processing of applications for dispensation.

#### **Progress with applications for dispensation from the Tendering Agreements Decree**

Applications submitted	15
Applications under consideration	9
- Request for advice of CEM	8
- Pending EC decision	1
Applications settled	6
- Withdrawn	1
- Inadmissible	5

#### *Individual cases*

This section highlights a number of cases which may be of interest to other authorities.

#### Decisions, recommendations and requests for advice

During the year under review, three decisions were taken on access to cable networks. The advice of the CEM was requested in three further cases. The first concerned plans to declare certain exclusivity clauses in contracts relating to teletext service provision counter to the general interest, pursuant to Article 19 of the WEM. The second case related to plans to declare a branch protection regulation in the municipality of Heerhugowaard counter to the general interest, pursuant to Article 19 of the WEM. The third case concerned plans to declare conditional sales applied by the Stem and Brabants Dagblad counter to the general interest pursuant to Article 24 of the WEM. During the period under review, the CEM presented its advisory report on plans to declare a branch protection regulation in Beuningen counter to the general interest. Further details are presented below.

#### Access to cable networks

##### Cable supervision by the NMa

On 31 January 1997, the Minister of Economic Affairs, on behalf of the co-responsible Ministers of Transport and Public Works and of Education, Culture and Sciences, informed the Second Chamber of the solution supported by the Cabinet for supervision of access to cable networks. Primarily because the application of the WEM in practice has shown that competition law provides an adequate basis to effectively address the cable access problem, the Cabinet feels that supervision of cable access should take place on a structural basis, on the grounds of general competition law. The latest introduction date is 1 January 1998. The Cabinet does not consider it necessary to introduce specific regulations in media or telecommunications law. The Cabinet emphasises that competition law is also suitable for supervision of imperfect markets or markets in transition, as shown by practical experience relating to cable access, among other things. The temporary supervisory powers of the Media Commissariat will expire no later than 1 January 1998. As from that date, therefore, the NMa will hold sole responsibility for supervision of access to cable networks. The NMa will consult the Ministries of Education, Culture and Sciences and of Transport and Public Works, of the Media Commissariat and the Independent Post and Telecommunications Authority (OPTA) in this process.

##### Holland Advertising New Media (HANM)

On 4 October 1996, the CEM presented its advisory report on the plans of the Ministers of Economic Affairs, of Transport and Public Works and of Education, Culture and Sciences to order the Alkmaar cable operator to admit HANM pursuant to Article 24 of the WEM, and to declare an exclusivity clause between the Alkmaar cable operator and a cable newspaper competing with HANM non-binding, pursuant to Article 19 of the WEM. A decision was issued on 17 December 1996. On behalf of the Ministers of Transport and Public Works and of Education, Culture and Sciences, the exclusivity clause was declared to be counter to the general interest, in line with the advice of the CEM.

In the same decision, the Alkmaar cable operator, Stichting Beheer CAI Alkmaar, was ordered to grant access to HANM on the grounds of Article 24 of the WEM. It was also ordered to apply a provisional broadcasting charge equivalent to the current average broadcasting charge for program providers in the Alkmaar basic package, excluding compulsory broadcasts or programs of providers that have no interest in broadcasting, until such time as agreement on charges is reached. CAI Alkmaar filed an objection against this decision and petitioned the Industrial Appeals Court for a provisional order suspending the Ministry of Economic Affairs' decision. The Court rejected the petition in a ruling handed down on 17 April 1997. The objection is currently under consideration.

##### Complaint from Eurosport Sales Organisation SA

On 4 October 1996, the CEM presented its advisory report on the plans of the Ministers of Economic Affairs, of Transport and Public Works and of Education, Culture and Sciences to reject Eurosport's complaint. The Ministers formally rejected the complaint on 17 December 1996, in line with the CEM's recommendations. Eurosport's complaint concerned the principle applied by Kabeltelevisie Amsterdam BV (KTA) that it should be paid a fee for broadcasting of programs in the basic package. The decision rejecting the complaint stated that charging a fee is not, in itself, counter to the general interest.

### Complaint of Arcade Media BV

The CEM also presented its advisory report on Arcade's complaint against KTA on 4 October 1996. Arcade complained about the alleged use of discriminatory and excessive broadcasting charges. A formal decision on this case was also issued on 17 December 1996. On behalf of the Ministers of Transport and Public Works and of Education, Culture and Sciences, the Minister of Economic Affairs ordered KTA to review its system of charges for program providers for the basic package within three months, pursuant to Article 24 of the WEM. In the same decision, exclusivity clauses in KTA's contracts with program providers were prohibited pursuant to Article 19 of the WEM. The exclusivity clauses prevented program providers from distributing their programs in the Amsterdam regions through other channels. A further investigation was announced, in order to determine whether KTA realised excessive profits from the operation of the basic package. KTA filed an objection to the decision. This is still under consideration. As part of the objection procedure, KTA has now been granted a postponement of the introduction of the new charges system (due by 21 March 1997 in accordance with the decision), pending a decision on the objection. The reason for the postponement was that KTA took the view that it would not be in a position to introduce a new system of charges by 21 March 1997. The postponement order stated that in due course, the new system of charges should be introduced retroactively as from 21 March 1997.

### Charging policy of cable operators

The above decisions discussed the issue of broadcasting charges in detail. It was noted that cable operators hold a dominant position with regard to the provision of the basic package and in principle, therefore, have an opportunity to fix broadcasting charges at an unreasonable level. This not only applies for broadcasting charges, but equally for subscription charges. The cable operators are also in a position to fix their broadcasting charges on discriminatory grounds. The general principle of the Minister of Economic Affairs is that broadcasting charges should be related to the actual costs incurred by the cable operator, with an increment enabling the operator to realise a reasonable profit. In principle, broadcasting charges should be the same for all program providers. According to the decisions, differentiation in charges is permissible only where this helps to make the basic package more attractive to the viewers. Furthermore, the differentiation should be identifiable, transparent and verifiable in advance. The grounds for differentiation should be quantifiable. This would be the case if, for example, a cable operator stated in advance that it will give discounts on the broadcasting charge, based on audience figures or ratings. This general policy line does not apply for the programs of the public broadcasting associations, which are subject to compulsory broadcasting under the Media Act. An exception is also made for programs of providers which themselves have no interest in broadcasting on the Dutch cable networks, such as the BBC. The decisions also define what is meant by 'a reasonable profit'. Assuming that a cable operator's commercial risks will be relatively low, in view of its market position for the basic package, it is determined that a gross return on invested capital of no more than 4 per cent above the interest rate for long government bonds is reasonable.

### KTA profit investigation

As mentioned above, the decision of 17 December 1996 announced that further inquiries will be made as to whether KTA realised excessive profits for the operation of its basic package. This investigation was performed in the first half of 1997. KTA was asked to complete a model drawn up by the Ministry for the 1994, 1995 and 1996 financial years, and to provide a (detailed) explanation of the allocation and valuation principles. On the basis of the information provided by KTA and a detailed analysis of this information by an external auditor appointed by the Ministry, it was found that KTA had not realised excessive profits for the operation of its basic package in the above years. The Minister of Economic Affairs therefore decided that no measures should be taken against KTA, and that this part of the decision should be regarded as settled. The Second Chamber will receive separate notification of this.

### Other cable complaints

A complaint from the 'A2000 Action Group' concerning the relatively high subscription charges in Weesp, in comparison with other municipalities where A2000 provides cable television, was rejected.

As explained earlier in reply to questions from the Second Chamber, it is justifiable under competition law for cable operators in different geographical areas to apply different subscription charges if these differences genuinely arise from differences in relation to the costs of the various local networks. A complaint from an consumer relating to an increase in subscription charges in the Bunde municipality was likewise rejected, because the increase was a consequence of an expanded supply of programs and upgrading of the cable network. Two further complaints were also rejected. One was a complaint from a local broadcasting association against the admission of a cable newspaper, and the other a complaint from a cable newspaper, submitted before any actual refusal of access had occurred.

### Teletext

On the basis of further inquiries following a complaint, it was found that exclusivity clauses are contained in the partnership agreements that Teleworld has contracted with all national Dutch-language commercial television companies. The exclusivity clauses relate to various forms of teletext service provision. The Ministry intended to send a request for advice to the CEM in July 1997, regarding its plans to declare the exclusivity clauses counter to the general interest. It was found that the exclusivity clauses meant that Teleworld is the only company that can provide teletext services, in partnership with the broadcasting companies concerned, and that this makes it entirely impossible for third parties, as well as the broadcasting companies themselves, to provide teletext services via the national Dutch-language broadcasting companies without the involvement of Teleworld. In response to these plans, Teleworld stated that it would be willing to alter a significant number of contracts, so that the exclusive rights would be eliminated and other companies, such as the complainant, could contract agreements with broadcasting companies for the provision of teletext services without any involvement by Teleworld.

### *Decisions on objections and appeals*

#### Decisions on objections

On 23 October 1996, the objection filed by the Eurosport Sales Organisation against the rejection of its request for application of Article 27 of the WEM to the operator of the Amsterdam cable network was rejected.

On 2 December 1996, the objection filed by Van der Venne Vastgoed against the rejection of its request for application of Article 27 of the WEM in relation to a Limburg cable newspaper's refusal to admit Van der Venne was rejected.

#### Industrial Appeals Court

On 17 April 1997, the Industrial Appeals Court rejected a petition from CAI Alkmaar for a provisional order concerning admission to a cable newspaper on the Alkmaar cable network, on the grounds of Article 24 of the WEM.

*Cases under investigation*

Water authorities

A complaint from an industrial company regarding charges for drinking water supplies is under investigation. The complainant draws the water needed for its production processes from a nearby lake. When this is not possible, for example due to maintenance work, the company takes up water from the local drinking water supply as a reserve facility. The complainant wants the local water authority to double the reserve facility, due to the opening of a new production plant. However, the water authority's new charges for this were many times higher than could have been expected on the basis of the former charges. The water authority in question had revised the basic rates because the former basic rates did not take enough account of the specific circumstances (very high demand in a very short space of time).

Mail order pharmacy

During the year under review, a complaint from a company wishing to operate a mail order pharmacy was investigated. According to the complainant, five major pharmaceutical wholesalers which, in the complainant's view, jointly held a dominant position, refused to supply the complainant, preventing it from gaining access to the market. The complaint was withdrawn after the complainant succeeded in acquiring the necessary medicines from other sources. In response to the complaint, an investigation has now been opened into the existence of provisions in contracts between care providers and pharmacies which may represent a restraint to mail order pharmacy.

Prices of Euro 95 petrol and diesel

Following the Second Chamber debates on increased duties for motor fuels, the Minister of Economic Affairs commissioned Coopers & Lybrand to investigate the relationship between 'basic prices' in the Netherlands and other countries in 1996. The investigation showed that the basic price (pump price less all duties and taxes) of Euro 95 petrol is higher in the Netherlands than in other countries, and that there are no consistent explanations for this. This led to the opening of a supervisory investigation pursuant to Article 41 of the WEM. The investigation has yet to be completed.

Chipcard

MKB-Nederland submitted a complaint about the unit charges applied by BeaNet, an alliance of Dutch banks, for Chipknip (chipcard) transactions. According to MKB-Nederland (the association of small and medium-sized enterprise), the use of an identical system of charges via BeaNet restricts competition between Dutch banks. The complaint is under investigation.

Decoders for digital satellite TV

A wholesaler of electrical appliances submitted a complaint regarding the refusal of MultiChoice to provide smartcards for certain brands of decoders. The complainant alleges that MultiChoice provides smartcards only for the Pace brand of decoders and that MultiChoice has an economic interest in Pace decoders. Partly on the basis of a technical investigation of the technical and functional differences and similarities between the various brands of decoders, performed by the Netherlands Organisation for Applied Scientific Research (TNO), MultiChoice was notified of a provisional opinion at the end of 1996. The provisional opinion is that MultiChoice holds a dominant position in the Dutch market for digital TV broadcasts to direct dish receivers, and that the failure to provide smartcards for decoders other than the Pace brand has a detrimental effect on competition in the Dutch market. MultiChoice was also informed that certain exclusivity clauses in its contracts with certain program providers may be counter to the

general interest, as they restrict access to the market and strengthen the existing monopoly position. A final decision has still to be taken.

#### Cross-subsidization of KPN

Transport Logistiek Nederland (TLN) submitted complaints to the Minister of Transport and Public Works and the Minister of Economic Affairs regarding unfair competition from Koninklijke PTT Nederland NV (post and telecoms services) and PTT Post in the package shipment sector. In its complaint, TLN notes that KPN finances company acquisitions and invests in non-concessionary services using profits from the post and telecoms business. According to TLN, there is both prohibited cross-subsidization, within the meaning of post and telecommunications law, and conduct infringing national and European competition law. TLN also notes that KPN offers customers special discount schemes and strengthens customer loyalty through conditional sales. TLN's complaint will be considered as part of the joint investigation of cross-subsidization at KPN by the Ministry of Transport and Public Works and the Ministry of Economic Affairs, already announced by the Minister of Transport and Public Works. The reason is the losses that KPN has suffered on non-concessionary activities in recent years. The investigation will be conducted in the second half of 1997.

#### Details of broadcasting programs

In response to a complaint from a publisher of a magazine containing details of satellite TV programs, concerning the refusal of both the Netherlands Broadcasting Foundation (NOS) and HMG to provide program details, the NOS and HMG were asked for further information. Both NOS and HMG stated that they are currently reviewing their policies on the provision of program details to third parties, partly in view of the forthcoming amendment of the Media Act. The broadcasting companies will be notified of a provisional opinion and of the competition law conditions for the provision of program details after the summer. Another complaint from a publisher of an electronic program guide on the charges made by the NOS for the provision of program details was withdrawn, because negotiations between the complainant and the NOS are still in progress.

#### Temporary employment agencies

The Netherlands Association of Placement and Temporary Employment Agencies (NBBU) submitted a complaint against the exclusive partnership of Contant Beheer and the Construction Industry Social Fund in respect of their joint venture Uitzendbureau Constructief. This alliance takes advantage of the forthcoming withdrawal of the prohibition on provision of temporary employees for the construction industry through the formation of a temporary employment organisation focusing specifically on construction. The NBBU takes the view that this will give Constructief a dominant position when the prohibition on temporary employment is actually withdrawn. The complaint is still under investigation.

#### Franking machines

A company submitted a complaint against PTT Post for alleged abuse of its dominant position in the franking machines market. The question of whether there are grounds for the application of Article 24 of the WEM is under investigation.

#### Investigation of price-fixing in the CD market

During the year under review, a supervisory investigation was performed in the CD sector, pursuant to Article 41 of the WEM. Investigations were carried out at various companies in the sector. The inquiries did not reveal any horizontal agreements on wholesale or consumer prices for CDs, either at the record company or the retail level. The investigation provided no grounds for a formal referral to the ECD

for further criminal investigations. Completion of the ECD investigation into potential contravention of the Decree on Annulment of Individual Resale Price Maintenance Agreements is expected shortly.

#### Telephone directories

A complaint concerning increased charges for 'prominent' corporate listings in telephone directories was rejected. It was not established that the operator of the relevant telephone directories hold a dominant position in the market for advertising through aggregated telephone lists in printed or electronic form. Even if there were a dominant position, it was not established that the telephone directory provider's practices carry consequences that are counter to the general interest, because the new charges are significantly lower than those applied by the provider of an alternative directory.

#### E-mail

In response to Second Chamber questions and press reports on PTT Telecom's plans to introduce a new 'Net' at the end of 1997, and to offer free e-mail services using existing telephone numbers, PTT Telecom was asked for further details. Among other things, the information provided by PTT Telecom shows that, in contrast to earlier reports, it will not use telephone numbers for addressing the e-mail service. It also showed that the same terms and prices will apply for PTT Telecom as for third parties for any provision of information from the concession service for the purposes of the e-mail service. PTT Telecom stated that it will take account of the rules of play based on telecommunications and competition law in the further development of its plans. As the service will not be introduced until the autumn of 1997, only then will it become clear whether this is actually the case in practice. The question will also be taken into consideration in the investigation of cross-subsidization at KPN mentioned above.

#### Digital satellite transmission of HMG and SBS6 programs

A number of complaints concerning the switch from analog to digital satellite transmissions of HMG and SBS6 programs were rejected in 1996. It was found that the broadcasting companies in question did not hold a (collective) dominant position in the market for satellite transmissions aimed at the Netherlands, because each company had made an individual choice to switch from analog to digital transmissions of its programs. Furthermore, even if there had been a dominant position, there was no evidence of consequences counter to the general interest, because the switch to digital transmission leads to substantial cost-savings for the broadcasting companies and to technical improvements.

#### Mobile telecommunications

A complaint regarding alleged agreement of prices for mobile telecommunications services was rejected, after it was found that there was insufficient evidence to warrant more detailed investigations. Another complaint concerning the fact that Libertel subscribers cannot reach PTT Telecom's 06-8008 information number was also rejected. It was not shown that Libertel holds a dominant position and even if it did, there was no question of a conflict with the general interest, because Libertel provides its users with a service equivalent to that of PTT Telecom.

#### Allocation of broadcasting frequencies

Two complaints against the Minister of Transport and Public Works' plans for allocation of FM frequencies for radio broadcasting were rejected. It was found that in this case, there is no market sharing within the meaning of the Market-Sharing Agreements Decree, because it is the Minister of Transport and Public Works, not the commercial broadcasting stations, who takes decisions on the allocation or distribution of the relevant frequencies.



### Road building

After a number of asphalt exchanges refused to supply a German civil engineering company, the company submitted a complaint, requesting urgent action in the form of an order to supply, pursuant to Article 27 of the WEM. According to the complainant, the refusal to supply was related to the fact that the relevant asphalt exchanges were controlled by rival contractors which were trying to prevent the complainant from carrying out the projects in question in this way. After a repeated request for delivery was placed, the complainant received various price quotations for asphalt supplies. However, the complainant claimed that the prices quoted were unreasonably high in comparison with the usual asphalt prices in the market, as a result of which the projects would have to be executed at a severe loss. In order to reach an early opinion on the prices quoted, the Department of Public Works was consulted. According to the Department of Public Works, the quoted prices could not be said to differ sharply from the usual market prices. The request for urgent action was rejected on these grounds.

### Branch protection

During the period under review, four complaints regarding branch protection were rejected, because the provisions concerned had no noticeable effect on competition in the relevant markets. An objection was filed against one of the rejections.

### Ferry services

A complaint regarding price-fixing for ferry services to the UK was withdrawn. A complaint concerning an increase in the charges for the ferry service to Ameland in high season was rejected.

### Coffee prices

In response to a press report on an agreement between catering establishments to fix the price of a cup of coffee at Leiden Central Station at NLG 2.25, the ECD was asked to open an investigation.

### Synthetic casings

A complaint concerning agreements between producers in Belgium and France and retailers in the Netherlands regarding the allocation of supply and production of synthetic skins for production of frankfurters was rejected. It was found that a full substitute for synthetic skins has been available since 1992 and for this reason, it can be assumed that the agreements are no longer effective. The same complaint was also rejected by the European Commission.

### Education and training for Works Councils

A training institute submitted a complaint against the Foundation of the Joint Training Institute for Works Councils (GBIO). This Foundation was formed by the Social and Economic Council (SER) for the purpose of assisting and supporting businesses in the education and training of Works Councils. To this end, the Foundation contracts partnership agreements with institutes that provide relevant training courses. As a result, the institutes can offer customers 50 per cent discounts, which are refunded by the Foundation. Any institute that meets the Foundation's guidelines qualifies for a partnership agreement. The complainant repeatedly applied to the Foundation, but was always rejected on the grounds that it failed to comply with the guidelines. The complaint was rejected, because no evidence was found of a competition agreement counter to the general interest, or of a dominant position with consequences counter to the general interest. The complainant filed an appeal against this decision.

### Travel agencies

The investigation of a complaint against the terms on which travel agents can join and remain members of the General Netherlands Association of Travel Agents (ANVR), announced in the preceding Annual Report, was settled after talks with the parties concerned. The ANVR consequently asked for a number of proposed ANVR decisions and regulations to be tested in terms of competition law. After the documents had been studied, the ANVR was notified of objections under competition law relating to a number of the proposed decisions and regulations (including infringement of the Horizontal Price Fixing Decree).

### *Court rulings relating to the Economic Competition Act*

#### KVB - Free Record Shop

The KVB petitioned for an interim injunction against the Free Record Shop BV and Free Record Shop Holding NV (hereinafter referred to as FRS). The KVB regulations require KVB members to apply the prescribed resale price maintenance system, including in respect of non-members. On 14 December 1995, FRS placed advertisements in various Dutch newspapers, offering a series of books for sale at prices 25 per cent below the regulation price. The KVB instituted interim injunction proceedings, in which FRS was ordered to comply with the pricing regulations. FRS argued in these proceedings that the regulations infringe Article 85 of the EC Treaty. KVB countered that it notified the European Commission of the regulations in good time (in 1962) and the Commission had not responded, which meant that their 'provisional validity' still applies. The Amsterdam District Court granted KVB's petition for an interim injunction, but later reached the conclusion that a number of questions relating to EC law needed to be answered for further handling of the case. The Court therefore sent the European Court of Justice three preliminary questions, two of which are closely interrelated.

The first two questions related to whether the provisional validity of the old cartel still applies in the given circumstances, whether - until the Commission takes a decision - it has a restricted life and, if not, when it expires. On 24 April 1997, the Court of Justice ruled that, in view of the need for legal security, the provisional validity of the old cartel does not end until the Commission has made its views known. The fact that a long period has passed since the notification, without any response from the Commission, does not affect the provisional validity of the cartel. The third question related to changes in the notified regulation since the notification date. The Court rules that the provisional validity also covered later changes in the original notified old cartel, in as far as these changes did not represent an expansion or intensification of the competition agreements. If the changes to the old cartel led to the introduction of new restraints, however, the possibility of segregating these from the original regulation must be considered. If this is the case, the provisional validity of the old cartel, in its form prior to the changes, is not at issue: in this case, only the new restraint is not covered by the provisional facility. The interim injunction proceedings between the KVB and FRS were due to continue on 22 August 1997. The national courts will then decide whether there has been any intensification of the competition agreements since 1962.

### *Mergers and acquisitions*

The current WEM does not provide for merger control. In two instances, the Dutch government has invoked the so-called Dutch Clause in the EC Merger Regulation (article 22).

*Acquisition of Toys R Us branches by Blokker*

In January 1997 the European Commission under the "Dutch Clause" of the Merger Regulation was requested to investigate a concentration on the toys market. There was concern about the consequences of the takeover for competitive relationships in the Dutch market for toys. The strong position of the Blokker group in the Dutch toys market (Blokker not only owns the chain of the same name, but also the Intertoys and Bart Smit formulas) would be expanded by a number of Toys R Us stores (and the accompanying market share) and the exclusive right to open new branches in the Netherlands under the Toys R Us name. In June, the European Commission declared the acquisition of the Dutch Toys R Us branches by Blokker as incompatible with the common market. The Commission came to the conclusion that the acquisition would strengthen Blokker's dominant position in the market for specialised toys retailing in the Netherlands. In order to restore genuine competition in that market, the Commission ordered Blokker to sell the Toys R Us branches to an independent third party.

*Holland Media Group*

The acquisition of joint control of the TV10 broadcasting station by the Holland Media Group (HMG) did not provide grounds to ask the European Commission to apply the 'Dutch clause' and investigate this operation for its effects on the structure of the market. This was despite the fact that HMG's share of the advertising market (currently some 55 per cent) will probably grow to 56 per cent or 57 per cent as a result of the operation, further strengthening HMG's existing dominant position in the TV advertising market. The reason is that during the last financial year, the Dutch market turnover of both Saban, now the majority shareholder of TV10 and that of TV10 itself clearly remained below the turnover limits for merger controls laid down in the new Competition Act. Pursuant to the new Competition Act, at least two of the undertakings concerned would have to realise a turnover of at least NLG 30 million in the Dutch market. For this reason, it was not considered opportune to invoke the 'Dutch clause' in this case.

*International cases**Complaint by Generali-Brentjens against the Bedrijfspensioenfonds voor de handel in bouwmaterialen*

The Generali Group and Brentjens Handelsonderneming BV submitted a complaint to the Commission against the Netherlands and the Bedrijfspensioenfonds voor de handel in bouwmaterialen (Industrial Pension Fund for the Building Materials Trade). The complaint was based on the claim made by the Bedrijfspensioenfonds against Brentjens for non-payment of premiums. The complainants took the view that compulsory participation in the Bedrijfspensioenfonds pension scheme infringes Article 3g, Article 5 in conjunction with Article 85, Article 90 in conjunction with Article 86 and Article 90 in conjunction with Articles 50 and 59 of the EC Treaty. In response to the complaint, the Commission put questions to the Dutch government, to which a reply was made. Furthermore, the Roermond Cantonal Court also presented preliminary questions to the European Court of Justice, in connection with interim injunction proceedings on the Bedrijfspensioenfonds's claim. The Netherlands will present written comments in this case.

*Plastic facade elements*

The VKG Recycling Foundation, formed by the Association of Plastic Facade Element Manufacturers (VKG) presented a request to the Minister of Housing, Physical Planning and the Environment to declare an agreement on a disposal contribution for plastic facade elements generally binding. The agreement was reported to the European Commission in early 1997, to determine whether it falls within the scope of Article 85, Clause 1 of the EC Treaty. The European Commission announced on

2 May that there are no reasons to undertake further steps in relation to the reported agreement pursuant to Article 85, Clause 1.

#### Unisource and Uniworld

The Unisource undertaking is an alliance of PTT Telecom, the Swedish Telia company and the Swiss PTT. Plans for the connection of the Spanish Telefónica organisation were reported to the European Commission. Uniworld is a proposed alliance between Unisource and AT&T. Both alliances could hold a dominant position in the Spanish telecoms market, among others. In both cases, after consulting the companies and governments concerned, the Commission issued a notice stating that, depending on the comments of interested third parties, it intended to take a favourable view of the alliance. It should be noted that in both cases, a number of changes were made in the original agreements and commitments, in order to make the transactions acceptable under EC competition law. The Commission assumes that these alliances will compete with the few telecommunications service providers in the world market.

#### Saint-Gobain/Wacker Chemie/NOM

This concentration involved the formation of a joint venture by Saint-Gobain (France), Wacker Chemie (Germany) and NV Noordelijke Ontwikkelingsmaatschappij (NOM), to which Wacker Chemie was to contribute its activities in the production and processing of silicon carbide (SiC). These activities involve a production unit located in Delfzijl: Electro Schmelzwerk Delfzijl BV, and SiC processing units in Grefrath and Kempten in Germany. SiC is used as a raw material for sanding and polishing agents, and for heat-resistant materials used in the production of pottery and in furnaces.

The Commission took the view that the concentration would lead to the creation of a dominant position in the European markets for SiC for sanding and polishing applications, and for heat-resistant applications. The Commission did not regard the growing competition from (Far) Eastern markets such as China, Russia and the Ukraine as sufficient to provide a counterweight to this dominant position in the medium-term.

An interesting aspect of this case was the fact that at the time of the procedure, anti-dumping measures were in effect against SiC-producing (Far) Eastern countries. During the proceedings, the parties offered to undertake to withdraw their support for the anti-dumping measures. The Commission found that such a commitment would not prevent the creation of a dominant position in the above markets and moreover, could not be regarded as an alteration of the original concentration plans within the meaning of Article 8, Clause 2 of the Mergers Regulation. On 4 December 1996, the Commission declared the concentration incompatible with the common market.

### **Competition in broader perspective - Regulatory Reform Initiatives**

In addition to the introduction of the new Competition Act, as discussed in section I, various other initiatives were developed in order to stimulate competitive relationships. Firstly, we report briefly on the progress of the MDW operation. Implementation of the Market and Government Working Group's recommendations will also provide an important stimulus for competition. These recommendations relate to the position of 'undertakings with exclusive market rights'. Attention also focused on the activities of a project group in the health care sector, and to policy developments relating to private health insurers.

#### ***Regulatory Reform: Market Function, Deregulation and Quality of Legislation***

The MDW project<sup>9</sup> is the current Administration's regulatory reform project, initiated in December 1994, with the aim of increasing the competitiveness of the Dutch economy through a critical

review of legislation and regulations, and by adapting them to contemporary requirements. A total of 26 projects have now been completed.

Another aim of the MDW operation involves efforts to reduce the burden of administrative costs. Proposed legislation is also tested in terms of MDW aspects as part of the operation. The aim of this test is to enable a more balanced consideration of the effectiveness and the side-effects of draft legislation.

### *Third tranche*

In June 1997, the third tranche projects performed as part of the MDW were completed. These covered the issues of competition and pricing in health care, competition orders, accountants, bailiffs, building regulations, licensing pursuant to the Pollution of Surface Waters Act (WVO) and product legislation. Some of these issues are discussed in more detail below.

### *Competition and pricing in health care*

In this project, the factors restricting competition between physiotherapists and dentists were identified and proposals were made in order to eliminate these restraints. The main proposals are:

- abolition of the compulsory Outcome of Consultation between health insurers and care providers, which in fact contains a detailed agreement service as a model for all individual agreements, together with the introduction of an open tendering system;
- in addition to open tendering, the introduction of basic charges as well as the existing maximum charges. The basic charges can serve as a point of departure for negotiations and so provide a first step towards price differentiation. The band width will then be increased with each tendering period;
- a further review of the selected distinction between the first and second compartments for physiotherapy;

providing free access to dental hygienists, expanding their duties to include preventive care for the purposes of compensation pursuant to the Health Insurance Act (ZFW) and increasing training capacity for dental hygienists.

### *Accounting*

The Working Group considered three aspects: compulsory use of auditors, the scope of the regulatory powers and competition in service provision relating to the performance of statutory duties.

The Working Group's main conclusions were:

- the public duties of certified public accountants (RAs) and accounting consultants (AAs) authorised to issue an auditor's opinion should be confined to audits and opinions on financial statements of large and medium-sized undertakings. Only in these cases is the use of an auditor compulsory;
- the statutory definition of the tasks of the professional organisations must be restricted, in the sense that they represent public interests only. This should not include protection of the interests of accountants. In the long term, continuation of the public law status of the Netherlands Institute of Registeraccountants (NIVRA) and the Netherlands Organisation of

Accounting Consultants (NOVAA) must be reviewed. This point can be included in the evaluation of legislation on accountants in 1999;

- the pros and cons of segregating supervision and advisory tasks, and the cases in which conflicts of interest call for requirements or prohibitions regarding co-operation with other professional groups, require further examination.

#### *Competition clauses*

The restrictive effects of competition clauses on labour mobility were investigated, together with the realistic employer's interests that these orders serve. The Working Group presented proposals aimed at reform of the existing statutory provision (Article 7:653 of the Civil Code) and creation of faster procedures. The main recommendations are:

- to restrict the application of competition clauses to permanent employment contracts, to suspend them for the duration of a probationary period and to limit their validity by law;
- to introduce a statutory provision that accurately defines the geographical and functional scope of competition clauses, and further statutory requirements regarding the level and type of penalties agreed in competition clauses;
- employers should have recourse to competition clauses only if they have a demonstrable and serious interest in the competition clause.

#### *Bailiffs*

The Working Group considered which regulations are necessary to assure the quality of professional practice and at the same time, avoid the unfair competition arising by combining official duties with commercial activities. The Working Group presented the following proposals:

- the monopoly in the domain of execution, seizure and serving of writs should be maintained, but the number of cases in which writs are compulsory can be drastically reduced;
- the monopoly in the domain of court activities can be abandoned;
- the policy on work locations and restricted areas of operation should be abandoned;
- the introduction of a small-scale regulatory industrial organisation (PBO) for bailiffs, which will establish the rules of conduct. Other rules will be laid down in legislation, General Administrative Orders (AMvBs) and Ministerial regulations. An independent body will be entrusted with supervision and disciplinary action;
- introduction of maximum charges for official actions in lieu of fixed charges.

#### *Regulating the Regulators*

As part of the MDW project, the Cabinet is defining the relationship between the enforcement of the Competition Act and sectoral regulators (e.g. in telecommunications and energy). The results of this MDW project are due to become available in the autumn of 1997 and could have consequences for the way in which co-ordination of the NMA and other regulators is co-ordinated. As a principle, proliferation of supervisory powers on competition law - i.e. enforcement of competition regulations by sectoral regulators - is undesirable.

*Fourth tranche*

The following issues will be reviewed in the fourth tranche of the MDW operation: - real estate agents, supervision and co-operation in collection of copyright, electronic signatures, urban regulations, business licensing, risk-bearing health insurance, pilotage service.

***Organisations with Exclusive or Special Market Rights.****Towards equal competitive conditions*

In countless different situations, government agencies compete with private enterprise in open markets. This trend has grown in recent years, partly through the hiving off and privatisation of government tasks. Consequently, regular complaints are made of unfair competition. Parliament also receives frequent calls to devote attention to this issue. In order to obtain a clear overview of the problem, the Cabinet installed the 'Market and Government' Working Group in early 1996. The Working Group, also known as the Cohen Working Group after its Chairman, Prof. M.J. Cohen, was instructed to draw up a conceptual framework for (semi-)government organisations that compete in the market with private companies. The Working Group presented its final report on 20 February 1997. The Cabinet sent the report to Parliament on 8 April 1997.

(Semi-)government organisations that compete with private companies often do so on the basis of an exclusive position, such as a monopoly, that they are granted in order to perform their public tasks. The Working Group refers to 'organisations with exclusive or special market rights' (OEMs). This covers a range of different government organisations: central government, provincial and municipal service departments, autonomous administrative organisations (ZBOs), publicly-owned companies, and also some private-law companies are entrusted with public tasks and can operate in the market on those grounds. The Working Group applied the principle of 'equal opportunities' for OEMs competing with private companies in the market. This principle led to the main rule that market operations by OEMs are undesirable, because it is not possible to create a level playing field effectively. No satisfactory measures to prevent distortion of competition can be taken in a single organisation that both provides a public service and performs commercial activities.

'Chinese walls' are not effective here, because there will always be cross-relations within a single entity, even if public and private activities are organised in separate legal bodies. This brings the Working Group to the conclusion that in principle, commercial activities should be segregated and hived off. The Working Group calls this the structure rule. There are a number of exceptions to this main rule, based on considerations in the general interest:

- commercial activities are inextricably related to the fulfilment of the OEM's public duties, for example the commercial activities of sheltered workshops or prisons;
- some commercial activities relating to scientific research, such as contract research by universities;
- performance of a government task requires a minimum capacity for durable means of production, for instance in the case of the Ministry of Defence airfield;
- a decision has been taken to allow competition for the public duties, such as in the case of electricity distribution.

In these cases, too, equal competitive conditions must apply as far as possible. These must be imposed via conduct rules. The Working Group takes the view that statutory regulations should be introduced for all OEMs, and that an independent supervisory authority should be appointed: private companies can address complaints to such a supervisory authority, but it can also institute investigations on its own initiative.

*The Cabinet's view*

The Cabinet endorses the main points of the Working Group's report. Activities are currently being developed along various lines:

- ten OEMs are being investigated. These are the Central Statistical Office (CBS), the Central Planning Bureau (CPB), Senter, the Industrial Property Office (BIE), the Export Promotion and Counselling Service (EVD), the Inland Revenue, the Domains Service, the Government Buildings Agency, Ministry of Defense airfields and the Ministry of Defense Training Institute. New Instructions for Government Service will be drawn up on the basis of these investigations (to be completed in January 1998). The Bank Nederlandse Gemeenten (the municipal authorities bank), the Nederlandse Waterschapsbank (water authorities bank) and the energy distribution companies are also being investigated. This could lead to new regulations for these organisations;
- all central government OEMs will be listed. On the basis of this list, an implementation plan will be drawn up for step-by-step investigations of (clusters of) OEMs. The corporation tax regime will be reformed, so that in principle, OEM commercial activities performed in competition with private companies will be liable for corporation tax;
- management talks will be conducted with the Netherlands Association of Municipal Authorities (VNG), the Interprovincial Consultative Forum (IPO) and the Association of Water Authorities (UVW) regarding how the Working Group's conceptual framework can be applied to semi-government organisations;
- the organisation of supervision will be addressed after the MDW Supervision Working Group has presented its report.

The Second Chamber Standing Economic Affairs Committee discussed and approved the report of the Cohen Working Group on 25 June 1997. A motion was passed, requesting the Cabinet to draw up statutory regulations for all OEMs, to provide for independent supervision and to draw up an implementing plan for this purpose. This will be sent to Parliament in the Fall.



## NOTES

1. NDP (four applications).
2. IVC.
3. Four applications from BankGirocentrale.
4. Notaries, bailiffs.
5. Vaals Municipal Authority, Netherlands Inland Waterways Towage Foundation, KNVB, Stibat.
6. Five on towage and salvage, one on earth removal.
7. Heatset.
8. KNMP, inland towage, plastic pipelines.
9. MDW stands for Marktwerking (Market Function), Deregulering (Deregulation) and Wetgevingskwaliteit (Quality of Legislation).



## NEW ZEALAND\*

*(1 September 1996 - 31 August 1997)*

### 1. **Changes to competition laws and policies, proposed or adopted**

No amendments were made to the Commerce Act in the year ended 31 August 1997.

The Ministry of Commerce is currently carrying out two reviews of parts of the Commerce Act. The first is on penalties, remedies and court processes under the Act. It aims to determine whether penalties and remedies in the Act are sufficient to deter contravention of the Act. The second review is of exemptions and exceptions to the Commerce Act. This review will look at the original reasons for exemptions and exceptions to the Act to determine whether they are still valid and will seek to determine whether the valid exemptions and exceptions are wider than is necessary to achieve their policy objective. Both reviews will be completed in 1998.

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

#### *Action taken against anti-competitive practices*

##### *Summary of activities of*

##### – Pro-active enforcement

The Commerce Commission continued to monitor Wholesale Gas Supply Contracts. It continued its analysis of information 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 Commission has monitored competition issues in telecommunications, in particular progress on the major outstanding issue of number portability. It also initiated a study to identify Commerce Act issues relevant to central and local government trading with a view to providing education on compliance with the Act.

##### – Complaints

During the year ended 30 June 1997, the Commission received 976 complaints. This was lower than the expected 1 200 complaints. Of the complaints received, 52 active investigations were initiated.

##### – Promotion of public awareness

The Commission issued 27 media releases related to Commerce Act enforcement. Commissioners and Commission staff gave 27 speeches on Commerce Act enforcement topics, including nine on Commission-wide topics. Guidelines on mergers and acquisitions were published in their final form in October 1996. The guidelines describe the basis on which the Commission will consider

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\* The original language of this document is English.

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. Two issues of *Compliance*, a Commission publication, focused on Commerce Act issues, one relating to local and central government compliance with the Act and another on business acquisitions.

– Investigation

From 1 July 1996 there were 58 investigations completed, including those on hand at the start of the year.

– 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 1997, 40 informal warnings were given, advising persons that, in the Commission's view, their behaviour was at risk in terms of the Act. Five administrative settlements were achieved during the year.

– Litigation

During the year ended 30 June 1997, the Commission approved the commencement of penalty action in the High Court against two matters, one relating to price-fixing and the other to market dominance. Three cases were decided by the courts including penalties totalling \$300 000 for price-fixing among bakers (*Commerce Commission v Country Fare Bakeries*) and seven penalties \$50 000 on car dealers for agreeing to limit the discount available to purchasers of new cars (*Commerce Commission v Albany Toyota and others*).

– Applications to authorise restrictive trade practices

On hand 1 July 1996	1	Authorised	1
Registered during year	4	Declined	2
		Withdrawn by applicant	2
		On hand 30 June 1997	0
<b>Total</b>	<b>5</b>	<b>Total</b>	<b>5</b>

The Commission considered two applications from the Electricity Market Company Ltd for authorisation of the rules relating to the pricing mechanisms, prudential provisions and the adoption of metering standards for the wholesale electricity market. Given the Commission's conclusion that the rules for which authorisation was sought will not lessen competition, the Commission declined to give authorisation to those rules (authorisation being neither required by the Act nor within the jurisdiction of the Commission).

The Commission considered an application from the New Zealand Rugby Football Union (NZRFU) for authorisation to enter into, and give effect to, a Player Transfer System. The Commission considered the competitive detriments and public benefits likely to flow from the transfer system. The Commission was satisfied that the detriments are likely to be small and the public benefits are likely to be in order of magnitude sufficient for them to exceed the detriments. Therefore, the Commission determined to grant an authorisation for the NZRFU to enter into, and give effect to, the Player Transfer System.

– 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

Power New Zealand v Mercury Energy and Commerce Commission (Court of Appeal)

The Court of Appeal confirmed the High Court's decision to confirm the Commerce Commission's decision to clear Mercury Energy to acquire 100 percent of the shares in Power New Zealand (see New Zealand's 1995/96 annual report for details of the High Court decision).

***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 1996 to 30 June 1997 were as follows:

Merger applications registered under section 66 (clearance)

On hand 1 July 1996	1	Cleared	23
Registered during year	40	Cleared with divestment undertaking	5
		Declined	9
		Withdrawn by applicant	2
		On hand 1 July 1997	2
<b>Total</b>	<b>41</b>	<b>Total</b>	<b>41</b>

Merger applications registered under section 67 (authorisation)

On hand 1 July 1996	0	Withdrawn	0
Registered during year	1	Authorised	0
		Declined	0
		On hand 1 July 1997	1
<b>Total</b>	<b>1</b>	<b>Total</b>	<b>1</b>

*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 1997, 302 acquisitions were identified by the programme, and of these 108 were followed up. This was consistent with previous years.

*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.

*i) Goodman Fielder Ltd/Defiance Mills Ltd*

The Commerce Commission cleared Goodman Fielder Ltd to acquire the New Zealand assets of the baking and milling operations of Defiance Mills Ltd, subject to Goodman Fielder divesting certain milling assets. The Commission was satisfied that, should the acquisition go ahead with the divestment's, Goodman Fielder would not acquire or strengthen a dominant position in any market.

The Commission declined a previous application by Goodman Fielder seeking clearance for the proposed acquisition because the Commission had not been satisfied that Goodman Fielder would not acquire or strengthen a dominant position. Those dominance concerns were largely removed by Goodman Fielder's current proposal which includes the divestment of its Christchurch mill, including its retail packing plant, to its competitor Allied Foods Company Ltd.

*ii) Tip Top Ice Cream Company Ltd/New American Ice Cream Ltd*

Tip Top applied for a clearance to acquire the trade names and trade marks, goodwill and business assets associated with the ice cream and frozen novelties manufacturing and distribution business of New American.

Although the Commission had no concerns about dominance in the frozen novelties/scoop ice cream and frozen desserts markets, it was not satisfied that Tip Top would not acquire a dominant position in the take home ice cream market if the proposal was implemented. Tip Top and New American are the first and second largest distributors of these products in New Zealand. Their only other competitors are very small and usually localised. The Commission therefore declined the clearance application.

*iii) Radio Network of New Zealand Ltd/Fifeshire FM Broadcasters Ltd*

Radio Network applied for a clearance to acquire all of the radio stations and frequencies owned by Fifeshire in Nelson, Westport and Picton. Radio Network already operates in these markets. If the acquisition proceeded, Radio Network would control 99 percent of the Nelson radio advertising market.

The Commission concluded that existing customers and remaining competitors would not constrain the merged company. It also considered that, while new entry into the Nelson radio advertising market is technically possible, it was not satisfied that new entry is commercially viable or likely. The Commission therefore declined the clearance application.

*iv) Gardner Smith NZ Ltd/Bulk Storage Terminals Ltd*

Gardner Smith applied for a clearance to acquire the assets of Bulk Storage. Gardner Smith processes, stores and distributes tallow and vegetable oils. It also provides, through subsidiaries, non-hazardous liquid bulk storage services at Auckland, Napier, Picton and Bluff. Bulk Storage provides non-hazardous liquid bulk storage services in Tauranga, New Plymouth and Wellington, and has a 50 percent interest in a firm which provides these services in Auckland.

The Commission was not satisfied that the combined entity would not acquire a dominant position in the Auckland regional market for the bulk storage of non-hazardous liquids, essentially because no sites are available at the port for new entrants. The Commission therefore declined the clearance application.

v) PRI Flight Catering Ltd/Air New Zealand Ltd

PRI applied for clearance to acquire the flight catering business of Air New Zealand. The two companies, between them, are the only two New Zealand companies supplying in-flight catering for domestic and international flights. Several small companies sub-contract to PRI and Air New Zealand but each can cater only for a few flights. For these companies to expand would require substantial investments and certainty that customers would be available.

The only other competitors are overseas airlines that double cater their flights, that is, they cater for the return trip. However, double catering is practical on only some short flights, for reasons including limited space on aircraft, time of day of the flights and the turn-around time of the aircraft.

The Commission concluded that the small extent of existing competition and the limited threat of new competition would not be enough to provide an effective or potential competitive constraint on the combined company. It therefore declined the clearance application.

vi) Wilson Parking New Zealand (1992) Ltd/Wellington City Council

Wilson Parking applied for clearance to acquire four Wellington carpark facilities from the Wellington City Council. If the proposal went ahead, Wilson Parking would have at least 70 percent of the long stay casual parking market, with Condren's and coupon parking being the only significant existing competition. The threat of competition from new entrants would not be great considering the difficulty of providing new parking facilities in the central city area.

Although Wilson Parking would not be dominant in the short stay market, where metered parks are the main competition, the Commission concluded that it would become dominant in the long stay market and therefore declined the clearance application.

vii) Radio Network of New Zealand Ltd/C93FM (Christchurch) Ltd

Radio Network applied for a clearance to acquire C93FM. Radio Network owns 99 radio frequencies, of which five are in Christchurch. C93FM owns three frequencies in Christchurch.

The Commission found that, if the proposal was to go ahead, Radio Network would have a very large share of the Christchurch radio advertising market. It would face insufficient constraint from its main competitor, MORE FM. New entry to the Christchurch market is highly unlikely as no frequencies are currently available in the area. There would be little opportunity for Christchurch advertisers to constrain the combined company. The Commission therefore declined the clearance application.

Radio Network has stated that it intends to appeal this decision to the High Court.

### **3. The role of the Competition Authority in formulation and implementation of other policies**

#### *Essential facilities*

New Zealand has placed reliance on the Commerce Act 1986 to regulate access to the facilities of vertically integrated natural monopolies. This approach is supported by information disclosure regulations together with the threat of further regulation if monopoly power is abused.

### ***Electricity***

An essential element of the regulatory regime for the electricity industry is the Electricity (Information Disclosure) Regulations 1994 which requires accounting separation of distribution, generation and retailing businesses. The purpose of the regulations is to make transparent the actions and activities of electricity businesses with market dominance. During the year the Ministry of Commerce issued a discussion paper concerning their effectiveness. As a consequence the Regulations are to be enhanced by requiring clearer separation of monopoly and contestable activities. In addition, accounting rules are to be introduced prohibiting cross subsidies from line to retail and generation activities.

### ***Telecommunications***

There were no fundamental changes to the regulatory regime during the year. However, there have been significant developments within the context of the New Zealand regulatory regime which relies primarily on the Commerce Act, information disclosure regulations and the threat of the introduction of price control and other measures to deal with market power. These are:

- significant entry by new operators into a number of telecommunications markets leading to significant reductions in national and international call prices;
- saturn Communications Ltd, a cable television company, will start operating a residential telecommunications access network in competition with Telecom Corporation in Wellington in 1998. Two carriers have reached agreement on number portability with Telecom Corporation.

### ***Postal services***

The Government has introduced legislation to Parliament which, if enacted, will open up the postal services market to full competition. At present a State-owned enterprise, NZ Post Ltd has a monopoly on all letters priced below NZ 80 cents (US 50 cents), twice its standard postal rate. The Government will enter into a Deed of Understanding with NZ Post covering universal service obligations for five years.

## **4. Summaries of, or reference to new reports and studies on competition policy issues**

### ***Booklets published***

- Business Acquisition Guidelines
- The Fair Trading Act - A Guide for Advertisers and Traders
- A Decade of Fair Trading in New Zealand

### ***Other publications***

Either pamphlets were revised and reprinted, and three new pamphlets, Care Labelling, Fibre Content Labelling, and Pyramid Selling, were all published.

Six issues of the newsletter, *Fair's Fair*, were published. Three issues of a new newsletter, Compliance, were published.



## NORWAY\*

(1996)

### Introduction

No major amendments have been made to the competition legislation in 1996.

In addition to its main activity of supervising markets in order to determine whether the provisions of the Competition Act are complied with, the Competition Authority has given particular priorities in 1996 to deregulated markets. The main target has been to initiate competition in these markets and ensure that competition policy views are taken into account when sector specific authorities regulate monopolies. During the year the Norwegian Competition Authority has dealt with several cases concerning the markets for electric power and telecommunications which are being opened for competition.

The Authority intervened against one merger in the agriculture market and examined several other merger cases. The Authority has intervened or notified interventions against loyalty rebates and other restrictions in various markets. A report on municipal buying practises for commodities and services was issued in 1996. The Authority has given several opinions on restraining effects of public measures.

In June 1996 the Competition Authority organised an international conference, called Competition Policies for an Integrated World Economy. The participants came from the business community, law firms, academia and research and from public sector management. Leading international experts in the field participated as speakers and panellists. The timing of the conference made it possible to discuss and clarify important linkages between competition and trade policies in advance of the First Ministerial Conference of the World Trade Organisation in Singapore which took place in December 1996.

The Norwegian Competition Authority will arrange a new competition policy conference in Oslo in 1998 on the theme Foundation of Competition Policy Analysis.

### 1. Competition laws and policies

#### *The Competition Act*

The Competition Act came into force on 1 January 1994. The purpose of the Competition Act is to achieve efficient utilisation of society's resources by providing the necessary conditions for effective competition.

#### *Prohibitions*

The Competition Act prohibits collusion on prices, mark-ups and discounts in connection with the sale of services and goods. The prohibitions do not apply to purchases. Any collaboration in connection with tenders is prohibited. Suppliers are not allowed to prescribe or seek to influence resellers' prices on goods or services. Nevertheless, an individual supplier may stipulate recommended prices for reseller's sales of goods or services on the condition that the prices are explicitly described as recommended. Market

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\* The original language of this document is English.

sharing in the form of area division, customer sharing, quota distribution, specialisation and limitation of quantity is prohibited. An individual supplier may, however, enter into an agreement on market sharing with dealers or determine market sharing for them.

#### *Exceptions*

The Act lists the following exceptions from the prohibitions:

- price collaboration in connection with individual projects and tenders when the collaboration is clearly expressed in the bid;
- price collaboration and market sharing between companies in the same group of companies and between companies with mutual owners;
- price collaboration and market sharing as part of an agreement between licensor and licensee of patents and designs;
- price collaboration and market sharing in connection with firsthand sales of Norwegian agricultural, forestry and fisheries products.

#### *Exception from the prohibition against market sharing*

The prohibition against market sharing encompasses both sharing of area, customers and quota distribution, specialisation or quantity restrictions. 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, especially if the acquisition involves goodwill or know-how. Such non-competition clauses imply that the former owner is excluded from the market. As the former owner might be an important potential competitor such agreements may only be in force for up to five years. Market sharing agreements are only allowed on condition that the new owner gains complete control over the company in question.

#### *Real estate*

In 1995 the Competition Authority made an exception from the prohibition against market sharing relating to the sale or rental of real estate, allowing agreements to be made that excludes the buyer or the tenant from running specific business activity on the property for a period of ten years. Agreements protecting a buyer or a tenant from competing business being established at a neighbouring estate may also be made.

#### *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 bar competitors from the market.

#### *Invalidity*

Agreements that conflict with prohibitions under the Competition Act shall be invalid between the parties of the agreement.

*Merger Control*

The Competition Authority may intervene against acquisitions of enterprises. Normally any intervention against an acquisition will have to be decided within six months after the final agreement on the 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 clarify whether the Authority will intervene. The Authority must then, within three months, decide whether intervention may take place.

*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 or services to consumers shall, pursuant to the Act, provide information on prices so that they can be easily observed by the customers.

*New legislation in 1996*

No major amendments have been made to the competition legislation in 1996, but a few minor new regulations have, however, been issued.

*Sale and transmission of electric power*

The Norwegian Competition Authority has adopted a new provision relating to price information for sale and transmission of electric power. The regulation requires suppliers of electric power to give price information to the consumers that makes it possible to compare offers from different suppliers. An invoice must be specified and disclose the following items:

- the price of electricity from supplier to the consumer;
- the yearly fee, if charged, by the electricity supplier;
- the price of transmission of electricity from the grid owner to the consumer; and
- the yearly fee, if charged, by the grid owner.

All prices must include taxes, like VAT and the Norwegian electricity tax. When advertising there should be given price examples for 10 000, 20 000 and 30 000 kWh if a yearly fee is charged by the electricity supplier. When referred to prices to consumer, there must always be a clear distinction between what is charged for the transmission of electricity, and what is charged for the electricity itself.

*Price information for dental services*

In 1996 the Competition Authority adopted new provisions imposing an obligation for dentists to provide specific price information to clients. A price list must be posted in the waiting room and lists must also be available for a client to take away. The list must contain prices for 12 specified services such as examination, amalgam fillings and x-rays. The prices shall be all inclusive. Price spreads can be indicated if prices vary for a specific service. Before starting treatment, the client should be given a price estimate.

### *The Price Policy Act*

Parallel with the Competition Act, the Act of 11 June 1993 relating to Price Policy (the Price Policy Act) took effect on 1 January 1994. The Act provides authorisation for price regulation. Moreover, it contains a prohibition on unreasonable prices.

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

### *Infringements of the prohibitions*

The Competition Authority is continually supervising markets in order to detect infringements of the Competition Act. Unlawful practices have been submitted to the police for prosecution. In some cases, substantial fines have been imposed by the courts or accepted by the companies without a trial. The infringements have mostly arisen under the prohibition against price fixing agreements and illegal resale price maintenance.

#### *Illegally influencing prices in craft guilds*

A local craft guild in the building trade and three members of the board were reported to the police for influencing the members prices in 1994. In a letter to the guild members, the accused had recommended charging a minimum of NOK 250 per hour for services as part of a campaign to increase earnings in the trade. The campaign was referred to in a local newspaper and supported by the head of the national craft association. The Competition Authority also reported the head of the association for trying to influence prices.

The head of the national craft association was found guilty in a lower court in March 1995 and fined NOK 30 000. The Supreme Court reversed the sentence on appeal. The Supreme Court stressed the principle of freedom of speech. The Court admitted that there might be a question whether the accused had gone beyond the limits of the law by influencing the price level in the trade. Members of trade organisations should be careful in order to avoid that their statements should be interpreted as an invitation to restrict competition. The Court, however, stressed the fact that the statements had been published as an opinion in a newspaper in connection with discussions of problems in the trade.

The local craft guild was found guilty in a lower court. The Court's majority found that the intention of the letter was to influence the members to charge higher prices than they themselves found reason to do, an act which is prohibited in the Competition Act. A Superior Court dealt with the case in 1996. A majority of four judges found the guild guilty, while a minority of three found it not guilty. According to Norwegian criminal procedure a majority of two is required to convict accused persons. The guild was therefore acquitted. The case has been appealed to the Supreme Court.

#### *Locks and security systems*

In 1992 a dominant supplier of locks and security systems was reported to the police for illegal price maintenance. Three individuals from the company were also reported. It was alleged that the enterprise had recommended wholesalers not to sell at prices below minimum prices set by the supplier. A substantial part of the goods produced by the company was sold through wholesalers. Competition among the wholesalers would be of great importance for the price level in the market.

The company was indicted in 1993. In April 1996 the enterprise accepted fines of NOK two millions, while the three people involved accepted fines of NOK 80 000.

### ***Merger control***

The Competition Authority has registered a total of 696 mergers or acquisitions in 1996. 46 mergers have been scrutinised, ten cases were still under consideration by the end of the year. In one case the Authority decided to intervene:

#### *Nordkronen/Norgesmøllene*

In 1996 the Competition Authority intervened against the acquisition of Nordkronen AS by Norgesmøllene DA. Both companies mill flour for the consumer market. After the acquisition Norgesmøllene would have had a considerable market share with only one competitor, Regal Mølle, left in the market.

The total yearly consumption of flour in Norway is some 300 000 ton. Until 1995 the sale of grain and flour was regulated through a state monopoly, Statkorn, which fixed prices and had an importation monopoly. Public and privately owned mills were responsible for the production of flour and Nordkronen was a real competitor to Norgesmøllene. The Norwegian producers operated under a state guarantee of being able to sell their entire production. Because of this guarantee, competition from abroad is limited. In addition the market is protected from imports by an import duty. Exportation is not in question. After deregulation, Statkorn has been reorganised and one division (Norgesmøllene) continues as a supplier in the market.

In the opinion of the Competition Authority the merger would substantially limit competition. Norgesmøllene was therefore ordered to sell parts of its milling activities within a given time limit. The decision was appealed to the Ministry of Planning and Co-ordination which annulled the intervention. Instead the company was instructed to notify price changes, new agreements relating to purchases of other enterprises and co-operation agreements and to the Competition Authority.

### ***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 some of the cases will be given.

#### *Loyalty rebates in agriculture*

In 1996 the Competition Authority intervened against loyalty clauses in an agreement between a dominant enterprise, Felleskjøpet Østlandet (FKØ), owned by various association of Norwegian farmers, and rural grain mills. In 1995 FKØ had acquired Norgros, one of its largest competitor in the market for fertiliser, farm machinery and seed products. The Competition Authority accepted the acquisition under specified conditions. The acquisition did, however, strengthen the position of FKØ.

Because of the dominant position of FKØ, the Competition Authority has considered the co-operation agreements between FKØ and thirty rural mills. Some of the agreements demand that the mills must cover their requirements for preservatives, fertilisers, seed products and pesticides with FKØ to obtain a dealers' discount with FKØ.

The loyalty rebates make it difficult for suppliers with a smaller range of products to compete on deliveries to the mills even if they are completely competitive on some products. Competing offers for one or a few products from other suppliers have to be so favourable that they compensate for the loss of dealers' rebates for the remaining products. For the mills the dealer rebate normally represents their net profit.

The Competition Authority held that competition would increase if competition took place within each single group of products. This would make access to the market easier. Except for fertiliser, the Competition Authority could not find any efficiency gains that should justify that rural mills should buy all supplies through FKØ. As a consequence the Competition Authority prohibited FKØ to set such conditions in their co-operation agreements. Furthermore the company was not allowed to fix rebates across groups of products. The mills should be free to buy from competing suppliers. FKØ was still allowed to be the sole supplier for raw materials for production of concentrated cattle food, except for grain, in those cases where the parties co-operated in connection with the production.

The decision was appealed to the Ministry, which did not change the decision made by the Competition Authority.

*Loyalty rebates in mobile telephony*

In Norway two parallel mobile telephony systems are operating. Telenor Mobil has a licence to provide a Nordic mobile telephony system, NMT. Telenor Mobil and NetCom each have a GSM-licence. Telenor is the sole supplier of NMT telephony and the sole supplier of a paging service in Norway.

In 1996 the Competition Authority notified Telenor that an intervention against the agreements between Telenor and its customers was under consideration. Telenor had been offering leading customers an aggregated rebate for its total use of NMT and GSM. This linkage between the monopoly market for NMT and the GSM market that was exposed to competition would hurt competition in the market. The linkage especially affected competition of the NMT-customers who were considered to be potential customers for GSM.

After having received the notice from the Competition Authority Telenor Mobil informed the Authority that for the future the company would refrain from such agreements. Rebates for GSM-customers will be agreed on separately. Customers with long-lasting agreements and considerable use of mobile telephony should get the opportunity to re-negotiate their agreement. After these changes have been made the Competition Authority found no reason to intervene against the rebates.

*Exclusive purchasing in explosives*

The Competition Authority notified in 1996 a dominant producer of explosives, Dyno Industrier ASA, of a possible intervention against some clauses in agreements between Dyno and its customers. In the agreements Dyno reserves the right to cover the total requirements of the customers for explosives. The agreements also contained other arrangements with same effects, for instance, loyalty rebates. The Competition Authority held that the clauses made access to the market difficult for new competitors.

After having received the notification, Dyno informed the Competition Authority that the company would change its agreements to accord with the view of the Competition Authority. The Authority accepted however that Dyno could deliver the total requirement of a customer to a specific project, when the customer wanted one sole supplier. The Authority also allowed Dyno to agree on corresponding clauses for projects, which necessitate considerable investments by Dyno.

*Price differentiation in the electricity market*

The Competition Authority has dealt with several cases concerning the market for electric power during 1996. By the Energy Act of 1991 the electricity market was opened for competition between suppliers of electricity. This implies that consumers located anywhere in Norway are free to buy electricity from any supplier, regardless of who the grid is owned by.

An inquiry made by the Competition Authority revealed that the suppliers of electricity are reluctant to deliver energy to customers located outside their own grid areas. Many suppliers also charged different prices depending on the location of the consumers, applying one rate for customers within the own grid area, and a higher rate for others.

Such discrimination is not prohibited by the Competition Act, but is clearly in conflict with its intentions. The Competition Authority submitted the information to the Ministry of Administration, now the Ministry of Planning and Co-ordination, with a proposal of a provision relating to the prohibition of the price discrimination practised by the electricity suppliers.

The Ministry decided not to intervene against the price discrimination. In the opinion of the Ministry, the unwanted practises in the electricity market were caused by the temporary shortage of electric power due to unexceptional weather conditions. Further, the electricity market was still thought to develop according to the reforms set out by the Energy Act. A close monitoring of the developments in the electricity market was, however, held as important by the Ministry. It was emphasised that this especially applied to behaviour of the electricity suppliers towards household sector.

### *Exemptions from the prohibitions*

The 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 number of the cases dealt with in 1996 concerned collaboration on prices within small chains of retailers. In most of these cases exemptions were granted.

### *Subjects related to prices*

#### *Price surveillance and price regulation*

For certain commodities and services for which competition is negligible or non-existent e.g. taxi services and rent for some types of housing, the Competition Authority has stipulated maximum prices. Some firms have been instructed to notify the Competition Authority when prices are increased. The Competition Authority has proposed to the Ministry of Planning and Co-ordination that maintenance of maximum prices for cement should be cancelled. The price regulation for milk has been abolished as of 1 January 1997.

#### *Price information and price awareness*

Price information through price labelling and price examinations is measures to increase transparency in the markets. The Authority attempts to promote price consciousness among consumers as well as in trade and industry by publishing surveys of prices. Price information for markets which have recently been deregulated, is particularly important. In 1996 the Control Division examined and published studies of price variations in different markets for instance in the markets for electric power, petrol and dental services.

The general obligation to provide information on prices so that they can be easily observed by consumers also applies to sale of services. For several services special provisions concerning price information have been introduced during the last year.

In order to promote price consciousness in municipalities the Competition Authority has examined their buying practises:

*Municipal buying practices*

The Competition Authority has issued a report on municipal buying practices for commodities and services. The report intended to contribute to more efficient use of resources, through increased competition and making entry to the markets easier for new competitors.

Municipalities are, apart from the Government, the largest buyers of goods and services in Norway. A number of markets are affected by municipal purchasing practices. The report shows that only some municipalities base their purchasing practices on competition between suppliers. 40 percent of the municipalities have no specific purchasing procedures. Only a few municipalities co-ordinate their purchases. About half of the municipalities have taken no steps to increase their knowledge in this area during the last two years. Few foreign firms submit bids to Norwegian municipalities inviting for tenders.

The Competition Authority has, however, registered a trend towards more efficient municipal purchasing. The Competition Authority has made a number of recommendations to improve the purchasing practice:

- special by-laws covering purchasing practises for municipalities should be enacted;
- co-ordination of purchases within each municipality and between municipalities should be established;
- municipalities should as a rule put purchases out to tender;
- purchasing competence should be increased;
- municipal auditors should demand rules governing purchases. They should point out the advantages by co-operation and stimulate the use of tenders;
- enterprises owned by municipalities should not be excessively sheltered from competition.

Distortion of competition between public and private companies should be avoided by organising public enterprises as joint-stock companies.

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

*Restraining effects of public measures*

According to the Competition Act, the 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 illustrate this:

*Alternative telecommunication networks*

In a statement to the Ministry of Transport and Communications the Competition Authority expressed satisfaction with a proposal enabling other enterprises than the monopoly, Telenor, to supply infrastructure for transmission of telecommunication services. Competition will reduce prices of telecommunication services for the consumers. Competition will also contribute to more effective use of existing infrastructure/networks.

The new regulations proposed by the Ministry do, however, restrict access to the market for telecommunication. Only enterprises that offer telecommunication services can establish their own



communication systems. Already established grid owners are allowed to continue without being suppliers of communications services. Enterprises are not allowed to dimension new nets with the purpose of selling excess capacity. According to the Competition Authority the distinctions between legal and forbidden investments are not sufficiently clear and will probably lead to uncertainty which in turn could lead to less investments.

The Competition Authority still finds that the restrictions could reduce the favourable effect of increased competition.

#### *Measuring and invoicing of electric power*

In 1996 the Competition Authority submitted a statement to the Ministry on a proposal concerning sales accounts for electricity consumption. An electric power supplier must pay a transaction fee when delivering electricity through the grid of other grid owners. This fee seemed to prevent efficient competition between power producers. In the new provisions the Norwegian Water Resources and Energy Administration (NVE) proposed to reduce the maximum fee from NOK 4 000 to NOK 1 000. The proposal will reduce costs and stimulate power stations to supply electricity outside their districts. In addition, there was a fee of NOK 246 which a consumer had to pay when changing supplier. NVE proposed to abandon this fee. The Competition Authority supported both proposals.

According to the proposal, a supplier may demand three weeks advance notice if a consumer wants to change supplier. The power stations may change prices giving two weeks notice. This limits the opportunity of the consumers to react on price changes in the market and can give suppliers enhanced incentives to increase prices and reduce incentives to price reduction. In the opinion of the Competition Authority the proposal does not sufficiently facilitate frequent switches between suppliers. The suppliers should be instructed to make it easier for the consumers to react on price changes.

## **4. Organisation of the Competition Authorities**

### *The Competition Authorities*

The superior authority in the sphere of competition policy rests with Stortinget, the Norwegian Parliament. The Ministry of Planning and Co-ordination is the governing body for the Norwegian Competition Authority, and hosts a specific section for competition policy, the Department of Competition Policy. The Ministry is the appellate body for complaints against individual decisions made by the Competition Authority. The Ministry is responsible for influencing other ministries in cases concerning government measures that may have a significant restraining effect on competition. The Ministry also participates in international activities in the field of competition law and policy.

### *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 Authority has a total staff of 145 persons. The head office of the Competition Authority is situated in Oslo with regional offices in the following eight towns: Oslo, Hamar, Kristiansand, Stavanger, Bergen, Trondheim, Bodø, and Tromsø.

### *The reorganisation of the Competition Authority*

During 1996 the Competition Authority was reorganised according to a strategic plan, decided on in 1995. The Authority is now organised in two different departments: a Control Department and a

Competition Department. In addition there are three staff units: the Legal Staff, the Information Staff and the Administration Staff. The former International Affairs unit has partly been integrated in the Competition Department, while the former Control Division has become a part of the Control Department. The Legal Staff has replaced the former Legal Department. The new organisation was introduced from 1 November 1996.

## **5. The relationship between the Competition Authority and other authorities**

### *The relationship between the Competition Authority and industry specific public authorities*

The Competition Authority has overlapping competence with industry specific public authorities which make regulations and grant concessions in various sectors, for instance energy, finance, post, telecommunications, railways, air transportation, health services, agriculture and fishery. The 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 regulatory authority of industry specific bodies..

The Competition Authority reached agreements for co-operation and co-ordination with the Norwegian Telecommunications Authority in 1995 and with the Banking, Insurance and Securities Commission and the Norwegian Water Resources and Energy Administration in 1996. The Competition Authority and the authorities of the industry specific bodies have to a certain degree overlapping competence with respect to competition policy.

#### *Telecommunication*

The Norwegian Telecommunications Authority and the Competition Authority have substantial areas of overlapping competence. The purpose of the agreement between the authorities is to ensure effective supervision of the telecommunication markets and that the market players shall have information on what kind of tasks the two authorities mainly deals with. Because of the rapid development in these markets, the agreement is flexible.

So far the Competition Authority has mainly dealt with various restrictions as for instance bundling of monopoly products and products exposed to competition, the use of loyalty rebates/locking in of customers, weak barriers between sheltered and competitive activities, ownership restrictions and unacceptable conditions for allowing access to infrastructure. The Competition Authority has given priority to these problems as they have a substantial impact on the possibility of establishing competition in those parts of the telecommunication market that has been opened up for competition.

#### *Banking, Insurance and Securities*

The Banking, Insurance and Securities Commission and the Competition Authority have implemented guidelines for the mutual exchange of information and co-operation. The authorities shall inform each other about their opinions in various cases. The Competition Authority can intervene against mergers or acquisitions and agreements that may need exemptions from the prohibitions in the Competition Act. The Banking, Insurance and Security Commission shall therefore inform the Competition Authority of application for merger concessions, concessions for co-operation agreements and about proposals for new regulations. The Competition Authority will keep the Commission informed about merger cases under consideration.

The Competition Authority has authority to intervene or to grant exemptions while the Banking, Insurance and Securities Commission prepare cases and gives opinions relating to concessions to the Ministry of Finance, which decide the cases. The Commission shall stress the solidity and liquidity of the

finance companies involved and take financial, stability and competition consideration, while the Competition Authority shall pay attention to the competition aspect.

#### *Electric power*

The Norwegian Competition Authority and the Norwegian Water Resources and Energy Administration (NVE) have in their agreement tried to separate their fields of work. The main task of NVE in this context is to govern and regulate the owners of the grid in Norway. This part of the electricity sector is presumed to be natural monopoly, but it is in many instances integrated with the sale of electricity. The sale of electricity is an activity exposed to competition. Therefore, NVE, is aiming to regulate the transmission of electricity to avoid cross subsidising.

On the other hand, it is stated in the agreement that the main task of the Norwegian Competition Authority concerning the electricity sector is to make sure that the sale of electricity is not in conflict with the Competition Act. In addition, the Competition Authority should evaluate monopoly regulations made by the NVE.

In cases of importance, as for instance mergers or interventions, it is called for the exchange of information and co-operation between the Norwegian Competition Authority and the NVE. Many new organisations in the electricity market need exemption from the Competition Act, as well as concessions according to the Energy Act. To avoid unwanted constellations in the electricity market, opinions from the other authority should be sought before new provisions are issued.

## **6. The relationship between the Competition Authority and public agencies and authorities**

### *The relationship between the Competition Authority and courts of law*

The Competition Act empowers the Competition Authority to take steps to secure evidence from enterprises suspected of infringing prohibitions under the Competition Act or the Price Policy Act. Prior to taking such steps the Authority must however have a court order from the Court of Examining and Summary Jurisdiction. The Authority may then confiscate and remove documents for further scrutiny and take down statements from employees. If warranted by the case the Authority will subsequently report infringements to the police. The prosecuting authority may institute proceedings under the criminal procedure Act. Infringement of the Competition Act is punishable by fines or imprisonment. The penalty for infringements is, under aggravating circumstances, imprisonment for up to six years. A claim for relinquishment of gain may be included as part of a criminal case. In connection with infringement of the Competition Act the Competition Authority may choose to issue a writ giving the option of relinquishing of the gain that has been obtained by infringement of the Act. The amount can be determined approximately when it is impossible to establish the size of the gain. If the recipient rejects the claim, the court can review the issue.

### *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 supervising and implementing the act to protect the interests of consumers. Marketing practices should not be unreasonable with regard to consumers. In the conduct of business applying incorrect or otherwise misleading representation is prohibited. 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 Control Department of the Competition Authority assists the Consumer Ombudsman in the enforcement of the Act.

*The Market Council*

The Market Council decides cases brought to it with reference to the Act by the Consumer Ombudsman or a party involved or affected.

*The Ombudsman for public administration*

The Ombudsman for Public Administration deal with 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.

*The EFTA Surveillance Authority, the EU Commission and 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 Competition Authority has a close co-operation with these authorities. The Competition Authority has regularly trainees both with the ESA and the EU Commission. There has been a close and long-standing relationship between the competition authorities in the Nordic countries. After Finland and Sweden have joined the European Union this relationships has become even more important to the Competition Authority. The Authority also has co-operated with competition authorities in other countries.

## POLAND\*

*(July 1996-June 1997)*

### 1. Changes to competition laws and policies, proposed or adopted

#### *Summary of New Legal Provisions of Competition Law and Related Legislation*

In 1996 several substantial changes took effect in the legal provisions that were the basis for the functioning of the authorities responsible for competition policy in Poland. The hitherto existing two-instance procedure of deciding on cases (Instance I: Antimonopoly Office, Instance II: Antimonopoly Court), based on the Act of 1 March 1996 on the changes in the Code of Civil Procedures (Dz.U.Nr43, poz.189), was replaced by three-instance procedure, that provides for a possibility to file cassation suits to Supreme Court from the decision of the Antimonopoly Court (earlier to be appealed only by way of extraordinary appeal).

These substantial changes, however, were mainly related to the reform of the administration and economic centre, initiated in the second half of 1996. The changes, resulting from the Act of 8 August 1996 on the changes in certain acts regulating the functioning of economy and public administration (Dz.U. Nr. 106, poz.496) pertain, among others, to the competition authority and its range of competence:

- the President of the Office for Competition and Consumer Protection replaced the Antimonopoly Office in its function of the competition authority, and acts through the Office;
- the consumer protection prerogatives have been transferred to the Office;
- the catalogue of monopolistic practices has been expanded by the item: "creating adverse conditions for consumer claims";
- State Supervision of Commerce (PIH) has been subordinated to the President of the Office for Competition and Consumer Protection; and
- the President of the Office for Competition and Consumer Protection has been authorised to file claims of unfair competition at courts-of-law.

Other acts important for competition policy are: the Act of 30 August 1996 on the Commercialisation and Privatisation of State-Owned Enterprises (Dz.U. Nr. 118, poz. 561), that defining the principles of transforming these enterprises into companies as well as the Act of 29 March 1996 on the Changes in the Act on Companies with Foreign Capital (Dz.U. Nr 45, poz. 199), which makes Polish regulations in the matter more in line with those of the European Union thanks to a significant reduction in the differences of treatment of business entities with foreign capital and sector limitations in purchasing or acquiring shares in companies operating in areas subject to licensing.

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\* The original language of this document is English.

Another important sector act is that of 14 June 1996 on merging and grouping of certain banks in joint-stock companies (Dz. U. Nr 90, poz. 407). This act, that defines the principles for the grouping and merging of banks whose capital, directly or indirectly, belongs to State Treasury, and, in such cases, puts a limit on the application of the provisions of the antimonopoly act on merger control.

#### ***Other Relevant Measures, including New Guidelines***

The Office formulated a number of guidelines regarding the application of the Monopoly act provisions, particularly in the case of merger control and exemptions from application of the act, as well as those concerning the following issues:

- illegal monopolistic practices exercised by municipal services, confirmed by a big number of cases investigated by the Office that regarded water supplies and sewage disposal. The Office undertook preventive measures and submitted a document entitled „The Opinion of the Antimonopoly Office on Municipal Water Services” to self-government authorities and water supply and sewage enterprises. The document pointed out the following : necessity to delete from the water supply and sewage disposal agreements any clauses that could be considered circumstances of actions regarded as monopolistic practices, method of fee calculation and the prohibition to differentiate prices of water in a manner resulting in cross-subsidising of individual groups of customers;
- interpretation of the notion of „business secret”;
- the relation between antimonopoly regulations included in the act on National Investment Funds to the antimonopoly act;
- exclusiveness clause in distribution agreements; and
- exaction of fines imposed upon business entities engaged in particularly flagrant monopolistic practices.

#### ***Government Proposals for New Regulations***

The government did not put forward its own draft competition legislation, but defined the areas where it is to be effected and the preparations were entrusted to the Antimonopoly Office (currently the Office for Competition and Consumer Protection).

In accordance with the Resolution of the Council of Ministers of the Republic of Poland of February 1995, the Antimonopoly Office was appointed to supervise establishing of the state aid monitoring system in Poland and elaboration of a draft act on state aid.

As the Committee for European Integration decided in November 1996 that the Ministry of Economy (established as of 1 January 1997) would be the monitoring authority, further works on of the draft act on state aid will be conducted by this Ministry.

In the previous year, representatives of the Office for Competition and Consumer Protection (OCCP) participated in the inter-ministerial team for the preparation of the law on consumer rights. When OCCP' prerogatives were expanded by this sphere of issues, effective October 1996, the Office took over the initiative as to the amendment of legal acts concerning consumer protection. Polish regulations in this sphere must be compliant with European law and practice. This means, in particular, the elaboration of procedures in the sphere of consumer protection and consumption security.

Apart from the above, the Office participated in legislation work on several draft acts and executory provisions, in each case maintaining a pro- competition point of view.

## 2. Enforcement of competition laws and policies

### *Action against Anti-competitive Practices, including Agreements and Abuses of Dominant Positions*

#### *Summary of Activities*

##### *i) Competition Authorities*

– Number of proceedings instituted <i>ex officio</i> :	27 cases
– Number of proceedings instituted on motion:	164 cases
– Monopolistic practices found in:	79 cases
– Practices not found in:	63 cases
– Proceedings were discontinued in:	43 cases
– Settlement approved in:	3 cases

##### *ii) Antimonopoly court*

Out of 69 appeals filed with the Office in 1996 from the decisions taken in proceedings concerning monopolistic practices submitted to the Antimonopoly Office, the Court examined 39 appeals, among which:

- in 19 cases the appeal was dismissed;
- in 4 cases the decision was changed;
- in 6 cases the proceeding were discontinued due to appeal withdrawal;
- in 8 cases the appeal was revoked; and
- Two cases remained to be examined.

#### *Description of Significant Cases*

The case against the telecommunication company Telekomunikacja Polska S.A., (hereinafter referred to as T.P. S.A.) and the cable television Polska Telewizja Kablowa (hereinafter referred to as PTK) consisting in agreements to eliminate other business entities from the market and the abuse of dominant position by TP S.A.'s refusal to sign an agreement to rent part of the telephone cable ducts.

Administrative proceedings were instituted on motion of the cable television company, Lubelska Telewizja Kablowa, Ltd. in Lublin. The subject matter of the proceeding was the TP S.A.'s refusal to rent part of the telephone cable ducts to the cable television company, Lubelska Telewizja Kablowa, despite the

large reserves it possessed. In the course of the proceedings this charge was expanded by the fact that TP S.A. and PTK S.A. of Warsaw and PTK of Lublin had signed an agreement aiming at the elimination from the cable television market in Lublin of other business entities that were not parts to this agreement. Having examined the case, also covering technical analysis, it was decided that monopolistic practices were the case. The appeal in the case was dismissed by the Antimonopoly Court.

The case against TP S.A. of Warsaw charged with imposition of onerous terms of agreement.

Having conducted the *ex officio* administrative proceedings against TP S.A. of Warsaw, OCCP passed a decision ordering to refrain from monopolistic practices consisting in imposing upon the telephone subscribers onerous conditions that would bring the telephone network operator unjustified benefits. This condition compelled the telephone subscribers to pay an additional fee for restrictions on automatic telephone connections.

The ground for instituting the proceedings was a telephone subscriber's complaint exacted by TP S.A. for installation of a blocking device that would restrict long-distance and international connections. This fee consisted of two parts: a single fee for the installation of the blocking device and a fixed fee that increased the cost of the telephone subscription by 30 per cent-50 per cent (depending on the type of the blocking device).

In the course of the investigation of the case the Office for Competition and Consumer Protection assessed the manner of fee exaction for this service and determined that despite the undoubtedly dominant position the TP S.A.'s demand of the single payment (effective in the telephone tariff till July, 1996) was justified and did not prove to be an onerous condition in the agreement. The rendering of such a service involves additional work connected with the blocking device installation. It is different in case of the fixed payment that increases the monthly telephone subscription payment, which compels the telephone network operator to guarantee permanent readiness on the telephone network operator's part to render all telephone connection services under the agreement.

In the case of a partial blocking of telephone connections, the range of TP S.A. services becomes limited, whereas the amount of payment on the telephone subscriber's part does not only decrease, but also rises in a disproportionately high manner in comparison with the fixed telephone subscription rate; thus it becomes a source of substantial gain for the telephone network operator, which is not connected with the actual rendering of services. Due to the above presented flagrant disproportion between the services and the payments, that violates the principle of equivalence, it was determined that such practice constitutes an onerous condition for the telephone subscribers in the TP S.A. network and is a case of abuse of dominant market position.

The Office decided to impose a fine upon TP S.A. amounting to PLN 100 000 payable to the State Treasury.

The case against steel mills and scrap-metal trading firms for monopolistic practices, consisting in entering in a pricing agreement in dealings with third parties and limiting access to market or elimination from the market of business entities that were not parts to the agreement by limiting the number of suppliers.

The case was instituted on motion of the Association of Scrap-Metal Manufacturers and Exporters (Stowarzyszenie Producentów i Eksporterów Z<sup>3</sup>omu Metali) of Gdańsk against the following steel mills: *Czêstochowa*, *Katowice*, *Lucchini*, *Łabêdy*, *Ostrowiec*, *Stalowa Wola*, *Zawiercie*, and against the following scrap-metal suppliers: *PPZM Herby*, *PPZM Centroz<sup>3</sup>om* of Katowice, *PPZM Centroz<sup>3</sup>om* of Wroc<sup>3</sup>aw and *Metbud, Ltd.* .



In the course of the conducted investigation, the Office ascertained the pricing agreement between these entities, that set two dates for price reduction of the purchased scrap-metal as well as another agreement aimed at the elimination of other business entities from the market as a result of a limitation of scrap-metal suppliers that had been agreed upon.

The Office ascertained the exercising of monopolistic practices and decided to impose fines the above enterprises. At the same time, the Office did not find any practices that would aim at scrap-metal market division.

As a result of the appeal by these steel mills and scrap-metal suppliers, the Antimonopoly Court changed the decision, as it determined that only one type of monopolistic practice was the case here (consisting in vertical agreement), without horizontal agreement and reduced the fines by 50 per cent.

### ***Mergers and Acquisitions***

#### *Statistics*

374 favourable opinions were passed, and these concerned:

- 50 transformations
- 324 mergers, including:
  - merger of business entities: 12
  - acquisition or take-over of a part of property of other business entity: 24
  - acquisition or purchase of shares: 268
  - acquisition or purchase of shares by financial institutions, for whom dealings is their object of operations: 13
  - bank merger: 7

One negative opinion was given.

#### ***Summary of Significant Cases***

The transformation case of the *Ursus* Tractor Factory of Warsaw into a one-person joint-stock company of State Treasury. This transformation was caused by the necessity of satisfying the terms of the bank conciliation that stipulated that *Ursus* creditors be satisfied with the shares of the enterprise under transformation.

The Office approved the intended transformation.

- i) Creation of the Polska Kasa Opieki S.A. (PKO S.A.) bank group

A characteristic feature of the Polish banking system is the existence of numerous but rather small banks. The purpose of the establishment of the PKO S.A. bank group was to fortify the standing of the member banks against the background of increasing competition (including foreign banks) and improvement of development opportunities, i.e. quality improvement and broadening the range of services offered to customers, as well as increasing the security of the member banks by way of mutual liquidity guarantees.

The Office did not express any reservations as to the intention to merge, consisting in the establishment of the first bank group pursuant to the Act of June 14, 1996 (cf. item I.1). This group was established by the following banks: Polska Kasa Opieki S.A. as the dominant bank, that acquired 100 per cent of the shares (and thus obtained 100 per cent votes at general assemblies) of Powszechny Bank Gospodarczy S.A. of Łódź, Bank Kredytowo-Depozytowy S.A. of Lublin and Pomorski Bank Kredytowy S.A. of Szczecin.

In the opinion of the Office, the establishment of the bank group does not affect competition in any segment of banking services.

*ii) Purchase of shares of Polam-Pabianice S.A. by Philips Lighting Holding B.V.*

Philips Lighting Holding B.V. submitted a notification of a merger to the Office for Competition and Consumer Protection; this merger consisted in purchasing a set of shares of a Polish company: Pabianicka Fabryka Żarówek Polam-Pabianice S.A. Both entities operate on the market of lighting products and their elements, light bulbs and lamps in particular. On the basis of the information the Office received, both companies held dominant position in its different segments. At the same time, there were several competitive business entities, including foreign ones. The Office determined that the results of this transformation had to be examined not only in the light of the domestic market, but also with the European market in mind, especially the markets of the neighbouring countries, which are dominated by the greatest PHILIPS competitors.

In the Office's assessment, the intended merger of companies, when both held the dominant position in the range of certain product groups, will not affect the competition from the part of foreign manufacturers as they enjoy favourable import policy measures (0 per cent customs duty on finished products from the EU and CEFTA countries, with 11 per cent from the former USSR) and hold a market share of 10 per cent on the domestic market. The Office for Competition and Consumer Protection did not have any reservations as to the intended merger.

**3. The role of competition authorities in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies**

In 1996 the government initiated the preparation of a series of legal acts related to the issues of market economy. The Office and its representatives took part in the preparation of numerous drafts, as to the others, the Office passed opinions from the point of view of competition rules. The Office pointed out the importance of antimonopoly control in the spheres covered by a given regulation, as well as emphasised the elimination of barriers for competition development, consumer protection and the necessity for the regulations to comply with European legal standards.

Among the most important drafts, in elaboration of which the Office was engaged in 1996, are the following:

*i) Draft act "Energy Law" ("Prawo energetyczne"):*

Towards the end of 1996 the Polish Parliament scheduled a vote on the new act "Energy Law". The preparation of this act, with active participation of the Office, took three years to complete. The draft under discussion and the related executory acts are to constitute the legal basis for creating conditions for competition in the energy sector as well as legal regulations for the necessary state interventionism in this sector. The current legal situation in the energy sector does not comply with the principles of market economy and, despite the lack of a clear state monopoly in the energy sector, this hinders the development of competition in this sector. Since energy enterprises, to a great extent, have the character of a network monopoly, the competition authorities consistently postulated the implementation of elements of the market economy into this sector and the resignation of state intervention by the administrative means.

A great emphasis was put upon the establishment of Energy Regulation Office (Urząd Regulacji Energetyki), whose responsibility would cover the regulation of the operation of energy enterprises, energy and fuel suppliers; the regulation would secure the interests of the consumers and reasonable profits for the investors without differentiating among various forms of ownership.

Regardless of the official, based on legal competence, participation of the Office in the draft preparations, the Office conducted numerous administrative proceedings instituted on motion of electricity, gas or heat consumers. The result of the proceedings were numerous decisions ordering refraining from actions deemed monopolistic practices according to the act on counteracting monopolistic practices.

*ii) The draft act on railway transport:*

The Office's representatives were active participants in the Inter-Ministry Team for the Restructurization of Polish National Railways (PKP) and as well as in the preparation of the draft on railway transport. The purpose of these preparations was to make the Polish regulations compliant with the recent regulations in the European Union, and granting other than the Polish National Railways business entities access to use the railway network for their transport operations. The Office supported all these new draft regulations that would increase the PKP's adaptability to the requirements of the market economy as regards the standard of services rendered and the cost level; these would also facilitate the establishment of new railway transport firms, independent of the PKP.

*iii) The draft Act "Bank Law" („Prawo Bankowe")*

The Office passed an opinion, in which it postulated a better synchronisation of provisions concerning bank groups with the provisions of the antimonopoly act.

*iv) The draft act on the change of public security dealings and trust funds*

The draft act on investment funds

The Office, in its opinion, emphasised the necessity of a clear decision as to the application of the antimonopoly law to the possible fund mergers.

*v) The draft act on the change of the act on companies (joint ventures) with foreign capital:*

The Office postulated to introduce a provision that would stipulate that the proposed simplification of procedures does not preclude antimonopoly control.

*vi)* The draft act on the conditions of domestic transport of persons in motor vehicles:

The Office postulated to secure equal access to the market for new business entities.

*vii)* The draft act on the general conditions of product and services safety:

The Office introduced several remarks aimed at a better compliance of the regulations with the Directives of the European Union:

- the draft resolution of the Council for Research and Certification (Rada ds. Badań i Certyfikacji) regarding the detailed procedure of accreditation of entities that certify products;
- several draft acts concerning agriculture, including the amended draft act on the establishment of the Agency for Restructurisation and Modernisation of Agriculture (Agencja Restrukturyzacji i Modernizacji Rolnictwa) and the act on fertilisers;
- the draft act „Water Law” („Prawo Wodne”):
- the Office emphasised the necessity to adapt the act to new political and economic system and the harmonisation of the principles for economic activities in the sphere of water supplies and sewage disposal with the European Union regulations.

*viii)* The draft act on the economic register:

The Office emphasised the necessity of incorporating provisions concerning the information on mergers and transformations of business entities,

*ix)* The draft act „Industrial Law” („Prawo Przemysłowe”):

The Office's comments regarded the issue of paramount importance for the development of competition in Poland, on the market of brand goods and those protected by exclusive rights.

Furthermore, the Office participated in the preparations of sector development and restructurisation programs in a number of branches. Thus, the Office for Competition and Consumer Protection passed opinions on the following:

- “Assumptions for the Strategy and Policy of Industrial Development until the year 2010”;
- sectoral program: “Great Chemical Synthesis for the years 1995-2005”;
- restructurisation program for the armaments and aviation industry for the years 1996-2010;
- the draft study by the Minister of Ownership Transformations: „Directions of Privatisation in 1997” ;
- The draft ordinances regarding the establishment of special economic zones.

The Office for Competition and Consumer Protection participated in the final stage of preparation by the Ministry of Communication of the document: „Telecommunication Development Policy”, which defines the directions of telecommunication development until 2010, and was accepted by the Council of Ministers in May, 1996. The following Office's motions were submitted and taken into account in the then adopted document:

- fixing the date and conditions for the liberalisation of inter-zone service;
- elimination of the limitation up to two of the number of regional operators;
- necessity of defining the quality standards for telecommunication services and the operators' responsibility for sub-standard services.

Additionally, by way of a self-correction, the Minister of Communication supplemented the document by an appendix informing on the results of negotiations regarding the liberalisation of the telecommunication services market conducted at WTO.

While participating in the preparations of the Ministry of Industry and Trade program: „Black-Coal Mining, National Policy and the Sector's for the years 1996-2000”, the Office for Competition and Consumer Protection emphasised the necessity of incorporating therein such problems as:

- the acceleration of the tempo of the liquidation of permanently unprofitable coal mines;
- reduction of excavation costs in mines scheduled for permanent exploitation;
- the tempo pay rises to be dependent on the work efficiency.

These comments were adopted for the final draft, accepted by the Council of Ministers on 30 April 1996.

Furthermore, the Office passed opinions on the ordinances of the Minister for Foreign Economic Co-operation concerning goods and customs quotas and presented its position regarding the issue of imports subject anti-dumping proceedings.

A representative of the President of the Office for Competition and Consumer Protection is a permanent member of the Securities Commission and is entitled to pass opinions as to the acceptability of stock market transactions that constitute capital mergers of business entities in order to counteract limitation of competition on the market.

#### **4. Summaries of or references to new reports and studies on competition policy issues**

- at the beginning of 1996, the report : „The Level of Concentration of Polish Industry in the middle of the 1990's. Market Position of business organisations and their market behaviour” (prepared by the Office's order) was accepted;
- at the end of 1996 the Office for Competition and Consumer Protection initiated the study into the level of concentration on the press market. The purpose of this study, to be continued in 1997, was to update and supplement the collected information on the press market structure, particularly its ownership structure. The questionnaire was sent to over 130 press editors of nation-wide or local scope. In particular, the Office is interested in relations, domination and interdependence between entities acting on this market, who are the members of the boards of directors and in sales volume and structure;
- the Office for Competition and Consumer Protection initiated studies into the cable services, as television market. This was caused by consumer complaints about the quality and price of well as the progressing concentration of the entities operating on the market.



## PORTUGAL\*

(July 1996-June 1997)

### 1. Changes to competition law and policy, proposed or adopted

#### *Summary of new legal provisions of competition law or related legislation*

The Decree-Law No. 222/96 Of 25 November extinguished the previous Directorate-General for Competition and Prices and simultaneously created a new entity - the actual Directorate-General for Trade and Competition - whose powers and jurisdiction cover the protection and promotion of competition, price policy, and trade, being now the official Portuguese authority also for the trade issues.

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) came into force very recently, on the 1st. January 1994.

#### *Other relevant measures, including new guidelines*

The Directorate-General for Competition and Prices (DGCeP) 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 DGCeP.

#### *Government proposals for new legislation*

A proposal assigning the DGCeP the task of investigating some restrictive 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.

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\* The original language of this document is English.

**2. 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*

Summary of statistics

	<b>1996</b>	<b>Observations</b>
Cases under investigation	98(a)	(a) 40 were raised by complaints
Investigations concluded	51	
Opening of formal infringement procedures	13(b)	(b) 6 of which are still pending, and from the others 7 cases - all concluded -3 were referred to the Competition Council for final decision.
Prior evaluation of restrictive practices	2 (c)	(c) cases received from Competition Council

*Preliminary proceedings*

In 1996, 98 cases were investigated by the DGCEP, the majority of which (40) were raised by complaints.

During 1996, 51 preliminary investigations were concluded, nine of which gave origin to formal procedures for infringements of competition law (plus four opened in 1995), 38 were concluded, or filed, due to several reasons, such as compliance with the competition rules or withdraw of the complaint, and the rest of them were presented to another competent authorities regarding their specific matters.

*Formal procedures*

During the same year - 1996 - Three cases were referred to the Competition Council for final decision, under Article 26(1) of DL 371/93. The cases concerned were:

- abusive behaviours in the TV exhibition of football matches market;
- an association decision in the pharmaceutical product market;
- abuse of dominant position in the tobacco market.

*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 DGCEP 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 Competition Council.



In 1996, the DGCEP analysed two notifications concerning an exclusive distribution agreement in the publication sector and a standard agreement for the food distribution market.

The former was, in the end of the year, in appreciation and the latter has already been referred to the Competition Council.

#### *Decisions of the Competition Council*

In 1996, the Competition Council adopted nine decisions, one of them was an interim measure.

#### *Most relevant cases*

##### *Portline*

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 percent 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. DGCEP 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 Competition Council 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.

##### *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/Metalomecanica e Equipamentos Rodoviários SA, as well as refuse 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 Competition Council 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 Competition Council ordered the offenders to immediately cease that practice and to refrain from similar conducts in the future.

##### *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 DGCEP had accused the association of restricting the competition through a price recommendation decision, the Competition Council 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 Competition Council filed the case.

*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 Competition Council acceptance of credit cards. The DGCEP requested the Competition Council 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 Competition Council did not support the DGCEP'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 Competition Council 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.

*Multiópticas de gestão SA*

Multiópticas de Gestão SA is an undertaking whose seat is in Lisbon and activity is the import and export of optical material which it distributes both as a wholesaler and as a retailer.

The undertaking also renders the services related with that specific material. About 90 percent of its share capital is owned by the Spanish Multiópticas.

The Competition Council decided that some clauses of the standard agreement that binds the retailers to the undertaking aren't justified. One of these clauses bound them to participate in the costs of the franchise whenever they had to purchase with suppliers out of the group of the preferred ones.

The Competition Council imposed the Multiópticas the obligation of modifying the agreement and those clauses that restrain the competition in the market concerned.

**Mergers and acquisitions***Statistics on number, size and type of mergers notified*

	1996	Observations
Mergers notified	30(a)	(a) Including 3 cases notified in 1995
Mergers procedures examined	26(b)	(b) 21 were approved and 5 were filed
Procedures pending	4	

The Competition Act establishes that concentrations which lead to the creation or the strengthening of a share higher than 30 percent 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 DGCEP.

During the year of 1996, the DGCEP examined 30 merger operations having concluded 26, 21 of which were given favourable opinion and approved; the five ones left were filed.

For lack of prior notification, four merger operations were caught by the competition law (DL 371/93) and, so, legal proceedings have been taken against them.

The activity of the approved undertakings involved on the notified mergers and caught by the merger control provisions during the period mentioned above were as follows:

<b>Manufacturing or distribution:</b> -----	<b>7</b>
Food and beverage -----	1
Electrical machinery and apparatus -----	1
Medical instruments -----	2
Tobacco -----	3
<b>Wholesale and retail trade:</b> -----	<b>8</b>
Wholesale services -----	4
Retail services -----	4
<b>Communications services:</b> -----	<b>1</b>
Telecommunications -----	1
<b>Other services:</b> -----	<b>4</b>
Audio-visual -----	2
Catering -----	1
Rent-a-car -----	1
<b>Construction:</b> -----	<b>1</b>
Construction -----	1

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:

**Merger operations examined and approved in 1996**

	1996
<b>Form of merger</b>	
Take-overs	1
Acquisition of assets	3
Acquisition of shares	16
Joint ventures	-
Restructuring within the same	1
Co-operative joint ventures	-
<b>Type of merger</b>	
Vertical	1
Horizontal non-conglomerate	19
Horizontal conglomerate	1
<b>"Nationality" of the</b>	
Purely domestic	9
Indirect foreign participation	2
Direct foreign participation	5
Purely foreign	5

*Summary of significant cases*

*Unichem/Alliance*

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 percent, which would be reinforced through this merger operation, reaching nearly 17 percent of the relevant market.

The Minister approved the operation on the basis of the favourable opinion of the DGCeP, that underlined the need to do a close follow-up of this particular market.

*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 percent 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 percent - and would only strengthen it by nearly three percent, the market share of TEHALIT, which exports the major part of its production.

The merger was approved by the Minister, according to the favourable opinion of the DGCEP, 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.

*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 percent) 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 DGCEP rendered a favourable opinion, on the basis of which the merger was approved by the Minister.

*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 percent - the acquisition of 100 percent of its share capital did not produce major changes in the structure of the relevant market, clearly dominated by ARTSANA (approximately 60 percent). The DGCEP 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 Minister.

*Lusomundo/Filmayer*

The DGCEP 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 DGCEP'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 DGCEP.

Although the merger was not notified by the parties, the DGCEP 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 an 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 percent 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 percent.

The DGCEP 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 DGCEP's decision imposing a fine on LUSOMUNDO for failure to notify the merger, this was authorised by the Minister.

*PMN-SGPS, SA / Tabaqueira*

This merger operation, notified on 23 September 1996, consisted of the acquisition of 65 percent of the share capital of TABAQUEIRA - Empresa Industrial de Tabacos, SA , in the scope of an open competitive bidding related to this undertaking privatisation, by PMN-SGPS, SA a joint-venture specifically created by the Philips Morris and the portuguese group Melo.

This merger operation, that reinforced the TABAQUEIRA dominant position in the tobacco market, was approved under conditions such as the divestiture of the wholesalers' shares controlled by Tabaqueira, not to impose to any economic agent the purchase exclusivity of its products or establish any minimum quantity purchase obligation without the approval of DGCEP.

*Ford Motor Company (EUA)/Budget Rent-a-Car Corporation (EUA)*

This merger operation, notified on 18 September 1996, consisted of the acquisition by FORD MOTOR COMPANY (EUA) of the totality share capital of BUDGET RENT-A-CAR CORPORATION (EUA). The relevant market concerned was the market of short term rent-a-car.

Although the concentration was held in USA it had effects in Portuguese market, since the companies concerned are operating here through their subsidiaries Hertz and Budget.

The DGCEP gave a favourable opinion, taking into consideration the fact that, in reality, the market share of new entity did not produce major changes in the structure of the relevant market.

### **3. The role of competition authorities in the formulation and implementation of other policies**

*Privatisations*

*Latest developments*

The 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 DEPOSITOS 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 in that year 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 1997, there will not be any further public share in the shipping sector (construction and repairs).

In the 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 percent, 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) to start, 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 DGCEP, within the framework of merger control provisions set by the Competition Act, the conclusion of the competitive tendering depending on the opinion of DGCEP, there have not been any cases of this kind as previously, partly due to the preference for public offerings shown in the last privatisation's.

*Privatisation's occurred in the year 1996*

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 percent was sold through a public offering.

*ii) Bank*

The complete privatisation (second and third phases) of BFE - Banco do Fomento Exterior SA, consisting of the sale of the remaining 65 percent of the share capital through a public competitive tendering.

The last phase of privatisation of Banco Totta & Açores SA, in which the remaining share was sold.

*iii) Telecommunications*

The second phase of the privatisation of PORTUGAL TELECOM S.A. (21.74 percent), through a public offering and a direct sale to a group of financial institutions.

*iv) Tobacco manufacturing*

The approval of a new privatisation procedure of TABAQUEIRA, that includes three phases, the first concerning the sale of an equity share of 65 percent 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 percent of the share capital to specific categories of acquirers - workers and small investors, who usually are granted better conditions to subscribe shares.

The DGCeP has analysed the merger proposals presented within the public competitive tendering of the tobacco manufacturer TABAQUEIRA - Empresa Industrial de Tabacos S.A., since they are subject to compulsory notification under the merger control regime.

*v) 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.

***Deregulation***

The Decrees 31/94 and 35/95 came into force on 11 and 12 of January 1995 and excluded from the declared price regime all goods and services that were within the scope of it. With this measure of deregulation that declared price regime became completely empty.



## SPAIN\*

(1996)

### Executive Summary

The Competition Act 16/1989 was modified in 1996 by Royal Law-Decree 7/1996, introducing a new *de minimis* rule, which will enable competition authorities to reject cases that, due to their small dimension, are unlikely to distort competition in the market. At the same time, an amendment to paragraph 1 of article 2 mentions expressly the applicability of the Competition Law to the acts of the public administrations. In relation to mergers, a new amendment to article 15 allows the Service for the Protection of Competition (SDC) to decide whether a notified operation should be treated as a merger or as a co-operative agreement.

During 1996, the former General Directorate for the Protection of Competition was integrated in the new General Directorate of Economic Policy and Protection of Competition with two different departments: The department of competition Restrictive Practices and the Department of Mergers and Studies.

The Spanish Government passed in June 1996 a package of Royal Law-Decrees containing economic measures to liberalise the economic activities in sectors such as telecommunications, professional associations, energy, water, road and rail transport, pharmacies, etc. The Spanish Competition Authorities have played a very active advocacy role in the introduction of these measures by carrying out the necessary studies and reports.

With regard to competition enforcement 1996 has seen a considerable increase in the number of cases opened (180), being more and more frequent the cases opened because of a complaint, mostly arising from the service sector. Most of the cases relate to prohibited conducts or abuse of dominant position in the market.

The exemptions granted by the Tribunal for the Protection of Competition (TDC) refer mostly to the establishment of registers of late-paying clients and, in some cases, to vertical agreements such as franchise contracts or exclusive distribution agreements.

The TDC took a total of 51 antitrust decisions. Most of the violations were horizontal agreements. The Tribunal passed 13 commendatory resolutions, imposing fines for a total of pesetas 323 375 000.

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\* The original language of this document is English.

## 1. Changes to competition law and policies

### *Summary of new legal provisions of competition law and related legislation*

In June 1996 the Spanish government introduced a package of Royal Law-Decrees containing liberalising measures for certain sectors of the economy. Additionally, Royal Law-Decree 7/1996 of 7th June on "Urgent Fiscal and Economic Measures for the Promotion and Liberalisation of the Economic Activities" has modified Competition Act 16/1989.

In the first place, a new paragraph 3 has been added to article 1 in order to allow competition authorities to apply a *de minimis* rule in a flexible way. This rule will enable the authorities to reject complaints that, due to their small dimension, do not affect the public interest. The new paragraph 3 of article 1 reads as follows:

"The bodies for the Protection of Competition could deem exempt from the competition Act those prohibited conducts which, due to their small importance, are unable to affect competition in a significant manner. In those cases, the Service for the Protection of Competition could dismiss the complaints".

Secondly, a new paragraph has been added to paragraph 1 of article 2, in order to clarify that Competition Law is also applicable to restrictive agreements which are the result of actions carried out by the public administrations or public enterprises. The new complete paragraph 4 of article 2 states:

"The prohibitions contained in article 1 shall not apply to those agreements, decisions, recommendations and practices which result from the application of an act or the regulations issued in application of an act.

On the contrary, [the prohibitions] shall be applicable to those situations of restriction of competition resulting from the acting of other administrative powers or caused by the action of the public administrations, public bodies or public enterprises, lacking the aforementioned legal protection."

Finally, some modifications have been introduced in article 15, with respect to voluntary notifications of concentrations. Until now, the lack of definition of the concept of merger in the Spanish legislation and the comparative favourable treatment given to the mergers, encouraged companies to present their co-operation agreements as mergers. The new paragraph 5 of article 15 allows the Service for the Protection of Competition to decide within one month whether the operation notified should be treated as a merger or as a co-operative agreement. The new paragraph 5 of article 15 reads as follows:

"When the Service for the Protection of Competition considered that a voluntary notification of alliance between companies does not correspond to an operation of economic concentration, the SDC will resolve within one month time the operation to be treated as an application for authorisation of agreement between companies, according to that established by article 3, and it will not benefit from a tacit authorisation.

When a voluntary notification of an operation of concentration is presented subsequent to a complaint of competition restrictive practices for similar actions, the Service for the Protection of Competition will take proceedings to accumulate the two dossiers and will decide whether the operation should be treated as an agreement by article 1 or as an economic concentration.

The aforementioned decisions taken by the SDC could be reviewed by the Tribunal for the Protection of Competition in the terms established by article 47."

During 1996 the Spanish Administration underwent numerous changes, following criteria of efficiency and reduction of the public expenditure.

Royal-Decrees 765/1996 and 1884/1996 modified the organisation of the Ministry of Economy and Finance. The former General Directorate for the Protection of Competition is now integrated in the General Directorate of Economic Policy and Protection of Competition with two different departments: the department of competition restrictive practices and the department of mergers and studies.

## 2. Enforcement of competition laws and policies

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

#### *Summary of activities of Competition Authorities*

#### *The Service for the Protection of Competition (SDC)*

The following tables show the main developments in the activities of the SDC during 1996 and comparisons with previous years.

Opened Cases				
Year	Total	Complaints	SDC Initiative	Authorisations
1990	104	80	4	20
1991	94	74	11	9
1992	119	95	11	13
1993	141	99	9	33
1994	148	94	5	49
1995	158	86	13	59
1996	180	120	15	46

Closed cases					
Year	Total	Filed out	Accumulated	Dismissed	Sent toTDC
1990	89	26	6	5	52
1991	64	17	12	8	27
1992	111	39	20	21	31
1993	142	58	15	30	39
1994	148	59	2	19	68
1995	139	55	5	16	63
1996	182	79	13	24	66

During 1996 there has been a considerable increase in the number of cases opened due to a complaint (120 cases), mostly arising from the service sector.

21 complaints were rejected: three in application of the new *de minimis* rule introduced by Royal Law Decree 7/1996 and the rest due to the inapplicability of the Competition Act to the reported conducts.

With respect to the cases opened by the SDC in 1996, 51 dossiers were related to “prohibited conducts” (article 1), 57 to “abuse of a dominant position (article 6) and 27 to “distortion of free competition by unfair acts” (article 7).

Furthermore, the SDC has received 46 applications for single authorisations. Although, as in previous years, most of the authorisations relate to the establishment of registers of information on late-

paying clients, there has also been applications for authorisations of vertical restraints, such as franchise contracts and exclusive and selective distribution agreements.

*The Tribunal for the Protection of Competition (TDC)*

The following charts summarise the activities of the TDC in 1996:

Category	Violations	
	Found	Not found
Violation cases	13	1
Agreements	13	-
Abuse Dominance	-	-
Unfair Competition	-	-

Fines	
Total Antitrust Decisions	51
Violation found (Number of cases)	13
Fines imposed (number of cases)	12
Amount fined (pesetas)	323 375 000
Firms fined	40

Single Exemption Decisions	
Total	37
Exemption granted	25
Exemption denied	5
Exemption revoked	2
No exemption required	2
Accept withdrawal of application	3

Most of the violations of the Competition Act deemed in 1996 were horizontal agreements. The TDC passed 13 commendatory Resolutions, imposing fines amounting to a total of 323 375 000 pesetas.

The single exemptions granted were mostly those for the establishment of register of information on late-paying clients and four exemptions related to vertical agreements, of which two could benefit from the block exemption established by Royal Decree 157/1992.

*Description of significant cases*

*i) Exclusive sale of cosmetics in pharmacies*

The Association of Consumers of Spain (UCE) and the Association of Medium and Big Distribution Companies (ANGED) filed a complaint against 45 cosmetic firms for distributing their products exclusively through pharmacies.

In its statement of objections the Service for the Protection of Competition accused the companies of two violations of art.1 of the Competition Act: the fixation of prices; the exclusive distribution of their products through pharmacies.

The Tribunal for the Protection of Competition in its Resolution 363/95 of 31<sup>th</sup>. July 1996 stated that the prices of medicines are subject to a special legal regime which can not be extended to other products.

Even in the case that the prices were only “recommended prices”, as the companies alleged, there would be a violation of art. 1 of the Competition Act. The Tribunal considered that a “recommended price” is only admissible when there is enough competition among retailers for the price to act as a maximum price.

In this situation the consumer can compare the different offers which differ in the percentage of discount applied to the same product.

Already in its resolution of 23/6/92, the Tribunal stated that: “The existence of intra-brand competition in the sale price is an indispensable element for competition in a exclusive distribution system...”. Intra-brand competition does not exist in the pharmaceutical system, being a closed circuit, organised in *numerus clausus* and where competition among pharmacies is non-existent.

Thus the “recommended price” works as a fixed price in the pharmaceutical channels and it has to be considered as a prohibited conduct by art. 1 of the Competition Act.

The exclusive distribution system of cosmetics in pharmacies has been active for many years and has drawn the attention of both the French Conseil de la Concurrence and the Commission of the EU.

The system of exclusive distribution through pharmacies carried out by the Company Cosmetique Active Ibérica S.A. (CAI) in Spain is the same used by their French mother company Vichy, that fell under art. 85 of the EEC Treaty and the French Competition Law by Resolution of the Conseil de la Concurrence of 8th June 1987. In August 1989 Vichy notified to the Commission a new dual system of distribution: for France it would be only necessary the presence of a graduate in pharmacy at the selling spot while for the rest of the UE they kept the existing system: obliging the retailer to be a pharmacist.

The Commission decided in January 1991 that this system was a violation of art. 85 and could not be authorised under art. 85(3). In July 1992 Vichy notified a new model of contract where they only insisted on the presence of a graduate pharmacist in the shop where their cosmetics were sold. This condition was still considered excessive by the Commission.

The Cosmetic Company Pierre Fabre Iberica S.A., subsidiary of the French company Pierre Fabre Cosmetique has been distributing their products under the same conditions above mentioned in the case of the firm Vichy.

The TDC agreed with the Commission that the conducts in question are subject to art. 85(1) and can not be authorised according to art. 85(3). Besides, the result is the same when we apply art. 1 of the Spanish Competition Act: The exclusive sale in pharmacies is prohibited and can not be authorised.

The TDC explained in its resolution that the TDC does not prohibit the companies to sell their products in pharmacies. What it is prohibited is to conclude agreements that prevent the distributor from using other channels than the pharmacies and from selling to third parties, causing damage in this way to both retailers and clients.

The Tribunal considered that this kind of agreements extends the monopoly of medicines, stipulated by law, to other products, obtaining thus monopolistic benefits which are in no way justified.

The fact that the exclusive distribution of cosmetics in pharmacies has been established for many years has created the appearance that it is a legitimate practice and it has kept third operators outside the

market. The Tribunal decided therefore that: 1) the cosmetic companies should address the Association of Medium and Big Distribution Companies (ANGED) offering them the possibility to supply their products to their associates and 2) the cosmetic companies should stop all advertising containing the idea that their products are “only sold in pharmacies”. The TDC imposed high fines on the cosmetic companies, amounting to a total of 61 million pesetas.

*ii) The case of the patisseries of Barcelona*

The Consumers Association of Catalonia filed a complaint against several associations of bakers of Catalonia for having reached an agreement to produce and commercialise an only type of especially enriched bread with a weight of 100 grams to be sold Sundays and holidays.

The SDC considered the agreement to be a restriction to production which violates art. 1 of the Competition Act.

It is important to point out that according to law 23/1991 on Domestic Trade in Catalonia and Decree 23/199 on shopping hours, bakeries were not allowed to open Sundays and holidays.

However, patisseries were allowed to open on Sundays but could not sell other bread than the so called “enriched bread”.

The General Directorate of Domestic Trade and Services of the Trade Consumer and Tourism Council of the Catalonia Autonomus Government welcomed the agreement, as they considered it to be satisfactory for bakers, patissiers and consumers.

The TDC, however, stated in its resolution that the agreement limited the commercial freedom of those involved, helped to maintain the prohibition for bakers to produce bread on Sundays and holidays and, at the same time, prevented the patissiers from producing and commercialising bread other than the one agreed beforehand.

One of the arguments put forward by the patissiers associations in their defence was that the agreement had counted with the support of the Catalanian Administration. The TDC considered, nevertheless, that as art. 38 of the Spanish Constitution recognises free competition within the frame of a market economy, the administrative interventions in the market mechanism can only be justified by other public interests such as safety, health or consumers protection. In this case, the acts of the Administration had caused a restriction of competition in the market damaging the interests of the consumers.

The TDC stated that the control of production and the establishment of commercial conditions are serious violations of the Competition Act. However, having taking into account the intervention of the Autonomous Administration and the small effects that the collusive practice had caused in the market, the TDC decided to impose a symbolic fine amounting to pesetas. 250 000 on each of the associations.

*iii) The case of the cider cartels*

The Association of Consumers of Spain (UCE) filed a complaint against the Association of Hotels and Restaurants of Gijón (AEHG), the Association of Cider Producers of Asturias (ALAS) and the Asturian Association of cider-apples pickers (ACOMAS) for having carried out agreements to fix the prices of the apples for cider and the price of the bottle of cider at 250 pesetas. The case involved two different kind of agreements: a vertical one between the Association of cider-apples pickers and the Association of Cider Producers; a horizontal agreement among the members of the Hotels and Restaurants Association.

The vertical agreement implied the fixation of an only price for the apples for cider. The companies alleged that the agreement could be authorised due to the crisis taking place in this sector. The Tribunal for the Protection of Competition considered, however, that there were not enough reasons for the authorisation of the agreement. The companies also put forward the argument that the agreement had been supported by the Asturian Administration in order to promote this sector. The TDC remembered once again in its resolution that it is necessary to distinguish between the administrative interventions authorised by an specific law and those not covered by legal regulations. In this case, the Asturian Administration recognised that it does not exist any national or regional regulation which could enable the intervention of the price of apples. The agreement, therefore, remains a violation of art. 1.1(a) of the Competition Act. The TDC imposed on ACOMAS, a fine of one million pesetas and a fine of two million pesetas on ALAS, having considered the intervention of the Asturian Administration as an extenuating circumstance.

The horizontal agreement - the fixation of the price of the Bottle of cider among hotel owners and restaurateurs - constitutes as well a serious violation of art. 1 of the Competition Act. The companies alleged that the agreement was not compulsory and that it was not carried out by the members of the Association. The TDC declared in its resolution that art. 1 of the Competition Act expressly includes recommendations. The adoption of such an agreement is in itself a violation of art.1.

The TDC considered that the agreement had been used as a reference when fixing the price of the bottle of cider and that it had been partly followed. The Tribunal decided to impose on the Association a fine amounting to ten million pesetas.

*iv) Adoption of interim measures: AIRTEL-TELEFONICA 18.7.1996*

In December 1994; Airtel Móvil S.A. was awarded the licence to operate mobile GSM telephones. For the first time the market of the mobile telephones of digital technology was opened for a second operator who had to compete with a subsidiary of Telefónica, Telefónica Servicios Móviles, the only existing company providing services both in the analogic (Moviline) and digital (Movistar) systems.

In January 1996; Airtel filed a complaint against Telefónica for abuse of its dominant position in the market and unfair practices which placed Airtel in disadvantage. The complaint included three different aspects:

- 1) the distribution system used by Telefónica Móviles for the commercialisation of its services of mobile telephones. Airtel alleged that Telefónica Móviles introduced exclusivity clauses in the contracts for the distribution of Movistar. The exclusivity agreements contained apparently better economic conditions (bonuses, benefits, etc.) than the contracts without exclusivity;
- 2) the use by Telefónica Móviles of the distribution services of its mother company, Telefónica, through the numbers for customers services 004 and 022 which gave access to their commercial offices in the whole country;
- 3) the joint advertising carried out by Telefónica Móviles of its two services Moviline and Movistar. The publicity of these brands is usually accompanied by the logotype used by Telefónica for all its services.

The Tribunal for the Protection of Competition in its provisional resolution decided to take interim measures regarding the points 2 and 3 mentioned above. The TDC ordered Telefónica to desist immediately from using the numbers 004 and 022 for the distribution of the movistar services or for any other information related to these services or its contracts. Besides, the TDC asked Telefónica to stop the joint advertising of the services Moviline and Movistar and the inclusion of any reference to the other services in their publicity spots.

The TDC took into consideration the possible existence of cross subsidies between the analogue and digital systems and perhaps also between the mobile and fixed telephone services.

***Mergers and acquisitions***

*Statistics*

During 1996, 23 operations have been voluntarily notified to the Service for the Protection of Competition (SDC) according to art. 15 of the Competition Act, which means an increase of 15 percent in the number of voluntary notifications with respect to 1995. At the same time, the SDC started inquiries regarding 27 merger operations. In some cases, as a result of these inquiries, the companies involved decided to present voluntary notifications. In the rest of the cases, after having collected the necessary information, it was established that none of the operations were contrary to the maintenance of an effective competition in the market, and, therefore, the SDC did not start any proceedings.

Merger cases	
Notifications	23
SDC initiative	
Sent to TDC	2
TDC Reports produced	4

The distribution of the operations by economic sectors has been very even, having special incidence in the chemical sector and food industry.

*Significant cases*

*Cablevision*

In September 1995 Antena 3 Televisión S.A. filed a complaint before the SDC and the Commission of the EU against Telefónica and Canal Plus Spain S.A. for collusive practices and abuse of dominant position. The complaint was based on the strategic agreement reached by Telefónica and Canal Plus to operate jointly in the sector of cable communications.

The SDC and the Commission opened inquiries on the case and in October 1995 Telefónica, Canal Plus and Sogecable notified voluntarily a concentration operation carried out in July 1995, consisting in the taking of control of "Cablevisión", an incorporated company founded in 1992.

The SDC in its report to the Minister of Economy and Finance proposed that the case were sent to the TDC, due to the fact that the operation could hinder the maintenance of an effective competition in the Spanish market of cable communications.

At the same time, in December 1995 the companies "Jerez de Cable" and "Santander de Cable" filed another complaint against Telefónica and Canal Plus for the same agreement.

The Tribunal, after studying the case, considered that the operation, although containing important concentrative elements, did not constitute an economic concentration from the Spanish competition legislation point of view. It was, therefore, considered to be an strategic alliance of co-operative character, under the agreements and restrictive practices regulations.



On the other hand, the General Director of Competition of the Commission informed the companies involved and the Tribunal that the DGIV had come to the following preliminary results:

- a) the operation Cablevisión to provide technical, administrative and commercial services to the cable operators, especially in the field of cable TV, constituted an economic concentration of community dimension;
- b) the strategic agreement signed by Telefónica and Canal Plus/Sogecable, could be separated from the concentrative operation relating Cablevisión, and be analysed, in due time, from the perspective of articles 85 and 86 of the EU Treaty.

Finally, the TDC resolved:

1. To issue the following report:

- to recommend to the government not to pronounce on the operation until the Commission had taken a formal decision on the subject;
- to recommend to the government that, in the case that the Commission considered the operation to have a Community dimension, the Spanish government requested the Commission to send the case to the Spanish Authority in order to apply the national competition legislation. The reason for this request being that the operation hindered effective competition in a significant way and reinforced the dominant positions existing in the Spanish market of cable telecommunications.

In any case, the TDC considered that, due to reasons of public interest, the government should oppose the operation in the terms that had been notified because it included important restrictions to competition in the relevant markets which reached out of what it is established by the Cable Telecommunications Law.

2. To issue resolution of 26.2.1996

The Resolution stated that, having examined the complaints filed by Antena 3, Jerez de Cable and Santander de Cable against the strategic agreement reached by Telefónica and Canal Plus; and taking into account the agreement signed by Telefónica with Iberdrola and the type-contracts of Cablevision S.A. with the cable-communication operators, the Service for the Protection of Competition should open proceedings regarding these conducts.

The Council of Ministers of 1<sup>st</sup> March 1996 approved the concentration, subject to a number of conditions, imposed to Cablevision and the local telephone operators, Telefónica and Canal Plus.

- Conditions concerning the future contractual relation between Cablevisión and the local telephone operators (OLT):
  - Cablevisión will have the final decision on the programming to be offered by the OLTS, on the analysis of potential markets and, in general, on everything related to the supply of goods and services to the OLTS;
  - the contracts with Cablevisión will not prevent the OLTS and other operators from carrying out contracts with other companies other than Canal Plus;

- neither Cablevision nor the OLTS will have the exclusive as *premium* Channel of the hertzian emission of Canal Plus;
  - the OLTS and other operators will be free to fix the prices of the subscription for the services offered.
- Conditions concerning the strategic agreement between Telefónica and Canal Plus:

Clauses on exclusivity and on joint actions in satellite television should be removed from the strategic agreement. The parties could eventually apply for authorisation according to the Competition Act.

- Conditions concerning Canal Plus:

Canal Plus should modify its statutes in order to come to the following results:

- agreements related to the activities of Canal Plus in the field of Cable Telecommunications, having effects in Spain or the European Union, should be reached by 2/3 of the total number of members of the Council;
- Prisa and Canal Plus France are not allowed to have effective majority in the Council;
- the president of the Council will lack casting vote.

Prisa and Canal Plus Francia should record the agreement of 12<sup>th</sup> February 1996 by which they revoke the second paragraph of the protocol signed by Prisa and Canal Plus France on July 16, 1991. Any future agreement will require the authorisation of the Spanish Competition Authorities.

- Conditions concerning Telefónica:

According to the legal limits, established by article 4(3) of the Law on Cable Telecommunications, the maximum number of subscribers to the OLTS will be :

- on 31<sup>st</sup> December 1997, 300 000 subscribers;
- on 31<sup>st</sup> December 1998, 700 000 subscribers;
- on 31<sup>th</sup> December 1999, one million subscribers.

In spite of the decision of the Spanish Government, the parties notified the operation to the Commission. In view of the fact that the Commission was likely to prohibit the operation, the companies decided to drop the agreements.

#### *Hexcel-Hercules*

The operation consisted in a project of acquisition by the US Company Hexcel Corporation of the Division of Composites Products of the also Northamerican Company Hercules Incorporated. This operation implied the acquisition by Hexcel of the total of the share capital of Hercules Aerospace España S.A. (HAESA), Spanish subsidiary of the Hercules Group, as well as the acquisition of the rest of the assets of Hercules- DPC world-wide.

The operation had been notified to the Competition Authorities of Belgium, Italy, Sweden, United Kingdom, United States and Spain.

Both Hexcel and Hercules-DPC worked in the field of carbon fibbers and prepregs products and, therefore, the notified acquisition had direct effects on the final applications of those products.

The operation did not create competition problems in the market of carbon fibbers in Spain because:

- there were not horizontal implications, as Hexcel did not produce nor sell carbon fiber anywhere in the world;
- there were no risks of vertical restrictions because, before the acquisition of Hercules-DPC, Hexcel did not have any factory in Spain purchasing carbon fibbers and Hercules-DPC sold carbon fibbers in Spain only to its own factory HAESA.

Having taken into account traditional economic criteria, such as the existence of substitute products in supply and demand, it was considered as relevant market the production and commercialisation markets of prepregs for aircraft's. The market is a world-wide market because of the globalisation of the supply and the clients, and because of the lack of barriers to international trade. The suppliers of prepregs compete internationally and alternative suppliers outside Spain can start selling to Spanish clients in the medium term. At the same time, there are no commercial or distribution barriers and it does exist an important trade across the borders.

In the case of Spain, the Competition Authorities were interested in studying the effect of this economic concentration on the supply of prepregs to Spanish aerospace clients, that is to say, to Construcciones Aeronáuticas S.A. (CASA).

The TDC reached the following conclusions:

- the relevant product was the market of prepregs for aerospace use;
- the geographical market was considered to be world-wide;
- the main entry barrier for both the world and the Spanish market is the process of qualification of the products. This process requires a period of time of about two years and a very high cost. This means that if there is only one qualified suppliers the client can not buy from another supplier during that time;
- in Spain, the notified operation affected basically to the supply of aerospace prepregs qualified for the specifications used in the production of elevators of the programme Airbus;
- the notifying firm, as a result of the concentration, would become the sole supplier for about 84 percent of the purchases of prepregs of the only client in Spain CASA, at least in the short term (Before Hexcel had a share of the market of 34 percent and Hercules of 50 percent);
- the suppliers of prepregs for aerospace use face a high power of negotiation on their clients side. The supplying contracts are granted through auctions in which suppliers, chosen by the clients, are invited to participate. For this reason the behaviour of a supplier at a certain moment could affect its possibilities for getting new contracts or even for participating in future tenders.

At the same time, if Hexcel abused its dominant position as the sole supplier of some prepegs of CASA, it could jeopardise CASA's chances to be granted future contracts, such as the important A3XX programme.

The concentrative operation could have, however, positive effects on the improvement of the production systems.

The TDC decided to recommend the approval of the operation, subject to the following conditions: Hexcel should guarantee by contract to supply CASA during at least three years at market prices; Hexcel should keep the producing of prepegs in the factory acquired in Madrid during at least three years.

The Government approved the operation subject to the conditions established by the TDC.

### **3. The role of competition authorities in the formulation and implementation of other policies**

The General Directorate for Economic Policy and Protection of Competition has played a very important role in promoting competition in all sectors of the economy. These effects have resulted in important structural reforms and deregulatory measures in a wide range of economic sectors.

#### ***Telecommunications***

Royal Decree 6/1996 on Liberalisation of Telecommunications creates an independent regulatory body: La Comisión del Mercado de las Telecomunicaciones.

Furthermore, this decree eliminates the monopoly of telephone services, granting a licence to a second operator: Retevisión.

The oligopoly of the bearer services has been eliminated and it is now possible to have at least two nets of cable telecommunication in the local loop.

Law 13/1996 reinforces the role of the Comisión del Mercado de Telecomunicaciones and it makes easier for RENFE to install its own telecommunications nets.

#### ***Land and housing***

Royal Law-Decree 5/1996 has introduced important changes in order to increase the percentage of land use allowed to land-owners and to facilitate the development of urban land.

#### ***Professional associations***

Royal Law-Decree 5/1996 has modified the Law on Professional Associations of 1974 in order to introduce competition in the professions. The decree establishes the free fixing of professional fees and the application of the competition law to the professions. At the same time, the professionals will be able to work in the whole of the Spanish territory by joining just one association.

#### ***Energy***

Royal Law-Decree 7/1996 has allowed to liberalise the access of third parties to the reception, storage and transport facilities of oil by-products.

From June 1996 the prices of diesel oil have been liberalised and they are excluded from the system of maximum prices, which regulated them before.

Besides, Royal Decree 2033/1996 of 6<sup>th</sup> September regulates the access of third parties to the National net of gas pipelines and to the gas plants in a non-discriminatory way.

### ***The financial system***

A number of measures have been taken in order to give savings a higher degree of mobility, especially in which concerns small and medium enterprises. Thus, institutions of collective investment have now wider possibilities to invest in non-quoted financial assets.

### ***Road and rail transport.***

Law 13/1996 develops a number of measures in order to promote private financing of public works to keep a high level of investment in this area and, at the same time, to lighten the public deficit.

In road transport the conditions for the construction maintenance and exploitation of motorways have been modified. The time limit for the exploitation of a motorway has been extended to 75 years.

With respect to rail transport a public body has been created -Gestor de Infraestructuras Ferroviarias (GIF)- for the construction and administration of rail infrastructures. GIF has already been granted the line for the high-speed train Madrid-Barcelona-French border.

### ***Water***

A new type of contract has been introduced for the construction and exploitation of hydraulic works: regulation of hydraulic resources, purifying plants, etc. These contracts guarantee the licence-holder the right to exploitate the infrastructure. When necessary, the administration will provide additional compensations

### ***Pharmacies***

Royal Law-Decree 11/1996 has liberalised the opening hours of pharmacies and it has eliminated some of the old requirements to open new shops.

### ***Funerary services***

Competition has been introduced for the provision of funerary services by Royal Law-Decree 7/1996.

## **4. Reports and studies on competition policy issues**

### ***The Service for the protection of competition***

The SDC is entrusted by the Competition Act with the issuing of reports and studies on the economic sectors in order to determine the degree of Competition in the different product markets.

During 1996 the SDC has carried out 44 studies and reports. Almost half of the reports have been initiated at the SDC's own initiative in order to acquire an in-depth knowledge of the sectors which are being liberalised.

Some of the studies are related to public services such as the postal services, and the municipal services. Other reports refer to the Reform of the Electric Sector, the Market of Oil Products, the Banking Sector, Books, Competition and Pharmacies, etc.

***The Tribunal for the protection of competition***

The Law 7/1996 of 15<sup>th</sup> January 1996 on The Regulation of Retail Trade establishes that the TDC should issue a report before a licence to open a second hypermarket, department store or shopping center could be granted.

In this capacity, the TDC has issued 30 reports and has studies 12 more cases, where reports were not deemed necessary.

The TDC has also issued reports on the following subjects:

- the distribution of motor vehicles;
- the regulations on municipal markets;
- professional fees in relation to the construction of houses;
- free competition and the broadcasting rights of football matches in Spain;
- Draft Regulation on Corporate Taxes;
- Draft Decree of the Extremadura Government on aid to industrial promotion.

**SWEDEN<sup>\*</sup>***(1996)***1. Changes to competition laws and policies, proposed or adopted*****Summary of new legal provisions of competition law and related legislation******Amended regulations on block exemptions***

The Government has decided on amendments to the Swedish regulations on block exemptions. All but one of the regulations correspond to the EC block exemptions and the amendments were made mostly to adapt them to the amendments made within the European Union. An amended regulation on block exemption of motor vehicle distribution and servicing agreements will remain in force until 30 September 2002. Amended regulations on block exemptions of exclusive distribution agreements, exclusive purchasing agreements, specialisation agreements, research and development agreements and franchising agreements will remain in force until the end of June 1998 and an amended regulation on block exemption of technology transfer agreements expires at the end of March 2006. A new regulation on block exemption of categories of agreements, decisions and concerted practices in the insurance sector enters into force on 1 February 1997. The special Swedish block exemption on retail distribution chain agreements is currently under review.

***Other relevant measures, including new guidelines******Guidelines on co-operation in the taxi sector***

The Competition Authority intends to modify its general guidelines on co-operation between small and medium-sized lorry and taxi undertakings not covered by the Competition Act (KKVFS 1993:6), following a judgement of the Market Court. The guidelines were designed to give small undertakings guidance on how to define the relevant product and geographic market in the lorry and taxi sectors in the context of agreements of minor importance. However, in its judgement the Market Court ruled that even though there are reasons to increase the predictability of how the Competition Act will be applied, a uniform definition of the relevant geographic market in the taxi sector should not be applied if it does not take account of actual market conditions and demand structure.

***Government proposals for new legislation***

The Competition Act is currently under review by a governmental commission. The commission will present its final report at the end of February 1997. However, a proposal concerning merger control has already been made to amend the rules on notification. In brief, the proposal means that an acquisition would not have to be notified to the Competition Authority if the acquired company has a world-wide turnover of less than 100 million SEK. The threshold of an aggregate world-wide turnover exceeding four billion SEK will be retained. It will nevertheless be possible for the Authority to require the parties to a merger to notify the transaction even though the company to be acquired has a turnover of less than 100

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\* The original language of this document is English.

million SEK in particular cases. It is also proposed that the parties may voluntarily notify a merger in such cases. A Government Bill concerning the merger control amendments is scheduled for March 1997.

## 2. Enforcement of competition laws and policies

### *Action against anti-competitive practices, including agreements and abuse of dominant positions*

#### *Summary of activities of the Swedish Competition Authority*

The Swedish Competition Authority has a total of 121 employees including 46 lawyers and 55 economists. Approximately 80 percent of the resources are dedicated to competition law enforcement.

The following table shows the number of new cases registered during 1996 under the Competition Act - mergers, agreements and complaints - and the number of decisions taken during the same period. The total number of cases pending at the end of 1996 amounted to 526. Approximately 200 cases were notifications for negative clearance and exemption made to the Authority during the transition period between July and December 1993. (The total number of notifications received during this period was approximately 800).

1996	Registered new cases	Decisions
Mergers	299	301
Notifications for negative clearance or exemptions	131	170
Complaints	219	310
Other cases (inquiries etc.)	145	148
<b>Total</b>	<b>794</b>	<b>929</b>

An important task assigned to the Competition Authority is its consultative role on existing and proposed public regulations. A total of 149 formal opinions were submitted to governmental and public authorities.

#### *Courts*

The Competition Authority has in two cases in the Stockholm City Court requested the imposition of fines on companies for infringements of the Competition Act. Also in two cases the Authority has requested the Stockholm City Court to prohibit a proposed merger.

During 1996 a total of 26 Competition Authority decisions were appealed to the Stockholm City Court (court of first instance) and decisions have been made in 16 cases. At the end of the year there were a total of 25 cases pending in the Court, including six cases where the Competition Authority has required undertakings to terminate infringements under Article 23 of the Competition Act.

Appeals were lodged with the Market Court against the majority of the decisions made by the Stockholm City Court concerning negative clearance/exemption. During the period the Market Court delivered a judgement in four appeal cases and five appeals had not been decided at the end of 1996.

### *Description of significant cases, including those with international implications*

#### *The Competition Authority*



i) Price fixing - timber

Two cases of great economic importance concern co-operation on the market for timber. Södra Skogsägarna is Sweden's biggest forest owners' association with over 30 000 members. Södra Skogsägarna fixes sales prices of timber coming from its members in the south of Sweden. These prices are used when the association sells members' products to external saw-mills and paper/pulp mills. According to the Swedish Competition Authority, this co-operation is too extensive. The special competition rules for the agriculture and forestry sector are for this reason not applicable. The Swedish Competition Authority has therefore ordered Södra Skogsägarna to stop the co-operation over prices.

ii) Buying cartel - timber

The wood processing industries Stora, MoDo and Munksjö co-operate in the joint purchasing organisation Sydved. This means that three of the largest enterprises in the wood processing industry in the southern part of Sweden, have ceased competing with each other in the south of Sweden concerning the buying and selling price of timber. The Swedish Competition Authority has examined the co-operation and found that it infringes the competition rules. Both decisions have been appealed to the Stockholm City Court. .

iii) Price co-ordination - airline companies

SAS and almost every other airline company providing scheduled air services within Sweden jointly decided to launch a new ticket category. The airline companies claimed that in order to supply the new product, prices had to be co-ordinated. An application for negative clearance or exemption regarding the price co-ordination was submitted to the Competition Authority by the companies. The new product aimed at a higher level of flexibility for the passengers. According to the companies, a prerequisite for this increase in flexibility is that the companies involved at price conferences can agree on jointly applied prices for all existing routes. The product can only be sold at the agreed price. The Competition Authority regarded increased use of interlining between airline companies as positive. However, it should be possible to achieve this flexibility by means other than price co-ordination. The price co-ordination *per se* did not lead to the advantages intended by the companies. A jointly determined price for each route eliminates price competition for the product, a situation which does not normally favour consumers. The Competition Authority decided that the price co-ordination would infringe the Competition Act. Thus an exemption could not be granted. The companies claimed that the block exemption in Commission Regulation (EEC) No 1617/93 was applicable to the price co-ordination. According to the block exemption consultations on passenger and cargo tariffs are exempted under certain conditions. However, the Competition Authority considered that the notified price co-ordination went beyond what is permitted under the regulation.

iv) Resale price maintenance - watches

Seiko Sweden AB, which is a company within the world-wide Seiko Corporation, carried out an advertising campaign, in which some of Seiko's retailers participated. The campaign included coupons upon which a fixed price was printed. The customers were supposed to hand in the coupons when buying a watch included in the campaign. The Competition Authority found that the campaign, because of the coupons, constituted a concerted practice between the supplier Seiko and its retailers concerning pricing to consumers thereby infringing Article 6 of the Competition Act.

v) Price advertising - motorcycles

KGK Suzuki AB, the sole distributor in Sweden of Suzuki motorcycles, provided in its conditions of sale that advertising which mentioned prices should be made by KGK Suzuki and that a

retailer was not allowed to run such advertising without permission. KGK Suzuki terminated a distribution agreement with a local retailer, arguing that the retailer had engaged in nation-wide advertising and had stated prices in the advertisements. The Competition Authority held that KGK Suzuki by entering and applying the clause on price advertising had infringed the prohibition against anti-competitive agreements in the Competition Act. KGK Suzuki was obliged not to restrict a retailer's right to advertise prices in such a way.

*vi) Exemption - banking services*

The Swedish bank, Nordbanken, and one of the divisions of Sweden Post have reached an agreement concerning distribution and marketing of certain banking services. Nordbanken will produce the services and Sweden Post will distribute them. The co-operation is planned to take place in two different lines. "The blue line" is a continuation of the already existing co-operation between the two parties and "the yellow line" extends the co-operation further. The Competition Authority's assessment of the agreement was as follows. The agreement contains a clause according to which Sweden Post is supposed to withdraw from the agreement if it co-operates with another partner, and if there is a risk in that co-operation that business secrets belonging to Nordbanken will be revealed. According to the Competition Authority this clause was anti-competitive, however, the Authority found the clause indispensable for the co-operation. The agreement also contained a five year period of notice, which the Authority regarded as acceptable. The consequences for the account holders would be too unfavourable if the co-operation were to end at too short notice. A five year period would give the account holders a reasonable period to adjust themselves to the situation. An exemption was granted.

*vii) Abuse of a dominant position - Price discrimination (Postal services)*

Sweden Post announced during the autumn of 1996 that the prices for distribution of large volumes of pre-sorted addressed letters to some regions would be lower than the prices for distribution to other parts of the country. These regions were divided in three different blocks of cities, called zone 1 to 3. Distribution to the three zones led to different rebates. The highest rebate was given for distribution to zone 1, which mainly includes Stockholm, Gothenburg and Malmö. The main competitor, City Mail Sweden AB, filed a complaint concerning alleged abuse of a dominant position by Sweden Post. City Mail claimed that the rebates were given in order to eliminate City Mail from the market. It should be noted that the zone 1 area corresponds to the area where City Mail distributes post. The Swedish Competition Authority found that the system of rebates infringed Article 19 of the Swedish Competition Act and required Sweden Post to bring this infringement to an end. Sweden Post appealed this decision to the Stockholm City Court.

After an interim decision of the Swedish Competition Authority in this case, Sweden Post modified the rebates. Instead of giving different rebates for distribution to the different zones, the same rebate was given for distribution to zone 1-3. This rebate corresponded to the highest rebate in the earlier system, i.e. the rebate to zone 1. The Swedish Competition Authority found in a second interim decision that this new rebate system also infringed Article 19 of the Swedish Competition Act, in the same way as the earlier system, and required Sweden Post to bring this infringement to an end. This was also the outcome of the final decision of the Authority in this case. The decision was appealed by Sweden Post. In March 1997 Sweden Post introduces a totally new price system.

*viii) End-customer pricing - telecommunications*

Although there were indications of increased competition in various sectors of the telecommunications market in Sweden as a result of the Telecom Act and the Competition Act both entering into force in 1993, it should be underlined that the state-owned company, Telia, still has a generally strong position on the Swedish market and that in several sectors the company has a dominant position. In addition, Telia is also the main owner of the public network and the dominant supplier of various network services. Even if alternatives to the access network controlled by Telia could be established in the long run, competitors of Telia have no realistic opportunities to build a parallel network. Competitors of Telia are thus dependent on Telia and on access to its network. At present, the number of subscribers connected to Telia's fixed network is approximately six million, i.e. Telia has a relationship with almost all customers in Sweden connected to a fixed link.

In May 1996, Telia announced a new increased charge for calls originating from its network and terminating in those of its competitors. According to Telia, the main reason for introducing such a pricing scheme was to eliminate the losses made on such calls which could be attributed to the variable interconnection charge being higher than the call charge paid by the end customer.

In an interim decision taken by the Authority in June 1996, Telia was prohibited from introducing an extra charge for delivering phone calls to other operators' networks. In its decision, the Authority stated that Telia's action distorted competition and gave rise to a foreclosure effect. 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 SEK 30 million, an injunction was issued.

Telia appealed the decision to the Stockholm City Court. However, the Court confirmed the Authority's decision. A final decision was made by the Authority in December 1996. The Authority concluded that a pricing scheme which discriminates subscribers to Telia's network in a situation where they call subscribers connected to other operators' networks, greatly reduces incentives to use other telephone operators. Such asymmetric end-customer pricing by Telia, must be considered an abuse of a dominant position and is thus incompatible with the Competition Act. Again, under penalty of a fine amounting to SEK 30 million, an injunction was issued. Also this decision was appealed by Telia.

*ix) Aggregated rebates - mobile telecommunications services*

In Sweden there are three mobile telecommunications operators, each running their own digital network (GSM), namely Comviq GSM, Europolitan and Telia Mobitel. Only Telia Mobitel, a subsidiary of Telia, runs analogue systems in Sweden, NMT 450 and NMT 900.

Differences in service content between the NMT and GSM systems, e.g. coverage areas in Sweden and international roaming in Europe, imply that NMT and GSM must be considered as two separate markets. By means of international roaming agreements a GSM user can be reached and can communicate within large parts of Europe. Offers combining NMT and GSM services by Telia Mobitel have been the subject of a number of complaints to the Competition Authority. Telia Mobitel is the only operator able to offer combinations of these services to customers. In June 1996, the Authority prohibited Telia Mobitel from continuing to offer joint discounts for NMT and GSM subscriptions. The Authority stated that Telia Mobitel, by using such a discount system to strengthen its position on the GSM market, abused its dominant position on the NMT market and thus contravened the Competition Act.

x) Tying and refusal to supply - home-video tapes

The Disney company, Buena Vista Home Entertainment AB, in their sale of Disney home-video tapes to home-video tape-retailers tied marketing support to a fixed lowest consumer price. One retailer sold the home-video tapes at a lower price than the fixed one. Then Buena Vista withdrew the marketing support. In addition, Buena Vista also refused to supply any of their home-video tapes to the retailer. The Competition Authority found that tying the marketing support to a fixed price and the refusal to supply was an abuse of Buena Vista's dominant position.

xi) Price discrimination - TV

Swedish Performing Rights Society (STIM) applied for a negative clearance concerning rates and payments of royalties for licences issued to television programme companies for permission to broadcast STIM's repertoire of musical works protected by copyright.

According to the royalty principle used by STIM, each broadcaster had to pay an annual royalty equivalent to a certain percent of its net advertising revenue.

The Competition Authority found that the royalty principle in itself would lead to price discrimination between the television programme companies since there was no clear correlation between the use of music from STIM's repertoire by the companies and the net advertising revenue of those companies. The Authority concluded that the royalty principle used by STIM constituted an abuse of a dominant position since it had discriminatory anti-competitive effects. The royalty principle was declared incompatible with the Swedish Competition Act and the Authority rejected the application for negative clearance.

*The Courts*

In 1996 the Market Court and the Stockholm City Court made decisions on cases which in a general sense affect substantial issues such as the interpretation to be given the term undertaking, relevant market, dominant position and effect on the Swedish market. In addition, the Stockholm City Court made its first decision on a case concerning an acquisition.

*The Market Court*

In the Norsk Hydro case, the sellers of a company had provided an undertaking to the buyer, Norsk Hydro, that they would not operate a competing business. In addition to the non-competition clause, there was also a clause on professional secrecy. Norsk Hydro claimed that the clauses were not covered by the Competition Act since the sellers were physical persons. The issue of whether a physical person can be regarded as an undertaking under the Competition Act arose. The Market Court considered this was the case if the owner of shares in a company by virtue of this has a not insignificant influence on how the company is managed and participates in the activity of the company.

i) Relevant market to increase predictability for the players on the market, in its general guidelines (KKVFS 1993:6) concerning co-operation over central booking offices, the Competition Authority had earlier issued a general definition of the relevant geographic market as being the county where the central booking office has its principal activity. The validity of such a general definition of the relevant market was raised in the case Taxi Co-ordination in Skellefteå concerning co-operation within a central booking office in a municipality. In addition, the procurement of the municipality of Skellefteå concerned taxi transport within the municipality. The decision of the Market Court has shown that an investigation into the market conditions and a definition of the relevant market is required in each individual case.

*ii) Dominant position;* pursuant to Article 8 of the Competition Act (corresponding to Article 85(3) of the Rome Treaty) the Competition Authority may in individual cases grant an exemption from the prohibition against anti-competitive agreements between undertakings laid down in Article 6. An exemption, however, will not be granted if it affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question. The Taxi Stockholm case, concerning the application by members of Taxi Trafikförening for an exemption from anti-competitive co-operation in a central booking office, showed that market share alone cannot be regarded as sufficient to establish the existence of a dominant position. The Market Court stated that Taxi Stockholm had a market share of at least 35 percent. In its decision, the Market Court also stated that when determining whether an association of undertakings could eliminate competition, a pragmatic assessment based on the specific conditions existing in a given case must be applied. Since no specific thresholds exist and given the widely varying conditions of different markets, it is difficult to draw any direct and definite conclusions from praxis in the area. It is clear, however, that relatively high market shares can be accepted in a dynamic market characterised by a high degree of competition and low barriers to entry such as the taxi market in Stockholm.

*iii) Co-operation - appreciable effect;* The Competition Authority has in three cases made appeals against decisions of the Stockholm City Court which wholly or partially went against the Authority. In two of these cases, concerning co-operation in the agricultural sector and the insurance sector, the Stockholm City Court considered the co-operation as not having a sufficiently appreciable effect on competition and therefore they were not considered to be incompatible with the Competition Act. In the third decision, concerning price co-operation between petrol retailers within the Petrol Retailers' Association, the Stockholm City Court took the view that some petrol retailers should be placed on a level with an employee and where this is the case the co-operation was not covered by the Competition Act and thus the Court granted a negative clearance.

*iv) Public Procurement;* in March 1996 the Market Court for the first time applied the Act on Action against Improper Practice Regarding Public Procurement (LIU). A municipality had introduced a new set of criteria when evaluating the tenders regarding procurement of social welfare assistance. The Market Court prohibited future practice of the kind under penalty of a fine of SEK five million.

#### *The Stockholm City Court*

##### *i) Effect on the Swedish market*

The question of the effect on the Swedish market was raised in the ADA case where ADA AB, a pharmaceutical distributor, refused to supply a product to a company for re-export. Direct influence on the Swedish market was thus not an issue. The Competition Authority had, however, claimed that refusal to supply to the company could have an indirect effect on the Swedish market, since a condition for the existence of parallel imports of low-price pharmaceutical products was that the company concerned had the opportunity of building up a sound financial basis for its activities through profitable exports. The Stockholm City Court considered that in this case there was no such direct connection between the possibility of the company to obtain supplies for export and its possibility to obtain parallel imports and that ADA's refusal to supply could also be regarded as having a potential effect on the Swedish pharmaceutical market. The Competition Authority has not appealed against the decision of the Stockholm City Court. A complaint has also been lodged with the European Commission.

*ii) Predatory pricing - railways*

After a complaint from a minor Swedish railway operator, BK Tåg AB, the Swedish Competition Authority found that the Swedish State Railways (SJ) had abused its dominant position on the Swedish railway market through predatory pricing in a procurement procedure concerning regional railway services, by attempting to squeeze BK Tåg out of the market, thus infringing Article 19 of the Competition Act. On these grounds the Competition Authority took the case to the Stockholm City Court arguing that the Court should impose a fine of 30 million SEK on SJ. Judgement from the Stockholm City Court is expected during Spring 1997.

***Mergers and acquisitions***

*Statistics on number, size and type of mergers notified and/or controlled under competition laws*

During 1996 the Swedish Competition Authority made decisions in 301 cases under the rules in the Swedish Competition Act rules concerning acquisitions of companies. In 11 of these cases, an in-depth investigation was launched following the initial 30 day examination period. During the corresponding period in 1995 there were 252 cases decided, of which 17 involved an in-depth investigation.

*Summary of significant cases*

The Competition Authority decided in two cases during 1996 to apply for a prohibition of the notified acquisitions. These cases, concerning film laboratory services and vending machine services, are briefly described in the following. Finally, a case concerning domestic airlines is presented as an example of acquisitions that have led to an improvement in competition.

*i) FilmTeknik AB - film laboratory services*

This case concerned the transactions whereby the only two film laboratories in Sweden processing cinematographic film, Film Teknik and Swelab, would be controlled by the same owners, thus creating a monopoly situation for such services.

Before the notified transactions FilmTeknik was owned by the Norwegian media group Schibstedt. Swelab, a wholly owned subsidiary of Skandinaviska Filmlaboratorier Holding AB, was jointly controlled by Sveriges Television, a national broadcasting company, and Nordisk Film A/S, a Danish media group. As a result of the notified transactions, Schibstedt, Sveriges Television and Nordisk Film A/S would jointly control Skandinaviska Film laboratorier Holding AB. This company would in its turn control FilmTeknik and Swelab.

In this market, Film Teknik and Swelab, were the only suppliers of the entire chain of services performed in the processing process of cinematographic film. As a result of the national character of the market due to the need for close contact between the customers and the laboratory during the process, the short time in which the services must be supplied and the risk involved when transporting the exposed film to the laboratory, the Competition Authority found that the potential competitors situated abroad did not create enough pressure on Film Teknik and Swelab. The Competition Authority found that the notified transactions would create or strengthen a dominant position significantly impeding competition on the Swedish market in a manner that is detrimental to the public interest.

The Competition Authority applied to the Stockholm City Court for a prohibition of the notified acquisitions. The Court decided in December 1996 not to prohibit the acquisition. It held that although FilmTeknik/Swelab would have a dominant position after the acquisitions, there was nevertheless enough competitive pressure left on the market from small, specialised companies and foreign laboratories. The Authority decided not to appeal the Court decision.

*ii) Selecta AB/Servess - operating services provided by vending machines*

Selecta, a company owned by the Swiss Merkur group, is the largest supplier of operating services provided by vending machines in Sweden. These services are offered to companies that wish to give their employees coffee and make other snacks available at all times. On the market for operating services provided by vending machines in Stockholm, Servess prior to the acquisition by Selecta was the second largest operator, although it was much smaller than Selecta. Of the remaining companies, none have a market share exceeding ten percent. The Competition Authority's investigation showed that Selecta and Servess would have a market share exceeding 70 to 75 percent after the acquisition. In addition since Selecta is part of the Merkur group, which is active in the market for operating services provided by vending machines in many European companies, the Competition Authority found that Selecta would have a dominant position on the market after the acquisition. The investigation further showed that Selecta would be the only operator that would be able to provide services to larger companies that have special demands. The Competition Authority applied to the Stockholm City Court for a prohibition of the notified acquisitions. Selecta then undertook to divest a number of contracts with larger customers and the case was subsequently settled.

*Merger cases decided within the 30 day period*

*Braathens' acquisition of Transwede - domestic airlines*

The Competition Authority found that the Norwegian airline company Braathens' acquisition of 50 percent of the shares in the Swedish airline company Transwede Airways AB would be positive for the competition on the Swedish market for domestic airlines. The deregulation of the market for domestic airlines in Sweden came into force on 1 July 1992. One of the first companies to use the new freedom to compete was Transwede, which held a price level far below that of SAS and offered a higher level of services. Transwede is now providing domestic airline services to five destinations in Sweden. By means of its acquisition by Braathens, Transwede will have a new, strong owner, which will become a significant player on the Swedish market for domestic airlines. According to the Swedish Competition Authority, Transwede's prospects for competing with SAS will improve due to the merger. In Norway Braathens has been competing with SAS so successfully that it has won more than half of the market. A new study from the Swedish Competition Authority on the deregulation of the Swedish market for domestic airlines shows that the prices of airline tickets in Norway are lower than the prices in Sweden. According to the study the difference regarding the price structure in the two countries could depend on the strong competition between Braathens and SAS in Norway.

**3. The role of competition authorities in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies**

*Competition in the public sector*

A governmental commission has studied the problem of "predatory" pricing in the public sector. In its report (SOU 1995:105) "Competition in Balance" the commission proposes a number of measures, inter alia a new law prohibiting public "predatory" pricing, to create equal competition conditions between public and private participants. The proposals are based on the Competition Authority's report "Tax subsidies, predatory pricing and competition". In this report, the Competition Authority gave an account of its experiences of competition in the public sector as seen from complaints dealt with by the Authority. One conclusion is that the Competition Act in most cases can not be used to solve such problems. Later the Competition Authority has in another report delivered to the Government "Laundries of the county councils - a study of local business", pointed out the distortions in competition resulting from the fact that

local administrations and their companies "enter" the market. A number of measures to solve the problems are proposed in the report.

During the year the Competition Authority has received around a hundred notifications and complaints against public participants. As in earlier years, these complaints initiated primarily by small and medium-sized enterprises have been critical of the actions of local and Government authorities from a competition point of view. The Competition Authority has in most cases chosen not to make any further investigation of these complaints while waiting for the Government to determine its position to the proposals in the report "Competition in Balance and the reports of the Authority". This should also be seen in the light of the lack of effective legislation for dealing with several forms of anti-competitive behaviour from public participants. In the light of these experiences, the Competition Authority has come to the conclusion that limited regulations, such as those proposed by the governmental commission, will not suffice to solve the problems observed. The view of the Authority is that municipalities and other public bodies should not be involved in business activities on markets where effective competition already exists.

### *Competition on deregulated markets*

The Swedish Competition Authority has been given the special task by the Government of presenting its views on the developments of markets in which regulations have been abolished or reformed.

In its report, submitted to the Government in October 1996, the Swedish Competition Authority describes and comments on the changes in six markets in Sweden that have been deregulated during the last decade - taxi, telecommunications, postal services, airlines, railways and electricity.

The main conclusions from the report are the following:

#### *Successful deregulations*

One overall conclusion is that the deregulation that has taken place in these markets may generally be regarded as having been successful. In certain markets it will be necessary to change the regulatory rules in order to improve the conditions for competition. However, in an overall sense the markets are functioning in a better way now than if they had remained regulated.

An important reason for the deregulation carried out in monopoly markets is the desire to increase the efficiency of production in the companies concerned by exposing these markets to the pressure of competition. In the majority of the markets dealt with in the report, it seems that even the high level of expectations concerning such effects has been fulfilled. In those cases where the dominant players have been exposed to competition, major rationalisation programmes have been carried out and productivity has increased. In this respect, the state-owned companies in the telecommunications and postal sectors can be mentioned. The establishment of new undertakings has moreover led to new products and services being developed and put on the market.

#### *Preparatory work important*

The Competition Authority's experiences from many cases of deregulation is that shortcomings in implementing deregulation may have serious negative consequences, which on many occasions may be difficult to remedy afterwards. For this reason, the need for information, special legislation and structural measures, to indicate a few areas, should be thoroughly examined in advance. If special legislation is deemed to be necessary, it should be drawn up with the aim of taking care of competition problems that can be expected to occur initially when the deregulation is implemented. In many areas, the structural separation of certain activities is the best way of attaining the conditions for effective competition. The report emphasises, for instance, that structural measures in the telecommunications sector would be a



means of significantly reducing the need for special regulations and control of the telecommunications market.

#### *Unforeseen effects*

All experience to date, both Swedish and international, shows that deregulation is almost invariably accompanied by unforeseen effects. This depends largely on erroneous assessments concerning e.g. the functioning of a particular market, but it may also be related to changes in the surrounding world which at the time of the decision were difficult or virtually impossible to foresee.

One example of this is the recession in the Swedish economy that at the beginning of the 1990s had a great influence on the deregulation of the aviation market.

An important conclusion is that deregulations must be followed up and that there must be a preparedness to modify the new regulatory system. One method of ensuring this is to decide at the time of deregulation one or more dates at which a review of the effects of deregulation should be carried out and evaluated.

#### *Unrealistic expectations*

The extent to which deregulation is perceived as being successful is closely related to the expectations created prior to the change and the perspective from which the assessment is made. The Competition Authority's view is that the expectations created prior to deregulation are often unrealistic. If the level of expectations is high or if it is based on unrealistic assumptions on how the market functions, or on which parties initially are favoured, deregulation may appear to be a failure even though changes in the rules have contributed to creating a market that functions better than would have been the case if the change had not been implemented.

A development which can be noted but which is often not part of the expectations, is that some customer categories with more resources than others are able to take advantage of the situation and benefit from deregulation. This could to some extent be remedied with better information about the aim of deregulation and the opportunities it provides individual consumers if they change their behaviour.

#### *Asymmetric rules*

In deregulating markets that have long been dominated by a single player, special rules should be introduced to give new entrants good opportunities to establish themselves on the market. Experience shows that new players during a transitional period may need additional protection, in order to be able to contribute in the long-term to greater competitive pressure on the market.

Such types of asymmetric rules already exist in the Swedish Competition Act, for example by the imposition of stronger requirements on dominant undertakings. However, they should to a greater extent than is the case now also be introduced in special legislation regulating specific markets. Non-discriminatory conditions giving smaller undertakings access to such infrastructure as necessary to operate on the market can be mentioned as an example of the special requirements that can be imposed on dominant undertakings.

#### *The responsibility of the state as owner*

Many deregulated markets are dominated by a state-owned undertaking. This can lead to certain management problems but at the same time it provides the state with the opportunity of using its role as an owner to improve the conditions for competition. State ownership makes it possible to decide on and take measures on structural separation of certain operations.

One issue which according to the report should be more closely examined is whether the state makes sufficiently clear its two different roles as an owner and a regulator of the market. In certain cases, there is an inherent conflict of interest between these roles. One approach that should be considered by the Government for e.g. the postal and telecommunications sectors would be to separate the responsibility for ownership and the responsibility for regulation so that the two kinds of responsibility would be assigned to different ministries. Since state-owned undertakings often have a position closely resembling that of a monopoly in their core activities, and given also the risk of cross-subsidisation there is also a need to clearly define and decide which additional activities these undertakings should be allowed to carry out.

#### *Deregulation of the Swedish electricity market*

In overall terms, one of the aims of the deregulation of the electricity market in Sweden, was to introduce competition on the market to the benefit of consumers. The Competition Authority's main impression is that the deregulation of the electricity market has created opportunities for a well functioning competition among the generating companies. In the initial phase the majority of customers with high electricity consumption, for example large industrial companies, have been able to decrease their electricity costs, in some cases by changing their suppliers. Other kinds of customers - households and small companies - have not been able to take advantage of the deregulation, mainly because of the costly requirement for hourly metering of consumption when changing supplier. For that reason, the Authority has proposed that these customers should be exempted from the rules on hourly metering of electricity consumption and from the requirement to install a new meter when changing supplier. Instead a system based on standard metering should be introduced.

Another problem is that prices of transmission seem to be high in relation to actual costs or to costs at efficient operations. Organisational solutions arising from deregulation may formally fulfil the rules involved. In practice, however, transmission activities can be performed in conjunction with distribution. This leads to competition problems arising from the difficulties in identifying and accounting for all the costs of the transmission activity. For this reason, special rules should be introduced, defining the costs relating to transmission as well as the accounting principles and cost verification requirements that should apply. The Authority also proposes that the rules governing transmission organisations should be supplemented, in order to prevent as far as possible companies from running transmission activities together with distribution activities or other activities exposed to competition.

Finally, it is important to take measures to counteract the high market concentration of generation in Sweden. One should examine the possibility of divesting the major generating company Vattenfall into a number of independent companies. One of the most important questions is how to open the electricity market in Sweden to competition from generators in other countries. A prerequisite for equivalent conditions of competition between generators is that the countries affected have opened their national markets to competition. There are two necessary conditions for trade in electricity to function smoothly, namely that there is an effective electricity exchange and that there is trade in contracts. For the foreseeable future, the Norwegian electricity market, by way of the foreign trade mechanism, seems to offer the best possibility for increasing competition between generators in Sweden.

#### *Long distance bus services*

Long distance bus services are subject to regulations, requiring separate authorisation for each route. When considering an application, the authorities assess the risk that already established railway services or local public bus services run by the counties, might be damaged by the proposed new bus route. The Swedish Competition Authority has proposed that this regulation should be abolished. The proposal is based on a general economic analysis which shows that priority should not be given to maintaining a certain profitability in the railways. If a new long distance bus route should give rise to a deficit on e.g. a neighbouring railway route, this deficit should be assessed against potential welfare gains from the bus

connection. The main assumption for maintaining the present regulation - that long distance bus services attract passengers from the railways - has been shown to be only partly correct. Travelling by bus is cheaper than by train, whilst the journey by bus generally takes longer. The regulation, however, has prevented a substantial number of travellers from travelling in accordance with their individual preferences regarding price, travel time and comfort. A deregulation may also bring favourable effects on environment and energy consumption, and significant savings for companies and authorities which administer the regulation.

*Apoteksmonopolet*

The Competition Authority proposed in its formal opinion on "The Future Role of The National Corporation of Swedish Pharmacies" that the retail monopoly on pharmaceutical products be phased out. To maintain security when selling pharmaceutical products, the Authority proposed that a permit to run this activity should only be given to companies fulfilling certain competence requirements. The distribution system of pharmaceutical products is currently under review by a governmental commission.

**4. Summaries of or references to new reports and studies on competition policy issues**

*Available in English from the Swedish Competition Authority*

The Swedish Competition Authority. Functions and Organisation (1995)

Competition Rules in Sweden. Swedish Competition Authority (1995)

Annual Report 1995/96 of the Swedish Competition Authority. Abridged version in English

Long distance bus services. A summary of the report 1996:2. Swedish Competition Authority (1996)

Deregulation of the Swedish Electricity Market. A summary of the report 1996:3. Swedish Competition Authority (1996)

Competition on Deregulated Markets. A summary of the report 1996:4. Swedish Competition Authority (1996)



## **SWITZERLAND\***

*(1996-June 1997)*

### **Executive summary**

Competition policy in Switzerland was marked by the entry into force, on 1 July 1996, of the new Federal Act of 6 October 1995 on cartels and other restraints on competition (LCart). Compared to the previous Federal Act of 20 December 1985 on cartels and similar associations, which had been in force until 30 June 1996, LCart deals more harshly with cartels and other agreements, introduces prior controls on mergers and makes institutional as well as procedural improvements. Among those improvements is the fact that the Competition Commission, succeeding the Cartels Commission, now has genuine decision-making power and is assisted by a Secretariat. Its procedure is in harmony with the Federal Act on Administrative Procedure—a step forward in terms of transparency, effectiveness and judicial security.

Inasmuch as the new Act has been in force only since 1 July 1996 and provided for a six-month transitional period for competition-related agreements, the Competition Commission had until now to hand down not more than a limited number of decisions applicable to business enterprises. But it has taken stands on several major sets of proposed standards in hitherto highly regulated sectors of the economy, such as telecommunications, health care and the environment.

### **1. Changes to competition law and policy, proposed or adopted**

#### *New provisions of competition law or related legislation*

##### *Federal Act on cartels and other restraints of competition of 6 October 1995*

The new Federal Act on cartels and other restraints of competition of 6 October 1995 (LCart) entered into force on 1 July 1996. Its purpose is “*to prevent harmful economic or social effects of cartels and other restraints of competition and, by doing so, to promote competition in the interests of a market economy based on liberal principles*” (Art. 1, LCart). The Act is part of the programme to revitalise the Swiss economy that was launched by the government following the rejection of the European Economic Area (EEA) Treaty by the people and by the Cantons in December 1992. Also forming part of that programme are the Domestic Market Act and legislation on technical barriers to trade (see below).

LCart replaces the Federal Act of 20 December 1985 on cartels and similar associations. Compared to this latter statute, which focused on cartel practices, LCart has a broader scope of application, states rules of conduct more clearly, introduces a system of prior notification for concentration and makes institutional and procedural improvements.

LCart entered into force on 1 July 1996. Competition agreements were given until 1 January 1997 to be brought into compliance with the new legislation (Art. 62, par. 2, LCart).

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\* The original language of this document is French.

*i) The Act's scope of application*

LCart applies to private- and public-law enterprises, i.e. to all entities that produce goods or services and thereby play an independent role in the economy, from either the supply or the demand side. Its scope of application encompasses all forms of private restraints on competition. The Act applies to restraints on competition arising from participation in cartels or other agreements affecting competition, from abuse of dominant position and from participation in an act of concentration (Art. 2, par. 1, LCart). Furthermore, the Act also deals, albeit in a milder form, with restraints arising from other legislation (Arts. 45 and 46, LCart).

Compared to the previous statute, the new Act explicitly defines its scope of geographical application, which encompasses circumstances that produce effects in Switzerland even if they have taken place abroad (Art. 2, par. 2, LCart). Moreover, the Act applies to all sectors of economic activity, although it does make certain exceptions for procurement regimes and government-regulated prices, for measures regulating special rights, and for effects on competition that arise exclusively from legislation on intellectual property (Art. 3, LCart).

*ii) Unlawful agreements*

Whether horizontal or vertical, competition agreements fall under the scope of the Act. Agreements are deemed unlawful if they *(i)* have a significant effect on competition without enhancing economic efficiency; or *(ii)* eliminate effective competition (Art. 5, par. 1, LCart).

An agreement having a significant effect on competition may be justified on grounds of economic efficiency if necessary, i.e. when there is no alternative that is less harmful to competition, in order “to reduce production or distribution costs, improve products or production processes, promote research into or dissemination of technical or professional know-how, or exploit resources more rationally; and when such an agreement will not in any way whatsoever allow the enterprises concerned to eliminate effective competition” (Art. 5, par. 2, LCart).

The Act contains a list of agreements that are presumed to eliminate effective competition (Art. 5, par. 3, LCart). The agreements in question are those that are concluded between firms effectively or potentially in competition (horizontal agreements) and “that directly or indirectly fix prices; or restrict the quantities of goods or services to be produced, bought or supplied; or allocate markets geographically or according to trading partners.”

*iii) Unlawful practices of firms that dominate their market*

The Act does not prohibit a firm from holding a dominant position in a given market, but it does penalise abuse of such a position (Art. 7, LCart). In this regard, the legislation is similar to solutions adopted in other countries, particularly in Europe. Under LCart Art. 4, par. 2, one or more firms hold a dominant position if that position enables them, on either the supply or the demand side, “to behave in a substantially independent manner with regard to the other participants in the market.”).

The Act provides a non-exhaustive list of unlawful practices (Art. 7, par. 2, LCart): “refusal to deal (o.g. refusal to supply or buy goods); discrimination between trading partners with regard to prices or other conditions of trade; the imposition of unfair prices or other unfair conditions of trade; the undercutting of prices or other conditions directed against a specific competitor; restrictions on production, outlets or technical development; the conclusion of contracts only on condition that partners agree to supply additional goods or services”.

*iv) Concentration of enterprises*

Control over concentration of enterprises is one of the Act's main innovations. The law makes a distinction between two different types of concentration (Art. 4, par. 3, LCart): "the merger of two or more enterprises hitherto independent of each other" and "any transaction whereby one or more enterprises acquire, in particular by the acquisition of an equity interest or conclusion of an agreement, direct or indirect control of one or more hitherto independent enterprises, or of a part thereof." ).).

The sole objective of prior control over business concentration is to prevent the creation or reinforcement of a dominant position. Accordingly, notification is required only if mergers exceed certain thresholds. Business concentration transactions must be notified in advance to the Competition Commission if, during the most recent financial year prior to the proposed transaction (Art. 9, par. 1, LCart): (i) the enterprises concerned reported joint turnover of at least two billion Swiss francs or turnover in Switzerland of at least 500 million Swiss francs; and (ii) at least two of the enterprises concerned reported individual turnover in Switzerland of at least 100 million Swiss francs.

Special thresholds apply to the media sector (turnover is multiplied by 20), banks (turnover is replaced by 10 per cent of total balance sheet assets) and insurance companies (thresholds are calculated with reference not to turnover, but to aggregate annual gross premiums) (Art. 9, pars. 2 and 3, LCart).

Notwithstanding the above thresholds, notification is required if a decision enacted by the Commission has established that a participating firm occupies a dominant position in a market in Switzerland, and if the concentration in question involves either that same market, a related market or an upstream or downstream market (Art. 9, par. 4, LCart).

The Commission may prohibit the concentration or authorise it subject to conditions or obligations if it transpires from the investigation that the concentration creates or strengthens a dominant position liable to eliminate effective competition, and does not lead to a strengthening of competition in another market which outweighs the harmful effects of the dominant position (Art. 10, par. 2, LCart).

v) Exceptional authorisations based on compelling public interests

In response to an unfavourable ruling by the Competition Commission, or in connection with a civil suit, the firms involved may petition the Federal Council for an exceptional authorisation on the grounds of compelling public interests (Arts. 8 and 31, LCart in respect of unlawful restraints on competition and Arts. 11 and 36, LCart in respect of prohibition of concentration).

vi) Procedure

Compliance authorities

The Federal Competition Commission ("the Commission") constitutes the decision-making body and the *Secretariat of the Federal Competition Commission* ("the Secretariat") is the investigative body. The Commission now wields genuine decision-making power, and its jurisdiction is comprehensive. The Secretariat is subordinate to the Commission, but under the Act it has assigned duties of its own, including preliminary investigations and investigations in connection with procedures.

The Appeals Commission for Competition matters ("the Appeals Commission") for competition matters is the initial appellate jurisdiction for administrative decisions taken by the Secretariat or the Commission (Art. 44, LCart).

*Civil courts* rule only on aspects of civil law. The other authorities on which the Act confers certain functions are the Federal Court (Switzerland's supreme judicial authority) and the *Federal Council*

(which, as stated above, may grant exceptional authorisations on the grounds of compelling public interests).

#### Civil procedure

A new feature of the Act is the fact that evaluation criteria under both civil and administrative law are based on uniform material standards.

In a civil suit, a person whose opportunity to compete is impeded by an unlawful restraint on competition may request the civil judge the removal or cessation of the obstacle, damages and reparations as well as remittance of illicitly earned profits (Art. 12, par. 1, LCart).

The Act stipulates that “if the lawfulness of a restraint of competition is questioned in the course of a civil proceeding, the case shall be referred to the Competition Commission for an opinion” (Art. 15, par. 1, LCart).

#### Administrative procedure

The procedure is governed essentially by the Federal Act of 20 December 1968 on administrative procedure (LPA).

In respect of restraints on competition (unlawful restraints of competition and unlawful practices of enterprises having a dominant position), a distinction is made between preliminary investigations (Art. 26, LCart) and investigations (Art. 27, LCart).

The Secretariat may conduct *preliminary investigations* on its own initiative, at the request of enterprises concerned, or on information received from third parties (Art. 26, LCart). If a preliminary investigation uncovers evidence of unlawful restraint, the Secretariat may open an *investigation* (Art. 27, LCart) of the agreement together with one of the Commission’s co-chairmen. It must also do so if so invited by the Commission or the Federal Department of Economic Affairs.

The investigation, which is conducted by the Secretariat, culminates in a decision by the Commission. One possible outcome is a decision approving an amicable settlement. Such settlement is proposed by the Secretariat and covers the action necessary to eliminate the restraint on competition (Art. 29, LCart). If no amicable settlement can be reached, the Commission renders a decision that is binding on the firms involved (Art. 29, LCart), based on the report prepared for it by the Secretariat.

In respect of business concentration, a distinction is made between *preliminary investigations* (Art. 32, LCart) and investigation procedures (Art. 33, LCart). Instances of business concentration are reviewed by the Competition Commission if a preliminary review (Art. 32, par. 1, LCart) brings out evidence that such concentration will create or reinforce a dominant position. Within one month (the maximum length of a preliminary review) of the date on which notice of a concentration transaction is served (Art. 32, par. 1, LCart), the Commission shall notify the participating firms that a concentration review has been initiated. If no such notification has been made within the prescribed amount of time, the concentration transaction may go ahead without reservations. Participating firms refrain from effecting the concentration for a period of one month after notice is served, unless the Commission, at their request, has authorised them to do so for important reasons (Art. 32, par. 2, LCart). Whenever an investigation procedure is initiated, the Commission shall decide, at the beginning of that procedure, whether the concentration transaction may proceed provisionally as an exceptional measure or whether it shall remain suspended (Art. 33, par. 2, LCart). This review must be completed within four months, unless the Commission is prevented from doing so for reasons attributable to the participating firms (Art. 33, par. 3, LCart).



## Appeals and sanctions

Parties to an agreement and third parties may appeal any decision of the Commission or the Secretariat to the Appeals Commission (Art. 44, LCart). Rulings by the Appeals Commission may in turn be taken before the Federal Court through administrative appellate channels following a determination of the unlawful nature of a restraint on competition or of an instance of concentration by the Competition Commission or a decision of the Appeals Commission or the Federal Court.

A determination of the unlawfulness of a restraint on competition does not give rise to penalties. Such penalties are imposed only in the event, *inter alia*, of non-compliance with amicable settlements, administrative decisions (Art. 50, LCart) or non-compliance linked to concentration of enterprises (Art. 51, LCart). Administrative penalties are imposed on business enterprises, while criminal penalties are imposed on individuals held responsible. The two types of penalties may be imposed concurrently.

### *Other legislation*

#### *i) Ordinance on the control of concentration of enterprises of 17 June 1996*

Certain LCart provisions on the control of concentration of enterprises are stipulated in the above Ordinance (Ordonnance sur le contrôle des concentrations d'entreprises, OCCE), including: the term "acquisition of control" (Art. 1, OCCE); the notion of "participating enterprises" (Art. 3, OCCE); rules for calculating turnover and special thresholds (Arts. 4, 5, 6, 7 and 8, OCCE) laid down in LCart for certain particular sectors (media, banks, insurance); and regulations governing the particulars of notification of concentration transactions (the information to be provided when serving notice is stated in Art. 11, OCCE), deadlines and other important procedural aspects. ).

Of particular significance are the criteria on which joint ventures constitute concentration of enterprises under the meaning of LCart. First, a transaction by which two or more enterprises acquire joint control of another firm over which they did not previously exercise joint control constitutes concentration of enterprises if the joint firm carries out *(i)* on a long-term basis *(ii)* all of the functions of an independent economic entity (Art. 2, par. 1, OCCE). Second, the creation by two or more firms of another firm over which they intend to exercise joint control constitutes business concentration if the joint firm carries out *(i)* on a long-term basis *(ii)* all of the functions of an independent economic entity, and, in addition, *(iii)* activities of at least one of the controlling firms are transferred to the joint firm (Art. 2, par. 2, OCCE).

#### *ii) Domestic Market Act of 6 October 1995*

The Domestic Market Act (*Loi sur le marché intérieur*, LMI) lays down the basic principles of market access for all of Switzerland. Its purpose is to eliminate restraints on competition arising from *cantonal and communal regulations*, with regard to government procurement and worker mobility in particular.

By virtue of this new statute, all persons having their establishment or their headquarters in Switzerland are entitled to offer goods or services, including labour, for sale throughout the entire country. This right is made effective thanks to mutual recognition of regulations and qualifications: in general, market access is governed by the regulations in force in the supplier's home market; furthermore, cantonal qualifications, or qualifications recognised at the cantonal level, are theoretically valid throughout the country. With regard to government procurement by cantons and communes, persons having their headquarters or establishment in Switzerland must be able to submit bids without suffering discrimination. Moreover, the cantons and communes must ensure that the intention to award major government contracts, along with criteria for participation and selection, are published in an official publication.

The Competition Commission must ensure that the federal government, cantons, communes and other bodies performing public duties comply with this Act (Art. 8, par. 1, LMI). The Commission may make recommendations to the federal government, cantons and communes regarding proposed or existing legislation (Art. 8, par. 2, LMI) and may also conduct investigations and make recommendations to the authorities involved (Art. 8, par. 3, LMI).

*iii) Act of 6 October 1995 on technical barriers to trade*

The purpose of the Act on technical barriers to trade is to avoid impediments that might arise out of incompatibility between various national specifications governing market access for products. The Act is a framework statute applicable to all federal legislation on products, which will have to be harmonised as much as possible at the international level.

The two implementing ordinances—the Notification Ordinance<sup>1</sup> and the Accreditation and Designation Ordinance<sup>2</sup>, both of 17 June 1996—give the Federal Council important weapons against technical barriers to trade. The first of these ordinances is intended to make the formulation and application of Swiss specifications and technical standards more transparent. The second aims to improve conditions for international recognition of Swiss test reports and certificates of compliance, and to facilitate international agreements in this area.

*Other relevant measures, including new guidelines*

None.

*Government proposals for new legislation*

The Commission is empowered to issue ordinances and communications setting the conditions on which agreements are generally deemed justified on grounds of economic efficiency (Art. 6, LCart). To date, no such ordinance or communication has been issued by the Commission, which is nonetheless working on a number of cases (e.g. sporting goods, calculation programs) which might be covered by such measures in the months ahead.

**2. Enforcement of competition law and policy**

*Action against anticompetitive practices, including agreements and abuse of dominant position*

*Summary of activities*

*i) Competition authorities*

1 January-30 June 1996

The above period may be considered a transitional phase in that it culminated in the expiration of the previous legislation on cartels.

In the health care sector, the Cartels Commission analysed the distribution system for medicinal drugs<sup>3</sup>. In line with the new Health Insurance Act and the new LCart, the “Association for Secure and Orderly Drug Supplies” (Association pour un approvisionnement sûr et ordonné en médicaments) altered its market “Regulations” as follows: the prices charged by drug producers would no longer be set, but would fluctuate within a given range ( $\pm$  two per cent); direct deliveries from wholesalers to physicians

would be authorised; and discount agreements between health insurance funds and pharmacists would no longer be prohibited.

Liberalisation of the *telecommunications* market required repeated interventions by the Cartels Commission. Abuse of the monopoly position occupied by Télécom PTT prompted the competition authority to draw up a Code of Conduct<sup>4</sup>. The Code allowed to prevent Télécom PTT from abusing its monopoly before the telecommunications market is liberalised. It also stipulated how the utility should conduct itself after the entry into force of the new LCart.

The Cartels Commission also analysed the state of competition in the Swiss sand and gravel market<sup>5</sup>, as well as the buying power of selected large distributors in the food market<sup>6</sup>. It investigated pricing practices for real estate transactions<sup>7</sup> and schemes for calculating costs in a variety of economic sectors<sup>8</sup>. It examined the distribution systems of a number of motor vehicle importers<sup>9</sup> and reviewed the pricing recommendations of one of the two largest associations in the rental market for sporting goods<sup>10</sup>.

1 July 1996-30 June 1997

The Secretariat initiated preliminary investigations in a variety of fields, such as parallel car imports (agreements concluded abroad)<sup>11</sup>, sporting goods (agreements)<sup>12</sup>, real estate management software (agreements)<sup>13</sup>, heat pumps (abuse of dominant position)<sup>14</sup>, porcelain (abuse of dominant position)<sup>15</sup>, construction (agreements)<sup>16</sup>, music scores (agreements)<sup>17</sup>, telephone directory data (abuse of dominant position)<sup>18</sup>, trade in address data (abuse of dominant position)<sup>19</sup>, waste recycling and disposal (agreements)<sup>20</sup> and schemes for calculating costs (agreements).<sup>21</sup>

Preliminary investigations that uncovered no signs of unlawful restraint of competition were pursued no further and closed. In other cases, measures to eliminate or prevent restraint on competition were settled amicably with the firms involved, or else full investigations were begun.

The Secretariat also conducted a number of full investigations, the most important of which warrant mention: Télécom PTT/Blue Window (abuse of dominant position)<sup>22</sup>, involving the “Blue Window” multimedia platform launched by Télécom PTT (see below); Arcovita/Visana/CSS (agreements and abuse of dominant position)<sup>23</sup>, concerning new insurance services in the semi-private insurance sector; *Fédération suisse pour l'insémination artificielle* (agreements and abuse of dominant position)<sup>24</sup>; Migros/Coop (agreements and abuse of dominant position)<sup>25</sup>, involving a regulation in the field of feed for animals for slaughter (see below); Recymet (agreements)<sup>26</sup>, involving the disposal of batteries.

In the course of these investigations, a number of petitions for temporary measures were filed, and in two cases the measures were granted (Télécom PTT /Blue Window<sup>27</sup> and *Fédération suisse pour l'insémination artificielle*<sup>28</sup>). In this latter instance, the decision to impose temporary measures was appealed to the Appeals Commission.

In addition, the Commission strove to promote competition amongst other groups, such as lawyers. At the Commission's behest, the Swiss Bar Association invited its cantonal chapters to tailor their by-laws to the new legislation on cartels by doing away with mandatory or recommended prices and other restraints on competition having to do with advertising and transfers of case files.

## ii) Monitoring of Prices

The Swiss price monitoring authority is empowered to intervene when agreements or dominant positions result in abusive pricing of goods or services. When parallel procedures have been undertaken by the Competition Commission and the Price Monitoring Office, procedures under LCart take precedence over those under the Price Monitoring Act, except as otherwise mutually agreed by the two authorities.

Between 1 January 1996 and 30 June 1997, the Price Monitoring Office examined, *inter alia*, the premiums charged by real estate insurers, prices and pricing components for urban waste, waste disposal charges, hospital fees, drug prices, notaries' fees and book prices<sup>29</sup>.

In the case of the books, an amicable settlement could be reached. The other cases are still pending or have prompted recommendations by the Price Monitoring Office.

*iii) The courts*

Between 1 January 1996 and 30 June 1997, a number of civil suits to eliminate barriers to competition were brought before civil courts. They concerned the way certain health insurance funds dealt with private clinics<sup>30</sup>, first-aid doctors and pharmacies.

The Federal Court handed down an important ruling regarding the liberalisation of parallel imports of perfumery products (Chanel S.A./EPA AG)<sup>31</sup>. It affirmed that trade mark rights were not violated by the removal, with no damage to the products themselves, of the codes by which distribution channels could be traced, nor by the import by merchants outside selective distribution networks of products lawfully invested with the same trade mark in a foreign country and identical to those sold by the authorised distributors.

*Summary of important cases*

Since the new LCart entered into force, a number of preliminary investigations and investigations have been initiated by the competition authorities. Two of the full investigations, one of which involved no international aspects, have been concluded.

*Télécom PTT/Blue Window:* The "Blue Window" service, which was launched by Télécom PTT, offers Internet access throughout Switzerland. It was found that Télécom PTT was engaging in abusive practices by imposing different conditions on other Internet providers than it did on its own service. In this way, Télécom PTT abused its dominant position and impeded other firms from entering or competing in the market by favouring its own activities with its new multimedia platform.

*Migros/Coop:* The two large meat distributors, Migros and Coop, jointly established rules for the feeding of animals for slaughter in order to restore consumer confidence in meat following the discovery of several cases of BSE ("mad cow disease"). These rules were examined by the Competition Commission from the standpoint of LCart Articles 5 (unlawful agreements) and 7 (unlawful practices of enterprises having dominant positions). Inasmuch as the unlawful practices were discontinued during the course of the investigation, the case was closed and no action taken.

*Mergers and acquisitions*

Although the Cartels Commission (which was replaced by the new Competition Commission) was empowered to issue recommendations in connection with business concentration transactions, it did not exercise that power in the cases cited below (see statistics for first-half 1996). The new LCart, which entered into force on 1 July 1996, now provides effective means of intervening in such matters. Competition authorities may prohibit such transactions or authorise them subject to conditions or obligations.

*Statistics on the number, size and types of mergers notified and/or controlled under Swiss competition law*

Period	Num.	Names of participating firms and Type of transaction	Result
1 <sup>st</sup> half 1996	4	Aargauer Tagblatt - Badener Tagblatt (Merger)	no acquisition (see. 57)
		Ciba Geigy - Sandoz (Merger)	ditto
		Galenica - Amidro (Take-over)	ditto
		Feldschlösschen - Hürlimann (Merger)	ditto
2 <sup>nd</sup> half 1996	1	Bell - Vulliamy <sup>32</sup> (Take-over)	no objection after preliminary investigation
1 <sup>st</sup> half 1997	7	SLB - GKB - BB Bank Belp <sup>33</sup> (Merger)	no objection after preliminary investigation (Art. 32, LCart)
		Newtelco (Joint enterprise) <sup>34</sup>	ditto
		BKW - AEK - Comtop (Joint enterprise) <sup>35</sup>	ditto
		Batigroup Holding AG (Merger) <sup>36</sup>	ditto
		DiAx (Joint enterprise) <sup>37</sup>	ditto
		Gasser - TDV (Take-over) <sup>38</sup>	no objection after review procedure (Art. 33, LCart)
		Watt (Joint enterprise)	case suspended (essential modifications, Art. 21, OCCE)

*Summary of a major case*

**Gasser - TDV:** This is the only instance of concentration of enterprises for which a preliminary investigation (Art. 32, LCart) led to the initiation of an investigation procedure (Art. 33, LCart). At issue was the take-over of a newspaper publisher [Tschudi Druck und Verlag AG (TDV)] by a publishing house (Gasser AG). The Competition Commission inquired whether a third firm, a classified advertising agency (Publicitas Holding AG) which not only owned 40 per cent of TDV but was also represented on that company's board of directors and had other means of exerting influence on Gasser AG and TDV, could be considered a participating firm and, in other words, whether it would have a decisive influence on TDV. Once Publicitas had reduced its representation on the TDV board of directors, the Competition Commission held that Gasser AG then exercised sole control over TDV.

Had the determination been one of joint control, Publicitas would have been part of the new group that resulted from the concentration. In fact, had TDV belonged to the Publicitas advertising group, it would also have benefited from the group's financial power, since that power significantly exceeded that of any other press companies present in the same market. For this reason, and because Publicitas Holding AG, by taking part in the concentration transaction, could have sewn up the regional market for classified advertising, the competition authorities would have ruled differently had the concentration involved both firms.

In its ruling, the Competition Commission considered that 1) the concentration in question was not a problem, inasmuch as the two newspaper publishers were active, in terms of readership, in different geographical markets (TDV being active in the canton of Glaris and Gasser AG in that of Grisons) and that Gasser AG, even though it had solid financial resources, did not wield overwhelming financial power; 2) concentration in the classified advertising market did not raise any objections in view of the fact that the newspaper publishers faced strong competition from papers with a geographically wider circulation base, and from other advertising media (e.g., local radio stations, billposting, direct advertising, etc.).

**3. The role of competition authorities in the formulation and implementation of other policies (e.g. participation in the legislative process and in commercial and industrial policies)**

*Legal bases*

The new LCart has not altered the other duties and powers of the competition authorities. It has, however, strengthened them, inasmuch as the reorganisation of those authorities, together with a substantial upgrading of staffing levels, enables them to perform their assigned tasks more effectively.

One extremely important task of the competition authorities is to participate in the legislative process by furnishing opinions on prospective bills, at both the federal and cantonal levels (Art. 46, LCart). In addition, the Competition Commission is assigned to constantly monitor the competition situation and to address recommendations to the authorities to promote effective competition (Art. 45, LCart).

Under the Domestic Market Act (LMI), the Competition Commission may address recommendations to the federal, cantonal or communal authorities regarding prospective or existing legislation. It can also conduct investigations and address recommendations to the relevant authorities. In addition, the Commission may provide expert advice to the administrative or judicial authorities with respect to application of the LMI.

*LCart-related activities of the competition authorities*

The activities of the competition authorities under Articles 45 and 46 of LCart involved a variety of areas that until now had been highly regulated. The main such areas include the following:

*i) Telecommunications*

Opening up the telecommunications market is one of the cornerstones of the programme to revitalise the Swiss economy. The Competition Commission, and its predecessor the Cartels Commission, have taken positions on both the new Telecommunications Act, adopted in April 1997, and the implementing ordinances currently under preparation<sup>39</sup>.

In this connection, the Competition Commission welcomed the opening up of the market, while at the same time urging new regulation in areas in which competition can have only limited impact, e.g. because of bottlenecks. The Commission also called for existing or new regulations to be drafted in a way that would be neutral from a competition standpoint; as a result, the areas “granting of concessions”, “basic service” and “interconnection” proved especially tricky. With regard to the granting of concessions, the Competition Commission advocated a procedure and selection criteria that would minimise the barriers to entry for new providers. In respect of basic service, the Commission’s primary focus was rate regulation. It was pointed out that regulation was needed only if the historical provider had no constraint attributable to current or potential competition. The interconnection requirement for dominant carriers is certainly crucial to a successful opening up of the telecommunications market. The Competition Commission had a great deal to say in this area, in which the principle of non-discrimination is an overriding consideration. The Commission’s opinions included proposals for price regulation and stipulations for interconnected basic service. The Commission exerted particular influence in eliminating the transitional period for number portability and the unbundling of local loops. In addition, it was necessary to call attention to the fundamental problems that would result from over-regulation, such as the elimination of positive incentives.

From a competition policy standpoint, the new Swiss telecommunications legislation can be deemed extremely positive, thanks also to the intense involvement of the competition authorities and close

co-operation with regulators. It can be noted with satisfaction that the Act took the Competition Commission's main concerns into account, and that the ordinances are likely to do so as well.

The Competition Commission recommended that the Federal Council require PTT firms to divest their equity interests in Cablecom Holding SA<sup>40</sup>. The latter is a company specialising in the transmission of radio and television programmes over cable networks. Its other areas of activity are wide-band network construction and sales of consumer electronics.

In June 1996, just days before the new Cartels Act entered into force, Cablecom acquired Alcatel's majority stake in a group of which Rediffusion was a member. This meant that Switzerland's two largest cable operators were joining forces. It so happens that Télécom PTT owned 32 per cent of Cablecom.

The federal departments in charge of new PTT acquisitions approved this take-over but advised the board of directors to put the case to the competition authority. Inasmuch as Cablecom's acquisition of Rediffusion did not fall under the control of concentration, the Competition Commission focused on the impact of Télécom PTT's interest in Cablecom from a competition policy standpoint. This opinion was stated in a report submitted to the Federal Council last week.

This acquisition is of paramount importance in view of the liberalisation, in 1998, of the telecommunications markets, which will cause Télécom PTT to lose its monopoly on telephone networks. In this regard, a distinction has to be made between long distance and local calls. For long distance traffic, Télécom PTT can expect competition from Newtelco (the telecoms system being laid along Swiss railway lines) and DiAx (the network of the electric companies). In local telephone networks ("local loops"), cable operators may be considered Télécom PTT's only potential competitors in the near term. These broad-based networks could adapt to duplex technology and open new vistas, particularly in telephony.

However, Télécom PTT's stake in Cablecom—by far its most serious competitor—is a major obstacle to present and potential competition in urban telephone networks, and, as such, runs counter to the liberalisation of telecommunications markets. Negative repercussions are also to be expected from the standpoint of economic efficiency, particularly in terms of pricing and inventiveness. Adding to this is the negative fallout for markets of the future, such as those involving multimedia.

For these reasons, the Competition Commission deemed it indispensable that Télécom PTT divest its holdings in Cablecom in a manner that would be neutral from a competition standpoint. It addressed a recommendation to this effect to the Federal Council, which has ultimate supervisory authority over PTT enterprises.

#### *Health care*

Switzerland is undergoing substantial change in the realm of health care. *The new Health Insurance Act (Loi sur l'assurance-maladie, LAMal)* establishes a competitive system between health care providers and insurers. Rising premiums and high health care costs have triggered the development of new insurance products. They have also altered relationships between insurers and carers. In a large number of markets, the efforts made to contain the growth of premiums have resulted in a selection of health care providers, whose overcapacity is about to be reduced. In addition, providers can no longer count on being able to enter a market and, where applicable, with prices guaranteed from the outset.

The balance of power in health care markets has shifted. As a result, collusive arrangements that once existed between providers have been dismantled, bringing about numerous changes in the markets, along with frequent intervention by the competition authorities. Moreover, in a number of cases insurers have been reprimanded for abusing their dominant market positions.

In this context, the activity of the competition authorities is governed by LCart Articles 45, 46 and 47; the Competition Commission has formulated an opinion on the proposed Therapeutic Agents Act<sup>41</sup>. It has proposed authorisation, in theory, of mail-order drug sales, a relaxing of the rules on prescription drugs, and abolition of prohibitions on monetary or other consideration and on parallel imports. With a view towards the “Swiss domestic market”, the Competition Commission has come out in favour of a single federal licence for distributors, wholesalers, pharmacists and druggists.

The Competition Commission has also directed the Secretariat to prepare a recommendation with a view to allowing parallel imports.

In 1996, the Cartels Commission (predecessor to the Competition Commission) referred to the old Cartels Act to lay down the two functions of the cantons: first, to take charge of hospital planning and establish lists of hospitals; and second, to serve as the representatives of public hospitals. These legal opinions were issued in connection with appeals lodged by hospitals that had not been included on cantonal lists.

#### *The environment*

The Competition Commission, and its predecessor the Cartels Commission, have adopted positions on numerous bills in this area and have addressed recommendations to the Federal Council.

Revision of the Environmental Protection Act gave the competition authorities an opportunity to prepare their own report on environment-related problems, and on waste disposal in particular<sup>42</sup>. They noted that to establish and pursue environmental objectives was in no way incompatible with competition, but merely delineated the market for environmental goods. Competition could, as usual, serve the interests of co-ordination within those limits. The competition authorities therefore recommended that the Federal Council, among others, protect the environment primarily by means of instruments consistent with a market economy, such as tax incentives or emissions certificates, and that international efforts be stepped up to harmonise environmental guidelines. In this way, international markets could open up quickly. They also urged the Federal Council to pay special attention to ensuring that implementation of the guidelines of the Environmental Protection Act would not be conducive to monopolies, in the waste disposal sector in particular.

The Federal Council is currently preparing a series of ordinances in the area of waste disposal (electronic waste, batteries, beverage packaging). In its advisory opinions on the proposed ordinances, the Competition Commission called attention to the fact that to establish waste disposal fees which would be incorporated into the prices charged would lead to agreements on prices. In the Commission’s view, it would suffice to appoint waste disposal managers and to lay down the conditions that disposal operations would be required to meet. How those operations would be financed could be decided by the managers themselves. It is not yet known whether the Competition Commission’s advice will be heeded.

#### ***The competition authorities’ activities in connection with the Domestic Market Act***

##### *Government procurement*

The federal Domestic Market Act (LMI) requires the cantons and communes to abide by the principle of non-discrimination and to publish eligibility and selection criteria for major contracts. Furthermore, any decisions that restrict freedom of access must be subject to appeal. Moreover, by virtue of the new GATT/WTO Agreement on Government Procurement, the cantons are required to liberalise tender procedures on an intergovernmental level.

In recent months, a number of pieces of proposed cantonal legislation on government procurement have been submitted to the competition authorities. In compliance with Article 8 of the LMI,



the Commission has already taken a stand on one such bill by issuing a recommendation, and other recommendations are in the preparation phase. In addition, co-operation has been established between the Competition Commission and intercantonal bodies in order to assist the cantons in drafting legislation in this area.

Moreover, the Competition Commission Secretariat has responded to a number of questions on various aspects of government procurement as submitted by private parties and public officials.

#### *Other activities*

The Competition Commission Secretariat also responded to a number of questions involving other areas covered by the LMI, including recognition of capacity certificates and the principle of place of origin. It did not fail to stress the importance of creating the Swiss domestic market in strengthening Switzerland's international competitiveness and economic standing.

#### **4. New reports and studies on competition policy**

The competition authorities publish a quarterly review, *Droit et politique de la concurrence* ("Competition Law and Policy", DPC), which includes a summary of their activities.

BALDI Marino (1996), "Les fondements de la nouvelle loi sur les cartels", *RSDA* special issue, p. 3 ff.

BALDI Marino (1997), "«Wirksamer Wettbewerb» als Schutzobjekt des neuen schweizerischen Kartellgesetzes", *Problèmes actuels de droit économique, Mélanges en l'honneur du Prof. Ch.-A. Junod*, Basel, p. 49 ff.

BALDI Marino (1997), "Zur «Philosophie» des neuen Kartellgesetzes", *Diplomatische Negotiation, Festschrift für Franz A. Blankart*, Bern, p. 349 ff.

DROLSHAMMER Jens and Patrik DUCREY (1997), "Entwicklungen im Wettbewerbs- und Kartellrecht", *SJZ*, p. 176 ff.

HOMBURGER Eric, Bruno SCHMIDHAUSER, Franz HOFFET and Patrik DUCREY (1996), *Kommentar zum schweizerischen Kartellgesetz*, loose-leaf collection, part I, Zurich, October.

RICHLI Paul (1995), "Neues Kartellgesetz und Binnenmarktgesetz - Überblick und Würdigung aus öffentlichrechtlicher Sicht", *AJP*, p. 593 ff.

SCHLUEP Walter R. (1996), "Entwicklungslinien des schweizerischen Kartellrechts", *AJP*, p. 795 ff.

STOFFEL Walter, ed. (1996), "Das neue schweizerische Kartell- und Wettbewerbsrecht/Le nouveau droit suisse sur les cartels et les autres restrictions de la concurrence", *SZW* special issue.

TERCIER Pierre (1996), "La lutte contre les contraintes cartellaires internes dans la nouvelle loi sur les cartels", *JdT* I, p. 2 ff.

TERCIER Pierre (1996), "Le nouveau droit de la concurrence: le temps des questions", *PJA*, p. 791 ff.

TERCIER Pierre and Silvio VENTURI (1997), "Les ententes illicites et l'abus de position dominante dans le nouveau droit suisse de la concurrence - Unlawful agreements, decisions and concerted practices and abuses of dominant position under the new Swiss law of Competition", *RDA/IBLJ*, p. 67 ff.

VON BÜREN Roland and Thomas COTTIER, eds. (1997), Die neue schweizerische Wettbewerbsordnung im internationalen Umfeld, Bern.

ZÄCH Roger, ed. (1996), Das neue schweizerische Kartellgesetz, Schulthess Polygraphischer Verlag, Zurich.

ZÄCH Roger and Peter ZWEIFEL, eds. (1995), Grundfragen der schweizerischen Kartellrechtsreform, Dike Verlag, St. Gallen.

ZURKINDEN Philippe (1997), "Wettbewerbsrecht: Vergleich Schweiz-EG", Schweizer Aussenwirtschaft, No. 22, May, p. 17 ff.

## **5. Resources of the competition authorities**

The Commission is composed of 15 members. Apart from the Chairman, who serves on a part-time basis, the members constitute a vigilant "watchdog" body.

Under the new Act, the Secretariat has been significantly reinforced, with its staff raised provisionally from 10 to 40 persons.

## **6. Annex**

Federal Act of 6 October 1995 on cartels and other restraints on competition (Recueil Systématique, hereinafter "RS" 251).

**NOTES**

1. Recueil Systématique (hereinafter “RS”) 946.511.
2. RS 946.512.
3. Publ. CCSPR 3/1996, p. 78 ff.
4. Publ. CCSPR 3/1996, p. 90 ff.
5. Publ. CCSPR 3/1996, p. 80 f.
6. Publ. CCSPR 3/1996, p. 8.
7. Publ. CCSPR 3/1996, p. 82 f.
8. Publ. CCSPR 3/1996, p. 85.
9. Publ. CCSPR 3/1996, p. 78; DPC 1997/1, p. 55 and DPC 1997/2, p. 178.
10. Publ. CCSPR 3/1996, p. 81 f.
11. DPC 1997/2, p. 146 f.
12. DPC 1997/1, p. 6.
13. DPC 1997/1, p. 29 f.
14. DPC 1997/1, p. 30 ff.
15. DPC 1997/1, p. 31 ff.
16. DPC 1997/1, p. 35.
17. DPC 1997/1, p. 35 ff.
18. DPC 1997/2, p. 131 f.
19. DPC 1997/2, p. 138 ff.
20. DPC 1997/2, p. 142 ff.
21. DPC 1997/2, p. 146.
22. DPC 1997/2, p. 161 ff.
23. DPC 1997/1, p. 6 f.
24. DPC 1997/1, p. 36 f.
25. DPC 1997/2, p. 137.
26. DPC 1997/2, p. 155 ff.
27. DPC 1997/1, p. 44 f.

28. DPC 1997/2, p. 243 ff.
29. Publ. CCSPR 1/1997, p. 91 ff.
30. DPC 1997/1, p. 72 ff.
31. DPC 1997/1, p. 105 ff.
32. DPC 1997/1, p. 54.
33. DPC 1997/1, p. 48 ff.
34. DPC 1997/1, p. 46 ff.
35. DPC 1997/1, p. 51 ff.
36. DPC 1997/2, p. 202 ff.
37. DPC 1997/2, p. 197 ff.
38. DPC 1997/2, p. 179 ff.
39. Publ. CCSPR 3/1996, p. 101; DPC 1997/2, p. 226.
40. DPC 1997/1, p. 57 ff.
41. DPC 1997/2, p. 220 ff.
42. Publ. CCSPR 2/1996, p. 15 ff.

*Annex*

**FEDERAL ACT ON CARTELS AND OTHER RESTRAINTS OF COMPETITION  
(ACT ON CARTELS, ACART)  
OF 6 OCTOBER 1995\***

The Federal Assembly of the Swiss Confederation,

having regard to Articles 3<sup>bis</sup> and 64 of the constitution;  
in application of the competition law provisions of international agreements;  
having regard to the Federal Council message of 23 November 1994<sup>1</sup>,

hereby decides:

**Chapter 1: General Provisions**

*Article 1: Purpose*

The purpose of the present Act is to prevent harmful economic or social effects of cartels and other restraints of competition and, by so doing, to promote competition in the interests of a market economy based on liberal principles.

*Article 2: Scope*

1. The present Act applies to private or public enterprises that are party to cartels or to other agreements affecting competition, have market power or take part in concentrations of enterprises.
2. The present law applies to restrictive practices whose effects are felt in Switzerland, even if they originate in another country.

*Article 3: Relationship with other provisions of law*

1. To the extent that provisions of law do not allow competition in a market for certain goods or services, such provisions take precedence over the provisions of this Act, including in particular:
  - a) provisions which establish an official market or price system;
  - b) provisions which entrust certain enterprises with the performance of public interest tasks, granting them special rights.
2. The present Act does not apply to effects on competition that result exclusively from laws governing intellectual property.
3. The procedures set forth herein regarding assessment of restraints of competition shall take precedence over the procedures set forth in the law of 20 December 1985<sup>2</sup> on the monitoring of prices except in the event of a decision to the contrary taken by common consent by the Competition Commission (Commission de la Concurrence) and the Price Inspector (Surveillant des Prix).

**Article 4: Definitions**

1. The term "agreements affecting competition" means binding or non-binding agreements and concerted practices between enterprises operating at the same or at different levels of the market, the purpose or effect of which is to restrain competition.
2. The term "enterprises having a dominant position in the market" means one or more enterprises being able, as regards supply or demand, to behave in a substantially independent manner with regard to the other participants in the market.
3. The term "concentration of enterprises" means:
  - a) the merger of two or more enterprises hitherto independent of each other;
  - b) any transaction whereby one or more enterprises acquire, in particular by the acquisition of an equity interest or conclusion of an agreement, direct or indirect control of one or more hitherto independent enterprises or of a part thereof.

**Chapter 2: Substantive provisions**

**Section 1: Unlawful restraints of competition**

**Article 5: Unlawful agreements**

1. Agreements that significantly affect competition in the market for certain goods or services and are not justified on grounds of economic efficiency and all agreements that lead to the suppression of effective competition are unlawful.
2. An agreement is deemed to be justified on grounds of economic efficiency:
  - a) when it is necessary in order to reduce production or distribution costs, improve products or production processes, promote research into or dissemination of technical or professional know-how, or exploit resources more rationally; and
  - b) when such agreement will not in any way whatsoever allow the enterprises concerned to eliminate effective competition.
3. The following agreements among actual or potential competitors are presumed to lead to the elimination of effective competition when they:
  - a) directly or indirectly fix prices; or
  - b) restrict the quantities of goods or services to be produced, bought or supplied; or
  - c) allocate markets geographically or according to trading partners.

**Article 6: Categories of agreements deemed to be justified**

1. The conditions under which agreements affecting competition are as a general rule deemed to be justified on grounds of economic efficiency may be determined by way of ordinances or communications. The following in particular will be taken into consideration in this respect:
  - a) Co-operation agreements relating to research and development;

- b) specialisation and rationalisation agreements, including agreements concerning the use of schemes for calculating costs;
- c) agreements granting exclusive rights to deal in certain goods or services;
- d) agreements granting exclusive licences for intellectual property rights.

2. Such ordinances and communications may also recognise particular forms of co-operation specific to certain branches of the economy as being deemed to be justified, in particular agreements concerning the effective implementation of legal provisions for the protection of customers or creditors in the field of financial services.

3. Communications shall be published in the Federal Bulletin (Feuille fédérale) by the Competition Commission. The Federal Council shall issue the ordinances provided for at paragraphs 1 and 2 above.

***Article 7: Unlawful practices of enterprises having a dominant position***

1. Practices of enterprises having a dominant position are deemed unlawful when such enterprises, through the abuse of their position, prevent other enterprises from entering or competing in the market or when they injure trading partners.

2. The following in particular may constitute unlawful practices:

- a) refusal to deal (e.g. refusal to supply or buy goods);
- b) discrimination between trading partners with regard to prices or other conditions of trade;
- c) the imposition of unfair prices or other unfair conditions of trade;
- d) the under-cutting of prices or other conditions directed against a specific competitor;
- e) restrictions on production, outlets or technical development;
- f) the conclusion of contracts only on condition that partners agree to supply additional goods or services.

***Article 8: Exceptional authorisation the grounds of compelling public interests***

Agreements affecting competition and practices of enterprises having a dominant position whose unlawful nature has been ascertained by the competent authority may be authorised by the Federal Council at the request of the enterprises concerned if, in exceptional cases, they are necessary in order to safeguard compelling public interests.

**Section 2: Concentrations of enterprises**

***Article 9: Notification of concentrations***

1. The Competition Commission must be notified of concentrations of enterprises before they are carried out when, in the last accounting period prior to the concentration:

- a) the enterprises concerned reported joint turnover of at least 2 billion Swiss francs or turnover in Switzerland of at least 500 million Swiss francs, and
- b) at least two of the enterprises concerned reported individual turnover in Switzerland of at least 100 million Swiss francs.

2. In the case of enterprises whose commercial activity consists in whole or in part in the publication production or distribution of newspapers or periodicals or in the broadcasting of programmes within the meaning of the federal Act on radio and television<sup>3</sup>, the amount to be taken into account shall be equivalent to twenty times the actual turnover generated in these fields.

3. In the case of insurance companies, turnover shall be replaced by the total amount of gross annual premiums; in the case of banks governed by the federal Act on banks and savings banks (LB)<sup>4</sup>, ten per cent of the balance sheet total shall be taken into account. The proportion of banks balance sheet totals generated in Switzerland shall be determined by the ratio between loans and advances arising from transactions with persons domiciled in Switzerland (banks and customers) and the total loans amount of those loans and advances.

4. Notwithstanding paragraphs 1 and 3 above, notification is mandatory when, on termination of a procedure initiated pursuant to the present law, a legally enforceable decision establishes that a participating enterprise occupies a dominant position in a market in Switzerland, and when the concentration concerns either that market or an adjacent market or a market upstream or downstream.

5. The Federal Assembly may, by way of a decree not subject to referendum:

- a) adjust the amounts set forth at paragraphs 1 and 3 above according to changed circumstances;
- b) establish special criteria for notification of concentrations in certain branches of the economy.

***Article 10: Assessment of concentrations of enterprises***

1. Concentrations of enterprises subject to notification shall be investigated by the Competition Commission if a preliminary review (Article 32(1)) reveals signs that they create or strengthen a dominant position.

2. The Competition Commission may prohibit the concentration or authorise it subject to conditions or obligations if it transpires from the investigation that the concentration:

- a) creates or strengthens a dominant position liable to eliminate effective competition, and
- b) does not lead to a strengthening of competition in another market which outweighs the harmful effects of the dominant position.

3. If a concentration of banks within the meaning of the federal Act on banks and savings banks<sup>5</sup> is deemed necessary by the Federal Banking Commission in order to protect the interests of creditors, such interests may be given priority. In such case, the Federal Banking Commission shall take the place of the Competition Commission, which it shall invite to submit an opinion.

4. In assessing the effects of a concentration of enterprises on the effectiveness of competition, the Competition Commission shall also take into account market developments and the situation with regard to international competition.

***Article 11: Exceptional authorisation on the grounds of compelling public interests***

A concentration of enterprises prohibited pursuant to Article 10 may be authorised by the Federal Council at the request of the enterprises taking part if, in exceptional cases, it is necessary in order to safeguard compelling, public interests.



### **Chapter 3: Provisions relating to civil procedure**

#### ***Article 12: Actions arising from an obstacle to competition***

1. A person impeded by an unlawful restraint of competition from entering or competing in a market may request:
  - a) removal or cessation of the obstacle;
  - b) damages and reparations in accordance with the code of obligations<sup>6</sup>;
  - c) remittance of illicitly earned profits in accordance with the provisions on conducting business without a mandate.
2. Obstacles to competition include in particular refusal-to deal and discriminatory measures.
3. The actions set forth at paragraph 1 above may also be taken by a person who, on account of a lawful restraint of competition, is impeded more seriously in his ability to compete than is warranted by the implementation of such restraint.

#### ***Article 13: Exercise of actions for removal or cessation of the obstacle***

In order to ensure removal or cessation of the obstacle to competition, the courts may, at the petitioner's request, rule that:

- a) contracts are null in whole or in part;
- b) the person at the origin of the obstacle to competition must conclude contracts on market terms with the person impeded under the conditions usually pertaining in the business concerned.

#### ***Article 14: Jurisdiction***

1. Cantons shall designate for their territory a court with sole jurisdiction within the canton in suits brought for restraint of competition. Such court shall also have jurisdiction in other civil suits if they are brought at the same time as the suit in restraint of competition and are related thereto.
2. The courts of the domicile or registered office of the petitioner or of the defendant shall have jurisdiction. Should there be more than one defendant, the petitioner may bring a suit against all the defendants in a competent court; the court thus petitioned shall then have exclusive jurisdiction.

#### ***Article 15: Assessment of the lawfulness of a restraint of competition***

1. If the lawfulness of a restraint of competition is questioned in the course of a civil proceeding, the case shall be referred to the Competition Commission for an opinion.
2. If a restraint of competition that is as such unlawful is presented as being necessary for the safeguard of compelling public interests, the matter shall be referred to the Federal Council for a ruling.

#### ***Article 16: Keeping of business secrets***

1. In disputes concerning restraints of competition, the parties' manufacturing or business secrets shall be kept.

2. The adverse party may have access to means of proof liable to reveal such secrets only to an extent that is compatible with the keeping of the secrets.

***Article 17: Provisional remedies***

1. In order to protect justified claims arising from a restraint of competition, the courts may order provisional remedies at a party's request.

2. Articles 28c to 28f of the Swiss Civil Code<sup>7</sup> shall apply by analogy to such provisional remedies.

**Chapter 4: Provisions relating to administrative procedure**

**Section 1: Competition authorities**

***Article 18: Competition Commission***

1. The Federal Council shall institute the Competition Commission (hereinafter the "Commission") and appoint a president and two vice-presidents.

2. The Commission shall comprise between eleven and fifteen members, the majority of whom shall be independent experts.

3. The Commission shall take all decisions that are not expressly reserved for another authority. It shall submit recommendations (Article 45(2)) and opinions (Article 46(2)) to the political authorities and shall give experts advice (Article 47(1)).

***Article 19: Organisation***

1. The Commission shall be independent of the administrative authorities. It may consist of chambers, each empowered to take decisions. It may, in specific cases, instruct a member of the presiding body to settle urgent business or matters of minor importance.

2. The Commission shall be attached for administrative purposes to the Federal Department of Public Economy (hereinafter the "Department").

***Article 20: Internal regulations***

1. The Commission shall draw up regulations setting out the details of its organisation, including in particular its own powers, those of the members of its presiding body and those of each chamber.

2. The regulations shall be subject to the approval of the Federal Council.

***Article 21: Decisions***

1. The Commission and the chambers shall constitute a quorum when at least half the members are present; such number may not under any circumstances be less than three.

2. Decisions shall be taken by a simple majority of members present; in the event of a tie, the president shall have the casting vote.

***Article 22: Disqualification of members of the Commission***

1. Members of the Commission must disqualify themselves if grounds for disqualification exist pursuant to Article 10 of the federal law on administrative procedure<sup>8</sup>.
2. As a general rule, a member of the Commission is not deemed to have a personal interest in a case nor to offer any other grounds for disqualification by the mere fact of representing an umbrella organisation.
3. If the disqualification is challenged, the Commission or chamber concerned shall rule in the absence of the member in question.

***Article 23: Duties of the Secretariat***

1. The Secretariat shall prepare the Commission's business, conduct investigations and, with a member of the presiding body, take procedural decisions. It shall make proposals to the Commission and carry out its decisions. It shall deal directly with interested parties, third parties and the authorities.
2. The Secretariat shall draw up opinions(Article 46(1)) and advise officials and enterprises on matters relating to application of the law.

***Article 24: Secretariat staff***

1. The Federal Council shall appoint the Secretariat's directors and the Commission the remainder of the staff.
2. Conditions of service shall be governed by the laws applicable to federal government employees.

***Article 25: Professional and business secrecy***

1. The competition authorities shall be bound by professional secrecy.
2. Information collected in performance of their duties may be used only for the purpose of the investigation.
3. The competition authorities may provide the Price Inspector with all information necessary for the accomplishment of his duties.
4. The competition authorities' publications may not reveal any business secrets.

**Section 2: Investigation concerning restraints of competition**

***Article 26: Preliminary investigations***

1. The Secretariat may conduct preliminary investigations on its own initiative, at the request of enterprises concerned or on information received from third parties.
2. The Secretariat may propose measures to suppress or prevent restraints of competition.
3. The preliminary investigation procedure does not imply the right to consult files.

***Article 27: Opening of an investigation***

1. If signs of an unlawful restraint of competition exist, the Secretariat shall open an investigation, with the consent of a member of the Commission's presiding body. It shall open an investigation in all events if asked to do so by the Commission or by the Department.
2. The Commission shall determine the order in which investigations that have been opened should be conducted.

***Article 28: Notice***

1. The Secretariat shall give notice of the opening of an investigation in an official publication.
2. Such notice shall state the purpose of the investigation and the parties concerned. It shall further invited concerned third parties to come forward within 30 days if they wish to take part in the investigation.
3. Non-publication shall not prevent the investigation from being conducted.

***Article 29 : Amicable settlement***

1. Should the Secretariat consider that a restraint of competition is unlawful, it may propose an amicable settlement to the enterprises involved concerning ways of removing the restraint.
2. Such settlement shall be in writing and must be approved by the Commission.

***Article 30: Decision***

1. On a proposal from the Secretariat, the Commission shall take its decision on measures to be taken or on approval of the amicable settlement.
2. The participants in the investigation may furnish in writing their opinions on the Secretariat's proposal. The Commission may conduct hearings and instruct the Secretariat to take additional steps for the requirements of the investigation.
3. Should a significant change have occurred in the legal or factual circumstances, the Commission may, on a proposal from the Secretariat or the interested parties, revoke or amend its decision.

***Article 31: Exceptional authorisation***

1. If the Commission has taken a decision acknowledging the unlawful nature of a restraint of competition, the interested parties may, within 30 days, submit to the Department an application for exceptional authorisation from the Federal Council on the grounds of compelling public interest. If such application is submitted, the period in which an appeal may be lodged with the Appeals Commission for Competition Matters shall begin to run only after notification of the Federal Council's decision.
2. Applications for exceptional authorisation from the Federal Council may also be submitted within 30 days of the entry into effect of a decision of the Appeals Commission for Competition Matters or a judgement of the Federal Court following an appeal under administrative law.
3. Exceptional authorisation shall be of limited duration and may be subject to terms and conditions.

4. The Federal Council may, at the request of the interested parties, extend exceptional authorisation if the conditions for granting it are still met.

### **Section 3: Investigation of concentrations of enterprises**

#### ***Article 32: Opening of an investigation procedure***

1. On receiving notice of a concentration of enterprises (Article 9), the Commission shall decide if there are grounds for investigating such concentration. The Commission shall inform the enterprises concerned of the opening of the investigation procedure within one month of receiving notice of the planned concentration. Should the Commission fail to do so, the concentration may proceed without reservation.

2. The participating enterprises shall refrain from carrying out the concentration for one month following notification unless, at their request, the Commission has authorised them to do so for important reasons.

#### ***Article 33: Investigation procedure***

1. Should the Commission decide to conduct an investigation, the Secretariat shall publish the principal terms of the concentration notice and state the time within which third parties may communicate their opinions on the notified concentration.

2. The Commission shall decide, at the outset of the investigation, whether the concentration may be carried out provisionally by way of exception or whether it should remain suspended.

3. The Commission must complete its investigation within four months unless prevented from doing so for reasons attributable to the enterprises taking part.

#### ***Article 34: Legal effects***

The effects in civil law of a concentration subject to the notification requirement shall be suspended, without prejudice to expiry of the deadline as set forth at Article 32(1), and the authorisation provisionally to carry out the concentration. Should the Commission fail to take a decision before the deadline set forth at Article 33(3), the concentration shall be deemed to have been authorised, unless the Commission states in a decision that it has been prevented from conducting the investigation for reasons attributable to the enterprises taking part.

#### ***Article 35: Violation of the notification requirement***

If a concentration of enterprises has been carried out without due notification, the procedure set forth at Articles 32 to 38 shall be initiated ex officio. In this case the period set forth at Article 32(1) shall begin to run when the competition authority is in possession of the information that should be provided in a notification of concentration.

**Article 36: Exceptional authorisation procedure**

1. If the Commission prohibits a concentration, the enterprises taking part may, within 30 days, submit to the Department an application for authorisation from the Federal Council on the grounds of compelling, public interest. If such application is made, the period within which an appeal may be lodged with the Appeals Commission for Competition Matters shall begin to run only after notification of the Federal Council's decision.

2. Applications for exceptional authorisation from the Federal Council may also be submitted within 30 days from the entry into effect of the decision of the Appeals Commission for Competition Matters or the judgement of the federal court following an appeal under administrative law.

3. The Federal Council shall take its decision if possible within four months following receipt of the application.

**Article 37: Re-establishment of effective competition**

1. If a prohibited concentration has been carried out or if a concentration is prohibited after completion and exceptional authorisation for the concentration has not been requested or granted, the enterprises taking part are required to take the necessary steps to re-establish effective competition.

2. The Commission may require the enterprises taking part to make binding proposals with a view to re-establishing, effective competition and may set them a deadline to this end.

3. If the Commission accepts the proposed measures, it may decide how and by when the enterprises taking part shall implement them.

4. If the Commission does not receive the proposals it has requested or if it rejects them, it may order:

- a) separation of the concentrated enterprises or assets;
- b) cessation of the effects of control;
- c) other measures to re-establish effective competition.

**Article 38: Revocation and revision**

1. The Commission may revoke an authorisation or decide to investigate a concentration despite expiry of the deadline set forth at Article 32(1), if:

- a) the enterprises taking part have furnished inaccurate information;
- b) the authorisation was obtained fraudulently;
- c) the enterprises taking part are in grave breach of a condition attached to the authorisation.

2. The Federal Council may revoke an exceptional authorisation on the same grounds.

## **Section 4: Procedure and recourse**

### ***Article 39: Principles***

The Federal Act on administrative procedure<sup>9</sup> applies to procedures, insofar as this Act does not provide otherwise.

### ***Article 40: Requirement to provide information***

Members of cartels, enterprises with market power, enterprises taking part in concentrations of enterprises and concerned third parties are required to provide the competition authorities with all relevant information and to produce all necessary documents. The right to refuse to provide information is governed by Article 16 of the Act on administrative procedure<sup>10</sup>.

### ***Article 41: Mutual assistance***

The administrative services of the Confederation and the cantons are required to co-operate with the competition authorities in their research and to make the necessary documents available to them.

### ***Article 42: Investigative measures***

The competition authorities may hear third parties as witnesses and require the parties to the investigation to make statements. Article 64 of the Act on federal civil procedure<sup>11</sup> applies. The above-mentioned authorities may order searches and seize exhibits.

### ***Article 43: Participation of third parties in the investigation***

1. The following may come forward in order to take part in an investigation concerning a restraint of competition:

- a) persons who cannot gain access to or exercise competition because of a restraint of competition;
- b) professional or economic bodies whose bylaws authorise them to defend their members' economic interests, inasmuch as members of the body or of one of its sections may take part in the investigation;
- c) organisations of national or regional importance which work for consumer protection under the terms of their bylaws.

2. The Secretariat may require groups of more than five participants in an investigation having identical interests to appoint a common representative if, not doing so, would excessively complicate the investigation. It may if necessary limit participation in a hearing; the rights of parties deriving from the Act on administrative procedure<sup>12</sup> are reserved.

3. Paragraphs 1 and 2 above are applicable by analogy to the procedure whereby the Federal Council grants exceptional authorisation for an unlawful restraint of competition (Article 8).

4. In the investigation procedure for concentrations of enterprises, only enterprises taking part have the status of parties.

***Article 44: Appeals to the Appeals Commission***

Appeals against decisions of the Commission or its Secretariat may be lodged with the Appeals Commission for Competition Matters.

**Section 5: Other duties and powers of the competition authorities**

***Article 45: Recommendations to the authorities***

1. The Commission shall constantly monitor the competition situation.
2. The Commission may address recommendations to the authorities, the purpose of such recommendations being to promote effective competition, especially with regard to the drafting and enforcement of laws relating to economic affairs.

***Article 46: Opinions***

1. The Secretariat shall review draft Confederation legislation, especially in economic matters, that is likely to influence competition. It shall determine whether the effect of such legislation is not to introduce distortions or excessive restraints of competition.
2. In the consultation procedure, the Commission shall adopt a position with regard to draft Confederation legislation that limits or influences competition in any way whatsoever. It may issue opinions on draft cantonal legislation.

***Article 47: Expert advice***

1. The Commission shall provide expert advice to other authorities on questions of principle relating to competition. In cases of minor importance, it may instruct the Secretariat to carry out this task.
2. The Commission and the Secretariat may receive fees for such work, intended to cover their costs.

***Article 48: Publication of decisions and judgements***

1. The competition authorities may publish their decisions.
2. The courts shall, without being asked to do so, furnish a complete copy of any judgements they may render pursuant to the present Act. The Secretariat shall collect such judgements and may publish them periodically.

***Article 49: Duty of information***

1. The Secretariat and the Commission shall inform the public of their activities.
2. The Commission shall draw up an annual report for the Federal Council.



## **Section 6: Administrative penalties**

### ***Article 50: Non-compliance with amicable settlements and administrative decisions***

An enterprise that contravenes to its profit an amicable settlement, a legally enforceable decision of the competition authorities or a decision of an appeals body shall be required to pay an amount that may be as much as three times the profit made as a result of non-compliance. If such profit cannot be calculated or estimated, the amount may be as much as 10 per cent of the enterprise's most recent turnover-in Switzerland. Article 9(3) applies by analogy.

### ***Article 51: Non-compliance related to a concentration of enterprises***

1. An enterprise that carries out a concentration without giving due notice thereof or fails to comply with a provisional ban on carrying out the concentration or fails to comply with a condition attached to the authorisation or carries out a prohibited concentration or fails to implement a measure intended to re-establish effective competition shall be required to pay an amount of at most one million Swiss francs.

2. Should an enterprise repeat its failure to comply with a condition attached to the authorisation, it shall be required to pay an amount of 10 per cent at most of the total revenue in Switzerland of all the enterprises taking part. Article 9(3) applies by analogy.

### ***Article 52: Other cases of non-compliance***

An enterprise that fails to fulfil its obligation to provide information or produce documents or complies only partially therewith shall be required to pay an amount of at most 100 000 Swiss francs.

### **Article 53: Procedure and recourse**

1. Cases of non-compliance shall be investigated by the Secretariat, with the consent of a member of the presiding body. The Commission shall rule.

2. Appeals against the Commission's decisions may be lodged with the Appeals Commission for Competition Matters.

## **Chapter 5: Criminal penalties**

### ***Article 54: Violation of amicable settlements and administrative decisions***

Any person who intentionally violates an amicable settlement, a legally enforceable decision of the competition authorities or a decision of an appeals body shall be required to pay a fine of at most 1 000 000 Swiss francs.

### ***Article 55: Other violations***

Any person who intentionally fails to comply or complies only partially with a decision of the competition authorities concerning the obligation to provide information (Article 40) or carries out a concentration of enterprises without giving due notice thereof or violates decisions relating to concentrations of enterprises shall be required to pay a fine of at most 20 000 Swiss francs.

***Article 56: Limitation of actions***

1. Criminal action is barred at the end of five years for violations of amicable settlements and administrative decisions (Article 54). It is barred in all events if, because of an interruption, such period is exceeded by half.
2. Criminal action is barred at the end of two years for other violations (Article 55).

***Article 57: Procedure and recourse***

1. The Federal Act on administrative criminal law<sup>13</sup> applies to actions and judgements for violations.
2. Actions shall be brought by the Secretariat, with the consent of a member of the presiding body. The Commission shall rule.

**Chapter 6: Implementation of international agreements**

***Article 58: Establishment of the facts***

1. If a party to an international agreement asserts that a restraint of competition is incompatible with such agreement, the Department may instruct the Secretariat to conduct a preliminary investigation.
2. On a proposal, from the Secretariat, the Department shall decide what further action to take, if any, after first hearing the interested parties.

***Article 59: Removal of incompatibilities***

1. If, in implementation of an international agreement, it is found that a restraint of competition is incompatible with such agreement the Department may, with the consent of the Federal Department of Foreign Affairs, propose an amicable settlement to the parties concerned with a view to removing the incompatibility.
2. If an amicable settlement cannot be reached in time and one party to the agreement threatens to take measures against Switzerland the Department may, with the consent of the Federal Department of Foreign Affairs, order the necessary measures to remove the restraint of competition.

**Chapter 7: Final provisions**

***Article 60: Implementation***

The Federal Council shall enact the provisions for implementation.

***Article 61: Repeal of the law in force***

The Act of 20 December 1985<sup>14</sup> on cartels and similar organisations is repealed.

***Article 62: Transitional arrangements***

1. Current procedures before the Cartel Commission relating to agreements affecting competition shall be suspended as of the entry into effect of the present law; if necessary, they shall be continued under the new law on expiry of a six month period.
2. New procedures before the Commission relating to agreements affecting competition may be introduced only after expiry of a six month period as of the entry into effect of the present law, unless the potential recipients of a decision have asked for an investigation to be conducted sooner. Preliminary investigations may be conducted at any time.
3. Decisions in force and recommendations accepted pursuant to the Federal Act of 20 December 1985<sup>15</sup> on cartels and similar organisations shall continue to be governed by the former law, including matters regarding penalties.

***Article 63: Referendum and entry into effect***

1. The present Act is subject to optional referendum.
2. The Federal Council shall set the date of entry into effect.

Council of States, 6 October 1995  
The President: Kuchler  
The Secretary: Lanz

National Council, 6 October 1995  
The President: Claude Frey  
The Secretary: Duvillard

Publication date: 17 October 1995<sup>16</sup>  
Referendum deadline: 15 January 1996

**NOTES**

- \* Unofficial translation by the Federal Office for Foreign Economic Affairs in co-operation with the OECD Secretariat.
1. FF 1995 I 472
  2. RS 942.20
  3. RS 784.40
  4. RS 952.0
  5. RS 952.0
  6. RS 220
  7. RS 210
  8. RS 172.021
  9. RS 172.021
  10. RS 172.021
  11. RS 273
  12. RS 172.021
  13. RS 313.0
  14. RO 1986 874, 1992 288
  15. RO 1986 874, 1992 288
  16. FF 1995 IV 520

*Appendix*

**AMENDMENTS TO CURRENT LEGISLATION**

**1. Federal law on the organisation and management of the Federal Council and the Federal administration<sup>1</sup>**

Article 58(1), letter D

D. Offices and services attached for administrative purposes

The offices and services listed hereunder shall be attached for administrative purposes to the Federal Chancellery or to Departments:

Add  
Competition Commission

**2. Federal Act on administrative procedure<sup>2</sup>**

*Article 14(1), letter d and paragraph 2*

1. If the facts cannot be sufficiently elucidated in some other way, the following authorities may order the hearing of witnesses:

d) Competition authorities within the meaning of the Act on cartels.

2. The authorities mentioned in paragraph 1, letters a, b and d shall instruct a suitably qualified official to hear witnesses.

**3. Federal Act of 20 December 1985<sup>3</sup> on the monitoring of prices**

*Article 5(2) (3) and (4) and Section 7 (title)*

The term "Cartel Commission" is replaced by "Competition Commission".

*Article 2: Scope with regard to persons*

The Act shall apply to agreements affecting competition within the meaning of the Act of 6 October 1995<sup>4</sup> on cartels and to enterprises with market power governed by public or private law.

*Article 6, first sentence*

Parties to agreements affecting competition or enterprises with market power that are considering a price rise may submit such rise to the Price Inspector...

***Article 14(1), first sentence***

1. If a legislative or executive authority of the Confederation, of a canton or of a commune is competent to decide or approve a price rise proposed by the parties to an agreement affecting competition or by an enterprise with market power, it shall first consider the opinion of the Price Inspector. ...

***Article 15,(1)***

1. Agreed prices or the prices of an enterprise with market power that are already subject to monitoring pursuant to other provisions of federal law shall be assessed by the competent authority in place of the Price Inspector.

***Article 16***

1. The Competition Commission may conduct investigations of agreements affecting competition or of enterprises with market power even if the Price Inspector has reduced the unfair price or suspended the procedure.

2. The Price Inspector alone is empowered to review the unfair nature of agreed prices or the prices of enterprises with market power.

***Article 17***

Parties to agreements affecting competition, enterprises with market power and third parties taking part in the market are required to provide the Price Inspector with all desired information and to produce all the necessary documents.

***Article 20, first sentence***

Decisions taken by the Price Inspector may be referred to the Appeals Commission for Competition Matters within 30 days.

**NOTES**

1. RS 172.010
2. RS 172.021
3. RS 942.20
4. RO ... (FF 1995 IV 520)





## **TURKEY\***

(1996)

### **1. Introduction of Competition Legislation**

#### *Turkish competition law*

Turkey's competition law is the "Act No. 4054 on the Protection of Competition" which has entered into force on December 13, 1994. The purpose set forth in the Act is "to establish a system ensuring the necessary regulation, supervision and the prevention of abuse of dominant position by undertakings and the agreements, decisions and concerted practices which have as their object or effect the prevention, restriction or distortion of competition. In other words, the Act aims to regulate the markets for goods and services in order to maintain a "workable competition" through which free trading, free access to the markets and functioning of an effective competition would be ensured.

#### *Description of the scope of application of the legislation*

Article 2 of the Act defines the scope of the enactment. According to Article 2, the Act regulates all agreements, decisions and concerted practices which have as their object or effect the prevention, distortion or restriction of competition amongst any undertakings which either operate in or may affect the markets for goods and services within the territory of Turkey and conduct which are deemed to create a merger or acquisition by which competition in the market would significantly be impeded.

The Act applies to all agreements, decisions and concerted practices which actually or potentially affect competition. In other words, not only an actual distortion but also a threat on competition would be within the scope of the Act.

Until and unless the Board declares otherwise, all sectors of economy and all undertakings shall be equally treated by this Act.

Without regard to the place of operation, as long as the agreement, decision or concerted practice or abuse of dominance or merger or acquisition impair the markets for goods and services within the territory of Turkey, they fall within the scope of the Act.

It would be realised from the substantial provisions of the Act that there are no exception as to different sectors of economy or as to different areas or undertakings.

So far as the parallel actions of the undertakings, and concerted practices are concerned, the Act brings a presumption of concerted practices where the parties are deemed to have concluded a concerted practice. They may be freed from liability only if they prove the contrary. Therefore, in cases where a concerted practice of an undertaking is at issue, the burden of proof is upon the undertakings concerned.

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\* The original language of this report is English

## **2. Arrangements contained in the Law**

### *Description of practices, acts or behaviour subject to control*

The prohibited behaviour of the undertakings are stated in Articles 4, 6, and 7.

#### *Cartel agreements*

Cartel agreements, decisions and concerted practices which impair competition are prohibited under Article 4. The list given in the second paragraph of Article 4 enumerates the principles. Practices which are not listed may also fall within this provision since the list comprises of the practices which particularly have an impact on competition.

#### *Abuse of dominant position*

Article 6 of the Act deals with the abuse of a dominant position. Any abuse, by one or more undertakings acting alone or by means of an agreement or concerted practices of a dominant position in a market for goods and services within the whole territory of the state or in a substantial part of it, is unlawful and prohibited. Article 6 is in no way concerned with how a dominant position is obtained but by only with the relevant conduct of the undertaking concerned which constitutes an abuse.

#### *Mergers and acquisitions*

Article 7 of the Act deals with mergers and acquisitions. Merger of two or more undertakings, or acquisition, except acquisition by inheritance, by an undertaking or by a person, of another undertaking, either by acquisition of all or a part of its assets or securities or other means by which that person or undertaking acquires a controlling power in that undertaking concerned, which would create or strengthen the dominant position of one or more undertakings as a result of which competition would be significantly impeded in a market for goods and services. Under this provision, the Act empowers the Board to determine and publish accordingly, the categories of mergers and acquisitions which, to be considered as legally valid, require a prior notification to the Board. The categories of mergers and acquisitions which require a prior notification, to be considered as legally valid, shall be published by the Competition Board and the thresholds for prohibited mergers and acquisitions are to be determined by the Board.

#### *Exemption*

Article 5 brings the possibility of getting an exemption from the application of Article 4, if the agreement, decision or concerted practice concerned meets the requirements stated in paragraphs a, b, c and d which otherwise would be subject to the consequences of Article 4.

By this provision on granting exemption either individual or block the Act focuses directly on the challenged restraint's impact on competitive conditions. In other words, a restrictive practice could be justified by virtue of contributing to improved methods of production or distribution or to economic progress.

Article 5 of the Act, does not set out any exemption clause for the abuse of dominant position.

#### *International agreements*

The Act No. 4054 is broadly based on EC competition legislation. It prohibits cartels, agreements or concerted practices preventing, restricting or distorting competition (though the possibility of an exemption is left open), and the abuse of economic power. Prior notification of concentration is required if the turnover and the market share reach a certain threshold (Competition Board shall determine).

Since there are also parallel provisions in the Customs Union Agreement between the European Union and Turkey, the Act in a way maintained compliance with the European Union requirements.

With a view to achieving the economic integration sought by the Customs Union, Turkey shall ensure that its legislation in the field of competition rules is made compatible with that of the European Community, and is applied effectively.

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

#### *Enforcement of the legislation*

A Competition Authority is to be established by this Act, which enjoys administrative and financial independence and a public legal personality for the purposes of establishment and improvement of markets for goods and services within free and effective competition and the supervision of enforcement of the Act.

The enforcement of the legislation involves three bodies: competition Board, a Directorate and Service Departments.

#### *The Competition board*

The Competition Board has the duty of securing adherence to the substantial provisions and enforcing the prohibitions set forth.

The organisational structure and particulars of the Board members and other staff are shown in Part III of the Act.

The Board is entitled to issue a “negative clearance” certificate upon the application of undertakings or association of undertakings which confirms that the behaviour concerned is not contrary to the competition rules.

The Board is empowered to interfere with any infringement of the Law either upon the application of the Ministry or upon a notification or complaint or upon its own initiative.

There is a notification requirement for the undertakings or association of undertakings for agreements, decisions and concerted practices which fall within the scope of Article 4. A notification as such should be made within a month following the conclusion of transaction.

The operation of substantial provisions mainly rely on a notification requirement, however, as stated earlier, the Board is also empowered to investigate on its own initiative.

In addition to its investigative powers, the Board is also empowered to impose fines and periodic penalty payments; the details of which is stated in Part III of the Act.

In part IV the examination and investigation procedures are laid out.

The tasks and the powers of the Authority seem to create a new era in the Turkish administrative legal system, when fully implemented. Since the Act envisages the participation of the parties to the decision-making process.

The Board performs a “semi-judicial” activity during the course of a pending investigation.

The judicial control of the decisions of the Board shall be made by the Council of State.

*The Directorate*

The Directorate, is the highest rank in the Competition Authority and the Director is responsible for the administration in general and the representation of the Authority.

This responsibility comprises of the powers and functions for the purposes of supervision, assessment, regulation and disclosure of the activities of the Authority in general.

*Service Departments*

Service Departments, of the Authority shall be comprised of main service departments organised as head of departments and the counselling departments and assisting departments.

***Description of the major decisions taken by administrative and/or judicial bodies***

The duties concerning the protection of competition are carried out by the Directorate General for the Protection of Consumers and Competition established by the Decree-Law No. 494, since the Competition Authority which is foreseen as the enforcement body of the Act No. 4054 is not instituted. The Directorate-General is not directly responsible for the implementation of the Act and is carrying out the investigations temporarily. So, the competence of the Directorate is very limited compared with the Competition Authority. After the establishment of the Authority the Directorate-General will continue to be responsible with consumer issues and remain as providing a link between the Government and the Authority.

***Activity of the Directorate-General for the protection of consumers and competition***

Between 1995 and 1996, the Directorate-General completed the investigations of several cases.

These cases involved various sectors of economic activity: the cement manufacturing and concrete preparation industries, road transport, bread, chicken meat, corrugated cardboard and distribution of periodicals.

Summary of significant cases are as follows:

*Agreements on the cement market*

Two undertakings made a market-share agreement and formed a control mechanism in order to stop the sales to the regions within their hinterland.

The undertakings introduced high sales price within the natural hinterland of the factory and low sale prices in regions where competition takes place, in order to prevent the sales of the low price cement in the high price region they introduced same good-different package practice.

Furthermore, a continuous information link concerning production, sales and stock has been developed between the undertakings.

A very similar anti-competitive practice was observed in another region. Within the region practices such as; refusing sales of other factory goods, cancelling the suppliers of such factories as well as preventing the introduction of new ones, refusing sales to regions with factories whereas introducing low

price in regions without factories, and providing a continuous information link concerning production, stock and quantity of sales between the factories.

*Anti-competitive agreements and abuse of dominant power on the bread market*

23 undertakings established a dominant position through an unincorporated company and abused their dominant power. These undertakings introduced predatory price in order to strengthen their dominance and forced the competitors for Company membership. New bread bakeries were rent and kept closed although most of the bakeries existing remained closed. In addition, the undertakings put pressure in order to prevent entrances of new competitors into the market from other regions, allowed entrances through restriction of production and produced low quality bread.

Five undertakings abused their dominant position through determination of daily bread quantity and introduction of prices below the cost aiming at pushing the competitors outside the market.

According to an agreement between the members of the Union of Bakery Employers the resellers margins were determined.

*Agreement on road transport*

Two undertakings fixed the prices, determined a common price list concerning the same direction and shared the market through the arrangement of the departure hours.

*Agreement on chicken meat market*

The Chicken Meat Producers Union intended to establish a marketing company aiming at the determination of the chicken meat quantity and consequently the production policy of the firms; in specific periods determined the production quantity, retail sales price and retailers profit; the Union transferred information to its members about yearly production and stock quantity.

*Agreement on concrete market*

Although sufficient evidence concerning the existence of an agreement have not been determined, identical price lists and sales conditions amongst concrete producers have been observed. Furthermore, an information network was established under the co-ordination of Concrete Manufacturers Union aiming at the transfer of information on production and sales quantities between the member undertakings.

*Anti-competitive agreement and abuse of dominant power on distribution of periodicals*

In Turkey, two major firms exist in the daily, weekly and monthly periodicals market. There also exist two major distribution firms established by these firms that are 100 percent dominant in the distribution market.

The two distribution firms jointly established a third firm while preserving their legal personality.

These distribution firms distributed their periodicals at lower prices whereas forced others to make contract with the third firm and introduced higher prices. This behaviour was evaluated as a discriminative price practice.

*Agreement on corrugated cardboard market*

The Corrugated Cardboard Manufacturers Union determined minimum sale prices and provided the members with information through lists.

## **THE UNITED KINGDOM\***

(1996)

### **1. Changes to competition laws and policies adopted or envisaged**

#### *Summary of new legal provisions in competition law and related legislation*

Regulations were introduced in 1996 to enable the United Kingdom competition authorities to deal with agreements relating to air services between an EU Member State and countries outside the EU. The EU Competition Law (Articles 88 and 89) Enforcement Regulations 1996 came into force on 28 August.

The Deregulation (Fair Trading Act 1973) (Amendment) (Merger Reference Time Limits) Order 1996, which came into effect on 19 March, reduced the statutory deadline for reference of completed mergers from six months to four months from the date of completion.

Four Orders came into effect in March, relating to procedures under the Restrictive Trade Practices Act 1976. The Restrictive Trade Practices (Non-notifiable Agreements) (EC Block Exemptions) Order 1996 and the Restrictive Trade Practices (Non-notifiable Agreements) (Turnover Threshold) Order 1996 reduced the number of agreements notifiable under the Act. The Deregulation (Restrictive Trade Practices Act 1976) (Amendment) (Variation of Exempt Agreements) Order 1996 amended the provisions governing the variation of certain exempt agreements. The Deregulation (Restrictive Trade Practices Act 1976) (Amendment) (Time Limits) Order 1996 amended to three months the time limit within which all agreements must be furnished to the Office of Fair Trading (OFT).

A Competition Bill was published in August which envisaged replacing the Restrictive Trade Practices Act 1976 with a prohibition of anti-competitive agreements based on Article 85 of the Treaty of Rome, and giving the Director General of Fair Trading (DGFT) greater investigatory powers in cases of alleged abuse of market power and the ability to impose interim measures in the more extreme instances. Parliamentary time was not, however, made available and it is intended that a further draft Competition Bill will be published in 1997.

#### *Changes in competition law rules, policies or guidelines*

There were no changes during 1996.

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\* The original language of this document is English.

## 2. 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 OFT to be entered on the Public Register - the Register of Restrictive Trading Agreements.

The DGFT has two main responsibilities under the Act. First, he must appraise the relevant restrictions in agreements which have been sent for registration at the proper time and, if necessary, refer them to the Restrictive Practices Court. The restrictions in such agreements are lawful unless and until the Court strikes them down. Second, he seeks out, investigates and evaluates registrable agreements that have not been sent for registration, many of which are harmful cartel agreements, with a view to referring them to the Court. It is unlawful to give effect to restrictions in a registrable agreement that has not been furnished for registration.

#### *Agreements submitted for registration*

Details of 1 819 agreements were sent to the OFT in 1996, compared with 1 393 in 1995. However, not all agreements prove to be registrable; in 1996, 699 agreements were added to the register (about the same number as in 1995), bringing the total number entered since the Register was established in 1956 to 13 535. The very significant rise in the number of agreements submitted by comparison with previous years may be an indication of continued economic growth but is more likely to be attributable to the Government's relaxation of the criteria for applications under section 23 of the 1976 Act, which permits more agreements to be placed on the special (confidential) section of the register. In addition, the activities of the OFT's Cartels Task Force may be a factor in bringing home to business the requirements of the Act and the important consequences of failing to furnish registrable agreements.

#### *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 DGFT - direct that reference to the Court is not required. In 1996, the DGFT was able to advise the Secretary of State that 653 agreements 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 1996, 44 new investigations were started, section 36 notices were issued in respect of ten 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 of the 1976 Act, 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 of the 1976 Act, 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.

*Court cases concluded*

Scottish Solicitors' Property Centres - In January the Restrictive Practices Court (Scotland) delivered its opinion on an application by the Aberdeen and Edinburgh Solicitors' Property Centres for an order under section 26 of the 1976 Act to remove the Centres' agreements with their members from the Register. The Court found for the DGFT that a series of bilateral agreements between individual member firms of solicitors and each Centre should be construed as amounting to multi-lateral agreements. However, the Court found against the DGFT in ruling that the refusal by the Centres to accept the submission of property particulars with which a non-solicitor estate agent is also involved fell within the exemption in the Act for legal services. The DGFT's concerns that the terms on which the Centres are operated limit consumer choice, stifle competition, and hinder the development and growth of independent conveyancers, led him, in March, to refer residential estate agency services in Scotland to the Monopolies and Mergers Commission (MMC) under the monopoly provisions of the Fair Trading Act 1973.

Newsagents - Proceedings against the National Federation of Retail Newsagents (NFRN) were successfully concluded at a hearing on 11 January. The NFRN made an implied recommendation to members, by circulating certain letters in August 1992, that members should not display for sale, or sell, copies of the Daily Telegraph of 15 August 1992, or any other Saturday issue of the paper. The NFRN made the recommendation, which amounted to an attempted boycott, as a reaction to the Daily Telegraph changing its terms and conditions which reduced the share of the cover price retained by newsagents. As other newspaper publishers had changed their terms and conditions in a similar way, the NFRN recommendation, by inference, applied to other national daily newspapers. Court action was initiated because the NFRN failed to provide copies of the documents concerned. The NFRN gave undertakings to the Court that it would provide the DGFT with details of any future recommendations to its members. Mr. Justice Buckley warned the NFRN that, as it was already subject to a court order dated 24 May 1973 - which restrained the NFRN from making any recommendation to its members to boycott any national daily newspaper - the 1992 recommendation appeared in reality to constitute contempt of the 1973 order.

Reinforced concrete flooring - Proceedings against five Northern Irish manufacturers of prestressed and reinforced concrete flooring were successfully concluded at a hearing on 21 March. The Court found that the companies had been party to a registrable but unregistered agreement involving price fixing and market sharing. In an undefended hearing the Court made orders against four of the companies, under section 35 of the 1976 Act, and accepted undertakings from the fifth, not to implement any registrable agreements without first submitting details to the DGFT.

Policy Market Makers - Proceedings against members of the Association of Policy Market Makers (APMM) were successfully concluded at a hearing of the Restrictive Practices Court on 2 December. The Court found that members of the APMM had been party to a registrable agreement on the charges that were to be made for the supply of services when buying or selling second-hand endowment policies. Members of the APMM gave undertakings in lieu of an order under section 2 of the 1976 Act not to enforce the agreement and not to enter into similar agreements in the future.

Sugar - Proceedings were successfully concluded against British Sugar plc and Tate & Lyle Industries Ltd at a hearing on 10 December. The Court declared the arrangement between the parties which involved the price of sugar to be sold to retailers to be against the public interest. Both companies agreed to

give undertakings to the Court in lieu of orders under sections 2 and 35 of the 1976 Act. An application by Tate & Lyle to have any order against it limited to its sugar production and supply business was rejected by the Court. In an earlier hearing on 21 August, the Court had turned down an application by British Sugar under section 26 of the 1976 Act to have the memorandum describing the arrangement removed from the public register. The Court said that the arrangement seemed to be a clear example of parties agreeing, albeit in an informal and unenforceable way, their general pricing policies.

Personal shipping services - On 19 June proceedings commenced against five baggage-handling freight forwarding companies and the owners of TNT Magazine. The agreements involved secret price fixing and market sharing, and restrictions on the way in which advertising was supplied and obtained. The DGFT took the view that the cartels effectively cut out consumer choice and severely hampered competitors from entering the market or increasing their market shares. On 2 December the Court struck down the agreements and made orders against one of the parties. The remaining parties gave undertakings to the Court. All parties are restrained from making similar agreements or implementing any other covert restrictive agreements in future.

*Other court proceedings*

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". Proceedings continued in respect of the DGFT's application under section 4 of the 1976 Act for an order declaring that the restriction in the NBA is contrary to the public interest, prohibiting its enforcement, and ordering the parties not to enter into other agreements to the like effect; and under section 17 of the Resale Prices Act for an order to discharge the Court's 1968 order exempting books and maps from the prohibition on resale price maintenance. (The final hearing took place in the second half of January 1997. The judgment is awaited.)

Football Association Premier League Ltd - On 3 April the DGFT commenced proceedings under section 1(3) of the 1976 Act against two agreements which provide for the exclusive televising of Premier League football matches. Under the first agreement, all Premier League member clubs accept a restriction that prevents them from selling their television rights, except through the Premier League. In addition the agreement, which established the Premier League in 1992, also includes the Football League Ltd and the Football Association Ltd as parties. The second agreement, which lasts for five years to the end of the 1996/97 season, provides for the collective selling of those rights by the Premier League and grants exclusive coverage to BSkyB in respect of live matches and to the BBC in respect of recorded highlights. In addition, the broadcasters are given the opportunity to match any competitors' bids for the future television rights to the Premier League competition.

In a preliminary hearing on 24 October, the Court ordered that the proceedings should also include new broadcasting agreements which the same parties entered into in July over four years to the end of the 2000/2001 season. The new agreements are in similar terms to the existing arrangements except for the omission of the matching offer provisions. The Court also made an order to limit the scope of the proceedings to those restrictions which the DGFT regards as significant - in effect, those restrictions which dictate the collective sale of clubs' TV rights. In the same hearing, the Court dismissed an application from the BBC for the Court to determine as a preliminary issue whether the grant of rights to enter and televise matches involves the supply of a service for the purposes of the Act. While the application was opposed by the other parties as well as the DGFT, the Court left it open to the BBC to reapply at a later stage. The Court also accepted an application from the Football League that it should be allowed to withdraw from the proceedings, given that it is no longer associated with any of the restrictions under consideration.

Powder coatings - On 23 December, proceedings were issued and served on ten manufacturers of powder coatings who were party to a price notification and maintenance agreement. Eight of these firms were also party to a price-raising agreement reached during October 1992. Both agreements were referred to the Court under section 1(3) of the 1976 Act and the DGFT applied to the Court under section 35(3) to restrain the parties from giving effect to that agreement or any other registrable agreements not furnished within the time limits specified by the Act.

*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 1996 the OFT received 185 complaints alleging contravention of the Act, compared with 63 in 1995. The unusually high number of complaints was largely the result of an organised campaign of complaint on medicaments. In six cases the DGFT obtained written assurances from suppliers that they would not seek to impose minimum prices at which dealers could resell their goods.

Review of medicaments exemption - Following the review announced in 1995, the DGFT announced in October that he would make a leave application to the Restrictive Practices Court as the first step in applying to have the exemption removed. The exemption was granted by the Court in 1970. 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 1970. The DGFT believes that there is such evidence relating to several areas, including reduced reliance of community pharmacies on over-the-counter medicines on general sale, increased reliance on income from dispensing NHS prescriptions, greater security because of Department of Health entry controls, and stable or increasing community pharmacy numbers. The leave application is likely to be heard in 1997.

*Monopoly situations (Fair Trading Act 1973)*

Section 2 of the Fair Trading Act 1973 requires the DGFT to keep commercial activities in the United Kingdom under review in order to detect monopoly situations (as defined in sections 6-11) and un-competitive practices.

The OFT carries out this function in two ways. First, it monitors the economic performance of industries to identify areas where there may be monopolies and abuses of monopoly situations. 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 from the companies concerned about their future conduct.

*References to the MMC*

In addition to the reference of residential estate agency services in Scotland referred above, the DGFT made two related monopoly references in 1996:

7 November the supply of foreign package holidays; and the supply of travel agency services in relation to the supply of foreign package holidays

*Reports by the MMC*

Two monopoly reports were published in 1996:

1 February The supply of the services of administering performing rights and film synchronisation rights

21 March Classified directory advertising services.

Performing rights - In its report, the MMC found that a monopoly situation existed in favour of the Performing Right Society (PRS). PRS is the only body in the United Kingdom which provides the services of administering performing rights and film synchronisation rights. Its income in 1994 was £167 million. On almost every occasion when a piece of copyright music is performed publicly (e.g. on the radio or live) a royalty is payable. PRS collects these royalties and distributes them to its composer and publisher members. Given that there are over two million pieces of copyright music in existence and tens of thousands of places where this music can be played or from which it can be broadcast, PRS has the difficult task of deciding how to distribute the income it receives fairly and promptly to members at minimal cost.

The reference to the MMC was instigated by complaints about the way in which PRS distributed royalty income to members. In particular, a number of writers of less popular forms of music claimed that PRS's revenue distribution policies favoured publishers and more popular music genres and that its rules did not provide for them to be sufficiently represented in pursuing their interests.

The MMC found: that the corporate structure and management practices of PRS led to inefficiencies in operation with, for example, no link between business and information technology strategy and no clearly defined set of objectives or long term strategy; that PRS's policies and procedures were not sufficiently transparent; that it had failed to adopt a proper cost allocation system and, in particular, had failed to monitor the fairness, cost and effectiveness of its distribution policies; and that the self-administration of live performing rights by members (then not allowed by PRS) should be permitted.

The MMC sought to promote efficiency, equity and transparency by making 44 detailed recommendations aimed at eight areas:

- corporate structure: day to day and policy making functions to be separated clearly and writer members to be allowed to send their representatives along to any PRS general meeting. All recommendations in this area have been met;
- strategy, objectives and planning: PRS to define its objectives, put in place a planning strategy, analyse the cost benefits of change, set out key steps to improving efficiency and work towards accreditation under an approved quality standard;
- information strategy: PRS's information systems to be improved and linked to its strategy;
- cost allocation: to be improved in consultation with PRS's members;

- sampling review and distribution modelling: royalties to be more fairly distributed to members and a model to be constructed which can assess rapidly the effect of changes in distribution policies. This work is underway;
- transparency in operation - membership issues: PRS to set out its responsibilities to members, set out the limitations of its distribution policy and give members published accounting information in relation to overseas earnings and consult members on policy and strategy;
- appeals board: to be established (in January 1997) to provide machinery for members to resolve disputes, e.g. on royalty distribution;
- self-administration of rights by members: PRS is making clear to members the circumstances in which they can administer their own rights and is providing mechanisms to enable this;
- the OFT is still in discussion with the PRS over the terms of undertakings to meet the MMC's concerns.

Classified directory advertising services - The MMC found that a monopoly situation existed in favour of British Telecommunications plc, whose Yellow Pages division (BTYP) supplied 84 percent of the reference services, and in 1994 earned profits of £140 m on sales of about £350 million. The MMC concluded that BTYP's prices were higher than would be the case if competition were effective, and that this was against the public interest. It also found that BTYP's recent publication of local directories was likely, given BTYP's dominant market position, to reduce the effectiveness of competition to BTYP, and was also against the public interest, being likely to lead in the longer term to reduced choice in and higher prices for the reference services.

The MMC recommended that BT be required to establish BTYP as a subsidiary of BT with appropriate reporting obligations; that BT should undertake that all arrangements between itself and BTYP should be transparent and on an arm's length basis; that BTYP should be prohibited from publishing or distributing more than one consumer classified advertising directory covering or including all or part of any particular area; and that a system of price control based on an RPI-2 formula should be imposed on BTYP.

The Parliamentary Under-Secretary for Competition and Consumer Affairs asked the DGFT to seek undertakings from BT along the lines of the third and fourth of these recommendations. In place of the first two he asked that BT undertake to publish annual accounts to make the profitability of its classified directory business public and transparent, to encourage competitors to enter or extend their activities and to strengthen the competitive checks on BTYP's pricing behaviour. He also asked that BT undertake to provide the DGFT with price and financial information to enable the DGFT to monitor BTYP's behaviour, and report to him on the effectiveness of the remedies in three years time, or earlier if necessary.

BT signed appropriate undertakings on 23 July. The RPI-2 price control was applied to directories published since 1 September. A local directory published in September was the last permitted case of more than one directory being published for any area. BTYP will publish the first set of accounts for BT's classified directory advertising business for the financial year 1996-97.

*Report by the Director General of Fair Trading*

In July the DGFT announced the conclusions of his review of BSkyB's position in the pay television market at wholesale level. New informal undertakings and modifications to the undertakings given in March 1995 were secured from BSkyB to remedy concerns that barriers to entry were impairing the competitive process. These undertakings relate to conditional access services, carriage requirements, position of bonus channels, separated and audited accounts, and restructuring of the rate card. A revised rate card was approved by the DGFT in December following a consultation with cable operators. The DGFT's report on his review was published in December.

*Action on earlier reports*

Films - In March, the DGFT recommended that an Order be made aimed at controlling the length of minimum exhibition periods imposed by film distributors. Given the increased competition among film exhibitors, DTI agreed with the DGFT's recommendation to take no action on alignment (the practice whereby, in 20 specified locations, distributors systematically preferred cinemas in one chain over those in another).

Bus services in the north east of England - Following publication of the MMC report in August 1995, undertakings which the Secretary of State believed would remedy the perceived detriments were negotiated with Stagecoach Holdings plc and announced by DTI on 8 October. Negotiations were still in progress at the end of the year with the Go-Ahead Group plc.

Video games - Following publication of the MMC report in 1995 the Department of Trade and Industry (DTI) initiated a consultation exercise to establish the precise nature of the intellectual property rights required by third parties for the production of video games, and to seek views on the potential impact of implementing the MMC's recommendations. Initial negotiations with Nintendo and Sega followed, with a view to securing relaxation of third party software licensing restrictions and improving the availability of games for rental.

In the meantime, in accordance with the MMC's suggestion, its report was made available to other competition authorities. The European Commission then started an enquiry to determine whether it should take action against Nintendo, Sega or Sony (which had entered the market by then) under Article 85 or 86 of the Treaty of Rome. Concern was focused on the companies' arrangements for licensing third party software publishers. Negotiations with the companies involving the Commission, DTI and the OFT continued throughout the year.

Electrical contracting services at London exhibition halls - In December 1995, announcing his decision to make an Order to remedy the adverse findings in the MMC's report on Electrical Contracting Services at Exhibition Halls in London, the Minister said that he would ask the DGFT to seek informal assurances from owners of similar halls outside Greater London that they would not engage in practices made unlawful under the Order. The Order prohibited owners of large halls in London from imposing unnecessary restrictions on who might provide electrical contracting services at independently organised exhibitions. It allowed them to specify a competitively chosen contractor for exhibitions organised in-house, but required the contractor to give prior notice to exhibitors of his charges before they were committed to the exhibition. Lastly, it prohibited hall-owners from receiving commissions from contractors. The DGFT told the Minister in August that he was satisfied with the practices of exhibition hall owners outside London.

Thomas Cook Group Ltd/Interpayment Services Ltd - The MMC had published a report in 1995 recommending remedies for the adverse effects it had argued would otherwise follow from the merger of these two companies. In June 1996 it was announced that, after negotiations with the OFT, Thomas Cook

had given undertakings in line with the MMC's recommendations that they would maintain MasterCard and Visa travellers cheques as separately branded products, and that Interpayment Services Ltd would remain the sole issuer's name on Visa travellers cheques; that they would not renew their agreement with MasterCard requiring a certain proportion of their travellers cheques to be of MasterCard brand; and that commercially sensitive information about the business of competing travel agents would not be passed to Thomas Cook's own travel or other retail businesses.

Beer Orders - 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.

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, with a view to assessing the effectiveness of the remedies that were put into place following the 1993 MMC report.

Fine fragrances - The DGFT received annual returns from the fine fragrance houses providing details of their range stocking and minimum purchase arrangements for 1995. In December, the fine fragrance houses were invited to volunteer information for 1996. The information is being requested in response to a suggestion in the MMC's report published in 1993 with a view to advising the European Commission in 1997 when its decision on perfume houses' distribution agreements expires.

Nutricia Holdings Ltd/Valio International UK Ltd - Following the MMC's report of December 1995, the OFT continued to negotiate undertakings with Nutricia aimed at controlling the prices of certain gluten-free and low-protein products.

#### *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. The Act in practice exempts the rules of recognised bodies and agreements for their constitution from the principal competition laws.

On the retail financial services front, the Personal Investment Authority (PIA) launched its Evolution Project, which will examine the scope for making regulation more cost-effective. An important discussion paper was issued in September. The DGFT welcomed the initiative in principle, although it will be some time before any concrete rule changes are proposed. Also in September, PIA announced its new disclosure regime for non-life investment products such as unit trusts. This is designed to give savers better information, on a standardised basis, about the products in question, in particular about management charges.

On the wholesale side, dealing with financial markets, the OFT contributed to discussions between regulators and the London Stock Exchange on proposals for the introduction of an electronic order-driven trading system in 1997.

The DGFT also continued his study of the underwriting of share issues, publishing a second report in December. This followed the completion of a survey of rights issues undertaken between June 1995 and May 1996. The survey indicated that little or no change had taken place since his predecessor's 1995 report, which had found evidence of standardised charging considerably in excess of the risk assumed. The DGFT considered carefully the option of making a reference to the MMC. However, developments in the last few months of 1996 were rather more encouraging with a number of innovative

issues that included a competitive element in their sub-underwriting. In the light of these changes the DGFT decided to defer a decision on a reference to the MMC until early in 1997 to allow a further period in which to assess the state of competition in this market.

#### *Applications for recognition*

CRESTCo - In May, the DGFT reported on the rules of CRESTCo, a United Kingdom-based company seeking recognition as a clearing house and, under separate Companies Act legislation, as an approved operator of a settlement system. CRESTCo will provide electronic settlement for trades in London of corporate securities. The DGFT found no present evidence that CRESTCo's rules would have significant adverse effects on competition, but he identified a number of areas where, as part of his continuing duty, he would keep developments under review.

#### *Regulatory developments*

Full details of regulatory developments are to be found in the annual reports of the regulatory bodies.

#### *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 percent 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.

The number of merger cases considered by the OFT continued to rise considerably in 1996. Whether as merger situations in the public domain (public mergers), under the confidential guidance procedure, or by way of informal advice, the total number of cases rose from 473 in 1995 to 531 in 1996. This represented a year-on-year increase of roughly 12 percent and followed a rise of some 24 percent in 1995.

In 1996 the OFT considered 128 requests for confidential guidance, compared with 144 in 1995, a decrease of some 11 percent. The DGFT advised on 74 requests, an increase of three percent on the 1995 total of 72. The remaining 54 requests were found not to qualify or were abandoned. In addition, OFT staff gave informal advice to parties involved in possible mergers about qualification for investigation and the potential for reference in 93 cases.

Parties to a merger may formally pre-notify it to the OFT before completion. In such cases, the Secretary of State must announce his decision within a stipulated time (20 working days, extendible to 35), or the power to refer it to the MMC is lost. During 1996 the OFT considered 30 proposed mergers under this procedure.

Unless a proposed merger has been prenotified under the statutory procedures 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 four months from the time the merger becomes public or was completed. (This period was reduced from six to four months in March 1996.)

The OFT examined 281 proposed or completed public mergers, compared with 306 in 1995, a decrease of eight percent. The DGFT advised on 176 cases, a decrease of eight percent on the 1995 total of 191. The remaining 105 were either found by the OFT not to qualify for investigation or were abandoned before a decision was taken.

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. Three references under this head were made in 1996.

The total value of the assets acquired or bid for in the qualifying merger situations examined by the OFT in 1996 was £149 billion (£178 billion in 1995). Horizontal mergers (where the largest and second largest activities of the merging firms overlap) accounted for 92 percent of the total number of qualifying cases examined in 1996 (91 percent in 1995). A more detailed statistical analysis of merger activity is given in the Annex.

#### *References to the MMC*

The Secretary of State made 12 merger references to the MMC under the Fair Trading Act in 1996, four more than in 1995. All were made in accordance with the DGFT's advice, and all were on competition grounds. In addition the Secretary of State made three references of a merger between water undertakings under the Water Act Industry Act 1991, also in accordance with the DGFT's advice. The references were:

1 March	Unichem plc/Lloyds Chemists plc
28 March	Gehe AG/Lloyds Chemists plc
28 March	NV Verenigde Bedrijven Nutricia/Enterprises belonging to Milupa AG
21 May	Wessex Water plc/South West Water plc Severn Trent plc/South West Water plc
23 May	General Utilities plc and SAUR Water Services plc/Mid Kent Holdings plc
30 July	National Express Group plc/Midland Mainline Ltd
30 August	Robert Wiseman Dairies plc/Scottish Pride Holdings plc
23 September	First Bus plc/SB Holdings Ltd
31 October	Cowie Group plc/British Bus Group Ltd
28 November	Peninsular and Oriental Steam Navigation Company/Stena Line Ltd
9 December	Bass plc/Carlsberg Tetley plc Merger of brewing interests of Bass Brewers Ltd and Carlsberg Tetley plc Carlsberg AS/20% share in Bass Brewers Ltd

- 19 December Klaus J Jacobs Holding AG/Societe Centrale D'Investissement et Associes Reports by the MMC  
Twelve merger reports were published in 1996.
- 9 January Belfast International Airport Ltd/Belfast City Airport Ltd
- 18 January Stagecoach Holdings plc/Chesterfield Transport (1989) Ltd
- 2 February Go Ahead Group plc/OK Motor Services Ltd
- 8 March British Bus plc/Arrowline (Travel) Ltd
- 25 April National Power plc/Southern Electric plc  
PowerGen plc/Midlands Electricity plc
- 19 July Unichem plc/Lloyds Chemists plc and Gehe AG/Lloyds Chemists plc
- 9 August NV Verenigde Bedrijven Nutricia /Enterprises belonging to Milupa AG
- 25 October Severn Trent plc/South West Water plc  
Wessex Water plc/South West Water plc (references under the Water Industry Act)
- 20 December National Express Group plc/Midland Mainline Ltd
- 24 December Robert Wiseman Dairies plc/Scottish Pride Holdings plc

In all but four cases, the MMC found the merger to be against the public interest. In the four remaining cases - Stagecoach Holdings plc/Chesterfield Transport (1989) Ltd; The Go Ahead Group plc/OK Motor Services Ltd; British Bus plc/Arrowline (Travel) Ltd; and NV Verenigde Bedrijven Nutricia/Enterprises belonging to Milupa AG - the MMC concluded that the merger did not operate against the public interest and was not expected to do so. In two of these cases - The Go Ahead Group plc/OK Motor Services Ltd and NV Verenigde Bedrijven Nutricia/Enterprises belonging to Milupa AG - one member of the inquiry group dissented from this conclusion.

Belfast International Airport Ltd/Belfast City Airport Ltd - The MMC concluded that the proposed merger was likely to operate against the public interest, because the two airports competed vigorously against each other, and this would be lost if they were brought under common control. It was not convinced that the potential public interest benefits from the merger would outweigh the detriments from the loss of competition (such as higher charges, reduced choice for passengers and airlines). The Secretary of State, in accordance with the DGFT's advice, accepted the MMC's findings and its recommendation that the merger should be prevented. On 21 May, the Secretary of State announced that Belfast International Airport Ltd had given him statutory undertakings not to acquire any interest in the shares of Belfast City Airport or any part of the business which it carries on.

National Power plc/Southern Electric plc and PowerGen plc/Midlands Electricity plc - The MMC concluded that both mergers may be expected to operate against the public interest. It concluded that they would lead to a reduction in competition through the influence over and information the generators would gain through Southern and Midlands' equity interests in independent power projects (IPPs) and certain rights under associated power purchase agreements. Given the existing market shares of the two generators, it considered that these could be expected to lead to higher prices. The MMC also concluded that the mergers would make it more difficult for the Director General of Electricity Supply (DGES) to monitor and enforce certain licence conditions and would lead to some customers unwittingly giving up

rights by using the generators - as opposed to Public Electricity Suppliers such as Southern and Midlands - as suppliers.

However, the MMC did not consider the detriments sufficiently serious to justify prohibition of the two mergers and recommended that they should be allowed subject to undertakings being given by the two generators. These were that they should sell, within 18 months, the equity interests in independent power projects (IPPs) held by Southern and Midlands respectively; that information arising from power purchase agreements with the IPPs should be ring-fenced from the generation businesses and that a number of licence amendments should be made to assist the DGES effectively to monitor and enforce licence conditions. One member of the inquiry group dissented from this conclusion and argued that the mergers should be prohibited.

The Secretary of State accepted the MMC's findings that the mergers may be expected to operate against the public interest but, given the state of development of the electricity market, did not believe that the remedies proposed by the MMC would be sufficient to address the detriments. He therefore prohibited both mergers and asked the DGFT to seek undertakings from the generators to effect the prohibitions. This conclusion was in accordance with the advice of the DGFT, and the views of the DGES and the minority member of the MMC inquiry group.

Unichem plc/Lloyds Chemists plc and Gehe AG/Lloyds Chemists plc - The MMC concluded that both of these proposed mergers were likely to operate against the public interest, because of the reduction in competition in pharmaceutical wholesaling, particularly in certain parts of the United Kingdom, which was likely to ensue whichever of the two competing bidders were to acquire Lloyds. The MMC recommended that the successful bidder should be required to divest the Lloyds' wholesaling depots serving the areas in which competition would be most seriously reduced. The DGFT advised that this remedy risked being insufficient, because of the importance of maintaining a third wholesaler capable of offering nation-wide service and the possibility that suitable buyers would not be found for the depots; accordingly he recommended (in line with a minority of the MMC members responsible for the report) that the merger should be prohibited. The Secretary of State announced, on publication of the report on 19 July, that he accepted the report's findings, and that he had concluded that it would be appropriate to give the two bidders an opportunity to find firm buyers for the businesses to be divested, within three months of that announcement, before moving to prohibition if that were not feasible. The Secretary of State announced on 18 October that satisfactory undertakings to divest had been obtained.

Severn Trent plc/South West Water plc and Wessex Water plc/South West Water plc - The MMC found both proposed mergers likely to operate against the public interest, principally because in neither case would the potential public interest benefits outweigh the considerable detriment arising from the loss of South West Water as an independent water and sewerage company, seriously weakening the system of comparative regulation operated by the Office of Water Services (OFWAT) under the Water Industry Act. The MMC proposed that both mergers be prohibited, and both recommendations were endorsed by the DGFT and accepted by the Secretary of State, who invited the DGFT to obtain satisfactory undertakings from the parties.

National Express Group plc/Midland Main Line Ltd - The MMC concluded that the merger might be expected to operate against the public interest by leading, over time, to higher coach fares or higher fares on both coach and rail and/or a lower quality of coach services or a lower quality of both coach and rail services on five routes between Sheffield, Chesterfield, Derby, Nottingham and Leicester and central London. It would result in a loss of competition between coach services operated by National Express's subsidiary, National Express Ltd, and rail services operated by Midland Main Line which would adversely affect leisure passengers. The MMC recommended behavioural undertakings relating to coach fares and service levels on the five routes. Although the DGFT would have preferred an opportunity to explore the possibility of new entry with other potentially interested coach operators to test whether

divestment of the coach routes was feasible, he agreed that, if such a structural solution were not feasible, the behavioural undertakings should be sought. After careful consideration, the Secretary of State decided that divestment would not be appropriate and asked the DGFT to seek undertakings in line with the MMC's recommendations. These undertakings were being negotiated at the end of 1996.

Robert Wiseman Dairies plc/Scottish Pride Holdings plc - The MMC concluded that the merger might be expected to operate against the public interest because of its effect on competition in the supply of fresh milk to customers in Scotland other than by national supermarket groups. However, the MMC did not believe that Scottish Pride could continue as an independent company. It recommended, therefore, that Wiseman should submit regular audited reports to the DGFT on its prices to the various categories of customer in Scotland. Accepting this recommendation, the Secretary of State asked the DGFT to seek appropriate undertakings from Wiseman.

*Undertakings in lieu of reference*

When it appears that a reference to the MMC may be necessary, the Secretary of State may, on the advice of the DGFT, accept undertakings to remedy the adverse effects, in lieu of reference. In 1996 there were four cases where undertakings were given in lieu of reference - bringing to 17 the total number of cases in which this procedure has been used since its introduction in 1990. The cases involved, and the dates on which the undertakings were given, were:

5 June	Stagecoach Holdings plc/Cambus Holdings Ltd
9 July	Granada Group plc/Forte plc
29 July	Ibstock plc/Redland plc
23 December	Stagecoach Holdings plc/Porterbrook Leasing Company Ltd

Stagecoach Holdings plc/Cambus Holdings plc - In accordance with the DGFT's recommendation, the Secretary of State accepted undertakings from Stagecoach that it would sell, within six months, two bus companies previously operated by Cambus in Milton Keynes (MK Metro Ltd and Milton Keynes City Bus Ltd) and Stagecoach's United Counties Omnibus Company depot in Huntingdon. The undertakings, which were designed to address competition concerns over the operation of commercial and tendered bus services in a large part of Cambridgeshire, Northamptonshire and north Bedfordshire and Buckinghamshire, also require Stagecoach to comply with certain matters relating to fares, service levels, tenders, responses to competition, the relationship of fares to costs and the provision of information.

Granada Group plc/Forte plc - In accordance with the DGFT's recommendation, the Secretary of State accepted undertakings from Granada to sell, by 25 April 1997, 21 motorway service areas (including the 'Welcome Break' name) and four sites that had been acquired for future development. The undertakings, which were designed to remedy concerns about the reduction in competition and consumer choice in the provision of goods and services at motorway service areas, also require Granada to abide by controls on the prices of accommodation and catering items at these areas in the period prior to their sale.

Ibstock plc/Redland plc - The Secretary of State accepted undertakings from Ibstock Building Products Ltd, a subsidiary of Ibstock plc that it would sell, by January 1998, five brick manufacturing plants: at Wealdon and Warnham in the South East, Steerpoint in the South West and Eldon and Todhills in the North East (representing a total annual capacity of 168 million bricks). The undertakings, which were designed to remedy concerns that the merger was likely to lead to a significant loss of competition in the market for the supply of bricks in Great Britain, also require that the plants are to be operated as viable businesses until disposal and then sold as going concerns. The original divestment package, announced on

11 July, was revised in the light of third party concerns that it was insufficient to address the adverse effects.

Stagecoach Holdings plc/Porterbrook Leasing Company Ltd - In accordance with the DGFT's recommendation, the Secretary of State accepted undertakings from Stagecoach that it would comply with a number of requirements in relation to the supply of railway rolling stock. The undertakings, which were designed to remedy concerns about the competitive process in the railway industry caused by Stagecoach's ownership both of a rolling stock company and train operating companies, address matters relating to non-discrimination, confidentiality, cross-subsidy, co-operation with train operating companies, the maintenance and provision of separate reports and accounting and the provision of information. Although the undertakings are to remain in force for the foreseeable future, they will be reviewed at the end of 2001.

*Action on earlier reports*

Service Corporation International Ltd (SCI)/Plantsbrook Group plc - The Secretary of State announced in December that he had accepted undertakings from SCI to remedy the adverse effects on competition identified by the MMC in 1995 as a result of its acquisition of Plantsbrook. The undertakings, which follow the MMC's recommendations, require SCI to sell individual funeral businesses in ten areas in the south east of England (Battersea, Brighton and Hove, Bromley, Camberwell, Chiswick, Crawley, Eastbourne, Fulham, Putney and Sidcup) and not to acquire any further businesses in these areas without the DGFT's prior approval. The undertakings also require SCI to disclose its ownership of funeral businesses and prevent discrimination between its funeral directing and crematoria businesses.

Stagecoach Holdings plc/assets of Lancaster City Transport Ltd - In May, undertakings were secured from Stagecoach (North West) Ltd 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 one reference in 1996:

14 August	Newsquest Media Group Ltd/Westminster Press Ltd (report published on 28 November).
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Newsquest Media Group Ltd/Westminster Press Ltd - The MMC concluded that there were no concerns on public interest grounds. Accordingly the Secretary of State gave his consent to the proposed merger. Following a reference on 21 November 1995, and a report by the MMC on 27 February 1996, he also gave his consent to the acquisition by Northcliffe Newspapers Group Ltd of newspapers published by Aberdeen Journals Ltd.

*Transfers not referred to the MMC*

The Secretary of State announced his consent to the following transactions without requiring the MMC to report:

- |           |   |
|-----------|---|
| 25 April  | Johnston Press plc/Doncaster Free Press, Doncaster Courier, Dearne Courier, Goole Howden Thorne Courier                                     |
| 27 June   | Johnston Press Ltd/newspapers belonging to EMAP plc<br>Mirror Group plc/Ulster News Letter, Belfast News Letter                             |
| 8 August  | Trinity International Holdings plc/Lewisham Mercury, Greenwich Mercury, Bexley Mercury  |
| 14 August | Trinity International Holdings plc/Ormskirk Advertiser, Maghull Advertiser and the Skelmersdale Advertiser, Southport and Formby Advertiser |

*Other proposed mergers*

British Airways plc/American Airlines Inc: Proposed Alliance - The parties announced in June that they proposed to integrate their respective transatlantic passenger and cargo services between Europe and the USA. The proposed alliance is being considered under the merger provisions of the Fair Trading Act, and also under the newly-introduced EU Competition Law (Articles 88 and 89) Enforcement Regulations relating to air services.

On 5 December the Secretary of State announced, in accordance with the DGFT's advice, that unless suitable undertakings were given by the parties, sufficient to remove the competition concerns arising from the proposal and allow it to be granted an exemption, under Article 85(3) of the Treaty of Rome, from the prohibition of anti-competitive agreements under Article 85(1), he would refer the merger to the MMC. The undertakings, and conditions to be attached to any proposed exemption, included a requirement for the parties to make available a total of 168 take-off and landing slots per week at Heathrow Airport (approximately 90 percent of the total brought to the alliance by American Airlines) to be used by competitors on transatlantic services from London. Further proposals required that certain of the slots to be given up should be reserved for use on services to Dallas (where the alliance would also be required to reduce its service once a new entrant appeared) and to Boston; also that BA should remove a clause in its agreement with USAir (in which BA was a major shareholder) preventing USAir from competing on transatlantic services to the United Kingdom, and that the alliance should allow other airlines to join its frequent flyer programmes. The exemption would also be conditional on the successful conclusion of a new US-United Kingdom air services agreement between the respective governments, removing restrictions in the current agreement on the number of United Kingdom and US airlines authorised to fly to and from London and the US, and the frequency of their services.

Third parties were invited to comment by 10 January 1997. On 13 December the OFT and DTI also made available for public comment a draft of the competition analysis required by EU competition law. The OFT has throughout liaised closely with the relevant EU and US authorities, and will continue to do so.

*Annex**Contact lens solutions*

The MMC reported in 1993 on the manufacturing, importing, wholesaling and retailing of contact lens solutions. As well as finding two scale monopolists among suppliers of solutions, and two among retailers, the MMC found that a complex monopoly existed among retailers generally - virtually all of whom sold branded solutions at, or just below, recommended retail prices - and also among opticians, who paid insufficient attention to cost considerations when recommending solutions to customers, and gave them inadequate information.

The key problem in the market was the licensing system operated by the Medicines Control Agency, an agency of the Department of Health. The MMC found that it took longer in the United Kingdom to acquire product licences than it did in other countries, while some products which were freely available elsewhere had not been licensed at all. This seriously inhibited competition among suppliers. Moreover, the licensing system severely restricted competition at the retail level by permitting only opticians and pharmacies to sell solutions - on the basis that these outlets could offer professional advice.

The MMC recommended that changes be considered to the licensing system; that priority be given to introducing the EC Directive on medical devices, which would lead to less stringent licensing provisions; that opticians' professional bodies amend their guidelines to address the shortcoming in advice given by opticians, and that the retailing of solutions be opened up to all retailers, provided they met certain standards. Following publication of the MMC's report, the Minister for Corporate Affairs said that the Government was fully committed to the implementation of the Directive. The rules restricting retail sales to opticians and pharmacies were subsequently relaxed, and suppliers were enabled to vary their product licences to allow them to supply other retailers such as drugstores and supermarkets.





## UNITED STATES\*

(1996)

### Summary of highlights from Fiscal Year 1996

In fiscal year 1996 (October 1, 1995 -September 30, 1996), the Telecommunications Act of 1996 was signed into law, designed to open up the entire telecommunications industry to the influence of competitive market forces. The Antitrust Division of the Department of Justice and the Federal Trade Commission announced revisions that expand upon earlier statements on health care provider networks. The new guidelines, clarifying that the more flexible rule of reason analysis will be applied to all provider-controlled networks likely to produce significant efficiencies that benefit consumers, are an effort to promote innovation in the industry without lessening antitrust scrutiny of anti-competitive arrangements. The agencies also adopted new rules amending pre-merger notification requirements, exempting certain classes of transactions not likely to raise antitrust concerns.

In May, the FTC issued a staff report on the findings of its Fall, 1995 hearings on Global and Innovation-Based Competition which examined whether market place changes in competition require any adjustments in US antitrust law and policy. The report makes certain proposals concerning, for example, the treatment of efficiencies and the approach to "innovation market" analysis in examining mergers. In September, the Commission adopted amendments to its rules governing litigation of administrative cases which are intended to minimise delay and streamline procedures.

During FY 1996, the Division opened 347 investigations and filed 71 antitrust cases, both civil and criminal, in federal court. The Division filed 42 criminal cases against 41 corporations and 22 individuals. Thirty-one corporate defendants and 16 individuals were assessed fines totalling \$26.8 million and five defendants were sentenced to a total of 2 431 days of incarceration. Another eight individual defendants were sentenced to spend a total of 1 148 days in some form of alternative confinement. In October 1996, the Division obtained the highest criminal antitrust fines ever in its investigation of the lysine and citric acid markets. The \$100 million fine paid by Archer Daniels Midland Co. was the biggest fine ever imposed in a criminal antitrust matter. The Division opened 331 civil investigations, both merger and non-merger, and issued 1 878 civil investigative demands (a form of compulsory process). The Division filed 20 non-merger civil complaints.

In the non-merger area, the FTC pursued a variety of legal theories, including horizontal restraints, exclusive dealing and resale price maintenance, in such sectors as pharmacy network services, truck-mounted fire pumps, athletic footwear and speciality wood products. Six consent agreements were accepted, and one administrative complaint was filed against Toys "R" Us. for, among other things, using its market power to keep toy prices higher. An initial decision was issued by and Administrative Law Judge in *International Association of Conference Interpreters* upholding a 1995 Commission complaint alleging price fixing and other restraints of competition in the provision of interpretation services in the United States. The Commission also issued a final order prohibiting the California Dental Association from imposing a variety of restrictions on truthful and non-deceptive advertising and solicitation practices of its members.

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\* The original language of this document is English.

The two agencies reviewed 3 087 transactions reported under the pre-merger notification provisions of the Hart-Scott-Rodino ("HSR") Act. A wide variety of industries were involved including defence, medical equipment, industrial gases, supermarkets, pharmaceuticals, chemicals, computer software systems, cable television, funeral homes, radio stations, paper products, ski resorts, and legal publishers. The Division investigated 186 transactions, requesting additional information in 102 cases, and investigated 49 non-HSR mergers. The FTC investigated 36 transactions with second requests. The Commission's investigations resulted in 23 consents, four abandoned transactions, and authorisation of the filing of preliminary injunction actions to block three proposed mergers, two of which were abandoned by the parties. The FTC's most notable merger investigation involved Time Warner's \$7.5 billion acquisition of Turner Broadcasting, which was allowed subject to a consent order requiring a combination of structural and non-structural remedies. In addition, the FTC secured a record \$7.8 million in civil penalties in HSR enforcement actions against firms that failed to observe the pre-merger notification requirements and waiting periods under the HSR Act before consummating a notifiable merger.

**All public documents issued by the FTC and DOJ are available on the Internet. The FTC's World Wide Web site is located at: <http://www.ftc.gov>. The Division's address is [gopher@usdoj.gov](mailto:gopher@usdoj.gov) or <http://www.usdoj.gov>; the Division's e-mail address is [antitrust@usdoj.gov](mailto:antitrust@usdoj.gov). More detailed descriptions or full texts of many of the matters referred to in this report are available there.**

## Introduction

This report describes federal antitrust developments in the United States for Fiscal Year 1996 ("FY 1996" - October 1, 1995 through September 30, 1996). It summarises the activities of the Antitrust Division ("Division") of the US Department of Justice ("Department" or "DOJ") and of the Bureau of Competition of the Federal Trade Commission ("FTC" or "Commission").

Joel I. Klein became Acting Assistant Attorney General when Anne K. Bingaman departed on October 18, 1996. A. Douglas Melamed became Principal Deputy Assistant Attorney General, overseeing the Division's civil enforcement program, appellate activities, and international efforts, on October 15, 1996. Andrew S. Joskow became the Deputy in charge of Economic Analysis in October 1996, having been acting deputy since May.

### 1. Changes in law or policies

#### *Changes in Antitrust rules, policies or guidelines*

The "Telecommunications Act of 1996", Public Law 104-104, was signed into law by President Clinton on February 8, 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. For additional details on the law, see United States Annual Report for FY 1995, paragraphs 17-22 (DAFFE/CLP(96)17/07).

As was reported in last year's annual report, the FTC proposed on July 21, 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 September 25, 1995. On March 25, 1996, the Commission adopted new rules amending the HSR reporting requirements that would exempt the following classes of transactions: (1) 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; (2) certain real estate acquisitions, such as acquisitions of shopping centres and hotels and motels, not likely to violate the antitrust laws; (3) acquisitions of oil and natural gas reserves and certain associated production and exploration assets valued at \$500 million or less; (4) acquisitions of coal reserves and certain associated productions and exploration assets valued at \$200 million or less; (5) 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 (6) acquisitions of realty acquired solely for rental or investment purposes.

On March 26, 1996, the Division issued a Protocol for Increased State Prosecution of Criminal Antitrust Offense. The protocol, which sets forth the circumstances where the Division may transfer prosecutorial responsibility for certain antitrust offenses to the States, is designed to enhance co-operation and antitrust enforcement efforts between the federal government and the State Attorneys General.

In May, 1996, the Commission issued a staff report on the findings of its 1995 hearings on Global and Innovation-Based Competition which examined whether marketplace changes in competition require any adjustments in US antitrust law and policy. Entitled "Anticipating the 21st Century:

Competition Policy in the New High-Tech, Global Marketplace”, the report makes certain proposals concerning, for example, the treatment of efficiencies and the approach to "innovation market" analysis in examining mergers.

In August, 1996, the FTC and DOJ announced revisions that expand upon statements on health care provider networks contained in their joint Statements of Enforcement Policy in Health Care and Antitrust, last revised in 1994. The most important changes clarify that the more flexible rule of reason analysis will be applied to all provider-controlled networks that are likely to produce significant efficiencies that benefit consumers. The new guidelines are an effort to promote innovation in the industry but do not lessen antitrust scrutiny of anti-competitive health care arrangements.

In September, 1996, the Commission adopted amendments to Part III of the FTC Rules of Practice and related rules governing litigation in administrative cases. These procedural amendments will apply to all Part III proceedings begun on or after January, 1997 and are intended to minimise delay and streamline procedures for Part III matters.

### *Proposals to change Antitrust laws, related legislation or policies*

In February, 1996, Chairman Pitofsky testified before a Congressional panel recommending against enactment of H.R. 2925, which would specify that certain kinds of health care provider networks must be judged under the rule of reason. While preventing restrictive treatment of provider networks is laudable, the Commission believes that health care markets are changing too quickly to allow potential efficiencies of provider collaboration to be based on any single set of criteria. Also, retaining the per se prohibition of certain forms of highly anti-competitive conduct, such as price fixing or market allocation, avoids complex and costly inquiries where the potential harm to competition is clear.

In 1996 legislators continued work on deregulatory proposals affecting the US postal monopoly, the electric power industry and ocean shipping, all of which are likely to be taken up again by the 105th Congress. Lawmakers are also expected to take up proposals affecting the application of the antitrust laws to professional sports, the health care industry, and intellectual property.

## **2. Enforcement of antitrust laws and policies: action against anti-competitive practices**

### *Department of Justice and FTC statistic*

#### *DOJ staffing and enforcement statistics*

At the end of FY 1996, the Division had 767 employees: 325 attorneys, 50 economists, 163 paralegals and 229 support staff.

During FY 1996, the Antitrust Division opened 347 investigations and filed 71 antitrust cases, both civil and criminal, in federal court. The Division was a party to 13 US antitrust cases decided by the federal Courts of Appeals and filed *amicus curiae* briefs in six Court of Appeals cases and three Supreme Court cases.

During FY 1996, the Division filed 42 criminal cases against 41 corporations and 22 individuals. Thirty-one corporate defendants and 16 individuals were assessed fines totalling \$26.8 million and 5 defendants were sentenced to a total of 2 431 days of incarceration. Another eight individual defendants were sentenced to spend a total of 1 148 days in some form of alternative confinement. The Division obtained the highest criminal antitrust fines ever in its investigation of the lysine and citric acid markets. The \$100 million fine paid by Archer Daniels Midland Co. (see below, paragraph 33) was the biggest fine ever imposed in a criminal antitrust matter.

The Division investigated 186 mergers and challenged nine; 21 transactions were restructured or abandoned prior to the filing of a complaint as a result of an announced challenge. The Division opened 331 civil investigations, both merger and non-merger, and issued 1 878 civil investigative demands (a form of compulsory process). The Division filed 20 non-merger civil complaints. Also during FY 1996, the Division responded to 24 requests for review of written business proposals.

#### *FTC staffing and enforcement statistics*

At the end of FY 1996, the FTC's Bureau of Competition had 212 employees: 146 attorneys, 35 other professionals and 31 clerical staff. The FTC also employs about 40 economists who participate in its antitrust enforcement activities.

Based on its review of pre-merger notification filings, the FTC investigated 36 transactions with second requests for information. The Commission authorised the staff to seek preliminary injunctions in federal district court to block three proposed mergers (two of which were abandoned after such authorisation), and accepted 21 consent agreements for public comment to settle anti-competitive concerns raised by proposed transactions. In addition, acting on two cases begun in previous years, the Commission dismissed two administrative complaints. Another four mergers or acquisitions were abandoned before the Commission could act and after FTC staff raised concerns that the transactions might reduce competition.

In the non-merger area, six consent agreements were accepted during FY 1996 involving a variety of legal theories, including horizontal restraints, exclusive dealing and resale price maintenance, in such sectors as pharmacy network services, fire engine fire pumps, athletic footwear and speciality wood products. The Commission issued one administrative complaint and one final order. An initial decision was issued by an Administrative Law Judge upholding a 1995 Commission complaint.

The Commission secured a record \$7.8 million in civil penalties in HSR enforcement actions against firms that failed to observe the pre-merger notification requirements and waiting periods under the HSR Act before consummating a notifiable acquisition. An additional \$250 000 was obtained for a company's violation of a final cease and desist order.

Staff of the Bureau of Competition provided guidance to industry through five advisory opinion letters on whether specific health care arrangements might violate antitrust laws.

#### *Antitrust cases in the courts*

##### *United States Supreme Court*

##### *DOJ or FTC cases*

There were no DOJ or FTC cases decided in the Supreme Court in FY 1996.

##### *Private cases*

The United States filed an *amicus* brief in *Anthony Brown v. Pro Football, Inc.*, 116 S.Ct. 2116 (1996). The issue in the case was whether federal labor laws preclude an antitrust challenge to an agreement among owners of professional sports teams to implement the terms of their last offer to a labour union after negotiations reached an impasse. Among other things, the Court rejected the government's argument that the non-statutory exemption from the antitrust laws should end when the labour negotiations reach an impasse. The Court concluded that the exemption applied to the employer conduct at issue in this case because that conduct occurred during and immediately after negotiations with the union, concerned issues that the parties were required to negotiate collectively, grew out of and was directly related to the

lawful operation of the bargaining process, and concerned only parties to the collective bargaining agreement.

*Court of Appeals cases*

*Significant DOJ cases decided in FY 1996*

There were nine decisions in Antitrust Division cases by appellate courts in FY 1996 but only two published decisions. The two reported decisions were both in criminal cases and did not involve any issues of antitrust policy.

*United States v. Nippon Paper Indus. Co., Ltd* (available in Westlaw at 1996 WL 528426 (D. Mass. Sept. 3, 1996)) is a district court decision which has been appealed to the First Circuit. The United States obtained indictments against a Japanese Corporation and its successor entity charging that it violated Sherman Act Section 1 by conspiring with other manufacturers of thermal facsimile ("fax") paper to raise the price of fax paper sold for importation into the United States. Defendant moved to dismiss the Indictment for failure to state an offence on grounds that (1) the Indictment alleged conspiratorial conduct undertaken entirely outside the United States; and (2) such wholly foreign conduct did not state a criminal Sherman Act violation. The Court agreed with both arguments. First, although the Indictment identified certain trading houses that purchased fax paper from the manufacturers at inflated prices and resold it within the United States as co-conspirators, that averment, the Court believed, did not suffice to show in-US conspiratorial conduct. Second, the court held that the Sherman Act, when enforced criminally, did not embrace a conspiracy in which all the overt acts are undertaken abroad, even if the scheme produces substantial intended effects within the United States. Although the Supreme Court in *Hartford Fire* construed the Sherman Act to reach such conduct in a civil setting, civil precedents, the Court held, did not control in a criminal case. And the criminal prosecution of wholly foreign conduct, the Court believed, would raise substantial notice concerns.

*FTC cases decided in FY 1996*

*FTC v. Coca Cola Bottling Co. of the Southwest* is an appeal from a Commission decision that ordered Coca Cola Bottling Co. of the Southwest to divest the franchise to bottle Dr Pepper acquired in 1984. In June, 1996, the US Court of Appeals for the Fifth Circuit reversed and remanded the Commission's divestiture order, holding that the Commission should have evaluated the acquisition under standards of the Soft Drink Interbrand Competition Act. 85 F.3d 1139 (5th Cir. 1996). The Commission subsequently dismissed its complaint.

*FTC v. Crestwood Dodge, Inc.* is an appeal from a Commission decision that ordered certain Detroit automobile dealers to remain open for certain hours during the week in order to remedy an agreement by those dealers to close on weekends and week nights. In May, 1996, the US Court of Appeals for the Sixth Circuit reversed and remanded the Commission's order, directing that the Commission consider whether the order was justified in light of changed circumstances since issuance of the Commission's complaint. 84 F.3d 786 (6th Cir. 1996).

*FTC v. Freeman Hospital* is 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 Eighth Circuit 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. 69 F.3d 260 (8th Cir. 1995). The Commission subsequently dismissed its complaint.

*Private cases having international implications*

In *Optimum, S.A. v. Legent Corp.*, 926 F.Supp. 530 (W.D. Penn. 1996), an Argentine software distributor sued a US software company, its wholly-owned Argentine distributor, and an Argentine company which had marketed the software through an exclusive contract with the plaintiff until the US defendant acquired a controlling interest in it, alleging Sherman Act violations. Plaintiff argued that its contractual rights to act as exclusive representative and distributor of the software were terminated in an effort by defendants to monopolise the Argentine market. The Court granted the defendants' motion to dismiss for lack of subject matter jurisdiction. The Court held that the alleged anti-competitive conduct involved commerce with a foreign nation and US export commerce, and therefore Section 6(a) of the Sherman Act required the plaintiff to show that the alleged conduct "had a direct, substantial, and reasonably foreseeable effect either upon United States domestic commerce, United States import commerce, or export commerce which injures export business in the United States". Plaintiff's only attempts to meet this burden were allegations concerning income flows between corporations in the US and in Argentina. The Court held these allegations to be insufficient to establish the requisite domestic effect. The plaintiff further alleged that defendant's large market share created a barrier to entry for other US companies, but the Court ruled that "plaintiff, a foreign corporation, cannot maintain an action under the Sherman Act based merely upon injury to United States exporters attempting to enter the Argentine computer software market".

In *Metro Industries, Inc. v. Sammi Corp.*, 82 F.3d 839 (9th Cir.), *cert. denied* 117 S.Ct. 181 (1996), Metro, an importer and wholesaler of kitchenware, sued Sammi, a South Korean exporting company, and two of its US subsidiaries, alleging, *inter alia*, that a Korean design registration system, which gave Korean hollowware producers the exclusive right to export a particular hollowware design for three years, constituted a market division that is a *per se* violation of Section 1 of the Sherman Act. Metro alleged that Sammi used this registration system to prevent Metro and other kitchenware importers from acquiring Korean-made stainless steel steamers from any of Sammi's competitors in Korea. In affirming summary judgement for the defendants, the Court of Appeals held that the design registration system was not an illegal market division arrangement subject to *per se* treatment under the Sherman Act. The Court went on to say that even if the *per se* rule would have been applicable to the defendants' conduct had it occurred in a domestic context, *per se* rules are not applicable to conduct occurring outside the United States. The Court held further that facts supporting jurisdiction had been properly pleaded, and that comity and fairness would not bar an assertion of jurisdiction. Summary judgement was appropriate, however, because Metro failed to produce any evidence of the injury to competition required in rule of reason cases.

In *Hammons v. Alcan Aluminum Corp.*, No. SACV 96-0319-LHM(EEEx) (C.D. Cal. July 1, 1996), the Court entered summary judgement for defendants in a state antitrust law action brought on behalf of a class of aluminum consumers alleging an illegal international conspiracy to restrict aluminum output and raise prices. The complaint was filed under California's Cartwright Act, but its relevant provisions appear to have been interpreted under federal Sherman Act precedents by the Court. Plaintiff alleged that US and other aluminum producers had agreed to curtail output around the beginning of 1994 in conjunction with an inter-governmental "Memorandum of Understanding" designed to alleviate international aluminum oversupply problems by requiring the Russian government to reduce Russian output. In a brief opinion, the District Court applied three separate federal antitrust defences: the non-justiciability of a "political question" the "act of state doctrine" and the Noerr-Pennington protection for petitioning government action. The court found no genuine issues of fact supporting claims that a private - as opposed to intergovernmental - production agreement had occurred.

In *Caribbean Broadcast System Ltd. v. Cable and Wireless PLC*, 1996-1 Trade Cas. (CCH) paragraph 71 263 (D.D.C. 1995), the plaintiffs, a radio broadcasting company organised under the laws of the British Virgin Islands and its US citizen sole shareholder, sued various British companies alleging violations of the Sherman Act and of the Lanham Trademark Act. Plaintiffs alleged that the defendants misrepresented the coverage and strength of their radio station, thereby creating a barrier to plaintiffs' entry

into the television and radio market in the British Virgin Islands by preventing plaintiffs from gaining access to advertising revenues. In granting defendants' motion to dismiss, the Court found that plaintiffs had demonstrated no adverse effect on US commerce, or on prices and supplies in the relevant market, as the only harm alleged was to the plaintiff broadcaster itself, which at most would form the basis for a commercial tort action. In addition, the Court found that jurisdiction was lacking because the plaintiffs were neither importers nor exporters of US goods and services, but rather were foreign sellers of a foreign product, namely broadcast airtime on stations in Tortola. "Because there are no allegations that Defendants' alleged misconduct has had any kind of anti-competitive effect on US advertisers or consumers, and there are no facts showing how US commerce has been adversely affected, the antitrust claims must be dismissed for lack of subject matter jurisdiction ...."

### ***Statistics on private and government cases filed during FY 1996***

According to the annual report of the Director of the Administrative Office of the US Courts, 720 new civil and criminal antitrust actions, both governmental and private, were filed in the federal district courts in the FY 1996.

### ***Significant DOJ and FTC enforcement actions***

#### *DOJ criminal enforcement*

On August 27, 1996, the Division filed six one-count felony informations in the US District Court in Chicago, charging two Japanese firms and one US-based Korean subsidiary with conspiring to fix prices to eliminate competition and allocate sales in the lysine market world-wide. The Division alleged that Ajinomoto Co. Inc. of Tokyo, Japan and its executive Kanji Mimoto, Kyowa Hakko Kogyo Co. Ltd. of Tokyo, Japan and its executive, Masaru Yamamoto, and Sewon America Inc. of Paramus, New Jersey and its President, Jhom Su Kim, agreed to increase the price of lysine and allocate the volume of lysine to be sold among the corporate conspirators, and participated in meetings and conversations for the purpose of monitoring and enforcing adherence to the agreed-upon prices during the period of June 1992 through June 27, 1995. On October 15, 1996, following a guilty plea, the defendants were fined more than \$20 million.

On October 15, 1996, in the same investigation, the Division filed a two-count felony information in the US District Court in Chicago charging Archer Daniels Midland Co. with conspiring to suppress and eliminate competition in the lysine market and in the citric acid market. Following a guilty plea, ADM agreed to pay a \$100 million criminal fine - the largest criminal antitrust fine ever - for its role in the conspiracy. Lysine, a \$600 million a year industry, is an amino acid used by farmers as a feed additive to ensure the proper growth of poultry and swine. Citric acid, a \$1.2 billion a year industry, is a flavour additive and preservative found in soft drinks, processed food, detergents, pharmaceutical and cosmetic products. Three ADM executives have also been indicted in this investigation.

On December 13, 1995, a grand jury in the District of Massachusetts returned a two-count felony indictment presented by the Antitrust Division charging various companies and individuals with fixing prices of jumbo rolls of thermal facsimile paper. Count I of the indictment alleged that Jujo Paper Co., Ltd. of Tokyo, Japan, and Nippon Paper Industries Co., Ltd. of Tokyo, Japan participated in a conspiracy to fix fax paper prices charged in North America in 1990. Count II of the indictment charged that Appleton Papers, Inc. of Appleton, Wisconsin, Jerry Wallace, an executive of Appleton Papers Inc., and Hirinori Ichida, an executive of Mitsubishi Paper Mills, Ltd. participated in a conspiracy to fix prices for fax paper charged in North America in 1991 and 1992. The charges against Appleton Papers and Wallace were subsequently severed and transferred to the Eastern District of Wisconsin. On January 13, 1997, a jury sitting in the US District Court for the Eastern District of Wisconsin found Appleton Papers and Wallace not guilty of the charges of price fixing. Upon motion by Jujo Paper and Nippon Paper, on September 3, 1996, the Court in the District of Massachusetts dismissed the indictment against them for failure to



adequately allege subject matter jurisdiction. The Antitrust Division appealed the Court's decision to the Court of Appeals for the First Circuit. That appeal has been briefed and argued, and the parties are waiting for a decision (see paragraph 23 above).

On April 24, 1996, the grand jury in the District of Massachusetts returned two additional indictments against three fax paper industry executives, all of whom are Japanese nationals. The first indictment alleged that Yoshihiro Kurachi, an executive with Kanzaki Paper Manufacturing Co., Ltd. and Noburu Kurushima, an executive with Mitsubishi Paper Mills, Ltd., met in Japan in 1991 and agreed to increase the prices of fax paper to a particular US customer. The second indictment alleged that Koichi Tano, an executive with Kanzaki Paper Manufacturing Co, Ltd., participated in a price fixing conspiracy in 1991 and 1992 to increase fax paper prices in North America.

On April 26, 1996, again as a result of its investigation into the thermal fax paper industry, the Division filed a one-count felony information in the US District Court in Massachusetts charging Honshu Paper Co. of Tokyo, Japan, with conspiring with others to increase the prices of thermal fax paper sold in the United States in 1991. Following a guilty plea, Honshu was ordered by the Court to pay a criminal fine of \$225 000.

On March 6, 1996, the Division filed a one-count felony information in the US District Court in Dallas, against ETI Explosives Technologies International Inc. of Wilmington, Delaware, charging a conspiracy to restrain competition in the commercial explosives industry. Following a guilty plea, ETI Inc. was fined \$950 000 for rigging bids on explosives contracts sold to customers in Alaska. On September 16, 1996, similar charges were brought against six distributors of commercial explosives. Amos L. Dolby Co. of Corsica, Pennsylvania, Douglas Explosives Inc. of Philipsburg, Pennsylvania, D.C. Guelich Explosives Co. of Clearfield, Pennsylvania, Hilltop Energy Inc. of Lisbon, Ohio, Kesco Inc. of Butler, Pennsylvania, and Ren-Loi Inc. of Cuddy, Pennsylvania, all pleaded guilty to the charges and agreed to pay a total of \$900 000 in criminal fines.

On September 26, 1996, the Division filed a one-count felony information in the US District Court in Dallas, charging Austin Powder Co. and its Evansville regional manger, Thomas F. Mechtenburg, with conspiring with others between 1987 and 1992 to fix prices of commercial explosives and to rig bids submitted to certain customers. Following a guilty plea, Austin Powder Co. was fined \$seven million and Mechtenburg was fined \$20 000. Commercial explosives, a \$one billion per year industry in the United States, are used primarily in the mining, construction, and oil and gas exploration industries. Since September 1995, the Division's investigation into this industry has resulted in 12 guilty pleas by eleven corporations and two individuals, and \$36 million in criminal fines.

On May 30, 1996, the Division filed a one-count felony information in the US District Court in Philadelphia, charging A&L Mayer Associates, Inc. with conspiring with others to suppress and eliminate competition in the sale of tampico fibre from January 1990 to April 1995. Tampico fibre, a \$four-five million a year industry in the US, is a vegetable fibre imported from Mexico used to make household scrub brushes and brooms, and consumer and industrial brushes. Following a guilty plea, A & L Mayer Associates agreed to pay a \$700 000 criminal fine. The Division also filed a civil complaint and proposed consent decree alleging that A & L Mayer Associates, A & L Mayer Inc., and Fibras Saltillo (their Mexican processor) engaged in anti-competitive activity, including retail price maintenance agreements which artificially inflated prices. On September 26, 1996, similar criminal and civil charges were filed in the US District Court in Philadelphia against Ixtlera de Santa Catarina, S.A. de C.V., the other primary Mexican processor, and MFC Corporation of Laredo, Texas, its US distributor. Following guilty pleas, these defendants agreed to pay a total of \$1.5 million in fines.

*DOJ non-merger civil enforcement*

In February 1996, the Division brought its fourth challenge of a most favoured nation clause provision in *US v. Delta Dental of Rhode Island*. The Division's complaint alleged that Delta Dental, Rhode Island's largest dental care insurer, reduced competition in the dental services and dental insurance markets through agreements with its participating dentists that had the effect of preventing dentists from cutting fees below those offered in the Delta Plan. See 1996-2 Trade Cases (CCH) paragraph 71 609 for the text of the complaint.

The Division filed a complaint and proposed consent decree in *US v. American National Can* (D.D.C. filed June 25, 1996) to break up an exclusive deal between two of the leading producers of equipment used to make laminated tubes for toothpaste, both of whom also manufactured and sold these tubes in the US and owned and licensed rights to laminated tube-making technology world-wide. According to the Division's complaint, KMK Maschinen AG, a Swiss corporation whose US laminated tube-making operations were conducted through Swisspack, a New Jersey corporation, exited the US tube market by selling Swisspack to American National Can, agreed to sell its tube-making equipment exclusively to American National Can, and gave American National Can exclusive rights to license KMK's technology in North America. In return, American National Can agreed to buy all tube-making equipment and to license any related technology for use in North America only from KMK; at about the same time, American National Can exited the tube-making equipment business. The proposed settlement would increase the source of tube-making equipment and technology by terminating the exclusive licensing agreement between the two companies and would enable KMK to re-enter the laminated tubes market in North America. The text of the final consent decree appears at 7 Trade Reg. Rep. (CCH) paragraph 50 805.

In *US v. Alex. Brown & Sons, Inc., et al.*, the Division filed a civil antitrust suit and proposed settlement charging 24 major Nasdaq market-makers who buy and sell stocks to the investing public with inflating the quoted "inside spread" - the difference between the best buying price and the best selling price of a stock - in a substantial number of Nasdaq stocks, resulting in investors having to pay more to buy or sell stocks than they would have in a competitive market. The Division's complaint alleged that the firms and others adhered to and enforced a "quoting convention" that was designed to deter price competition among the firms and other market-makers in the trading of Nasdaq stocks. The proposed settlement requires the settling firms to stop the practice that inflated transaction costs and to monitor and record up to 3.5 percent of the telephone conversations of their Nasdaq traders. In addition, under the proposed settlement, Division representatives can listen in on traders' conversations, to monitor compliance with the decree. A text of the proposed settlement appears at 7 Trade Reg. Rep. (CCH) paragraph 50,806.

In *US v. Universal Shippers Association, Inc.*, the Division filed a civil antitrust suit on August 26, 1996, challenging an agreement between Universal, one of the country's largest wine and spirits importers' association based in Bedford, Virginia, and the Lykes Bros. Steamship Company Inc., a major carrier of wine and spirits headquartered in Tampa, Florida. The Division's complaint alleged that the agreement required Lykes to charge other importers at least five percent more in shipping costs than it charged Universal, giving Universal an unreasonable advantage over its competitors. The consent decree prohibits Universal from agreeing to or enforcing an automatic rate differential clause in any contract and also nullifies any automatic rate differential clause in any existing contract. The text of the final consent decree appears at 7 Trade Reg. Rep. (CCH) paragraph 50 808.

*Modification or termination of DOJ consent decrees*

On October 11, 1995, the Division filed a motion to modify the Modification of Final Judgement of the 1982 AT&T consent decree and to allow US West Inc. to provide long distance telephone services outside of its 14 state region to customers outside of its region who sign up for its planned local telephone services. The Division stated that the ability to offer long distance services to customers who choose US

West's competitive local telephone services is likely to make those services more attractive to customers, and encourage the development of local telephone service in the markets that US West will enter.

Following passage of the Telecommunications Act of 1996, the United States moved for an order formally terminating the 1982 AT&T consent decree. On April 11, 1996, the district court (Judge Harold Greene) granted the motion, and terminated the decree, *nunc pro tunc*, as of February 8, 1996, the date the Act had become law. *United States V. Western Electric Co.*, 1996 Trade Cas. paragraph 1 364, 1996 WL 2559904 (D.D.C.). As the Court, the Department, and all parties agreed, termination was appropriate because the 1996 Act, which builds upon the success of the decree in promoting competition, expressly provides (in paragraph 601) that the Communications Act of 1934 as amended by the 1996 Act - and not the decree - prospectively governs the BOCs' activities. The court further ruled that the Department of Justice and the FCC may use, in connection with their duties under the 1996 Act, certain documents that the Department obtained from the BOCs pursuant to the decree. Finally, the court dismissed as moot all other pending motions under the decree.

On July 2, 1996, the Division filed documents in the US District Court in New York, agreeing to terminate the remaining provisions of the 1956 antitrust consent decree with IBM. The decree's main provisions were entered to create a market in used equipment that competed with IBM's new machines and to limit its monopoly power in the computer market. The proposed settlement would terminate by July 2001 the decree's provisions as they currently apply to IBM's midframe and mainframe computers.

#### *FTC non-merger enforcement actions*

#### *Commission administrative decisions*

In March, 1996, the Commission issued an order prohibiting the California Dental Association (CDA), a professional association with 19 000 members, from imposing a variety of restrictions on truthful and non-deceptive advertising and solicitation practices of its members. The Commission determined that the CDA had illegally restrained advertising of the price, quality, and availability of dental services and coerced compliance through expulsion and other means. In a key section of its opinion, the Commission found that broad, categorical bans on advertising of low prices and discounts are as anti-competitive as outright price fixing. *California Dental Ass'n*, Docket No. 9259, 5 Trade Reg. Rep. (CCH) paragraph 24 007.

In May, 1996, the Commission issued an administrative complaint charging that Toys "R" Us, the nation's largest toy retailer, used its market power to keep toy prices higher and to reduce toy outlet choices for consumers. The Commission seeks an order prohibiting Toys "R" Us from engaging in the anti-competitive activities alleged in the complaint. The matter is presently in litigation before an Administrative Trial Judge. *Toys "R" Us, Inc.*, Docket No. 9278, 5 Trade Reg. Rep. (CCH) paragraph 24 034.

The Commission, in September, 1996, dismissed on public interest grounds its administrative complaints against six of the largest publishers in the US charging that they had favoured large bookstore chains with price and promotional discounts not available to independent book stores. The grounds for the dismissal were (1) changes in the industry that have replaced the principal forms of alleged price discrimination and (2) private litigation that had resulted in settlements with four of the publishers. *Harper & Row*, Docket No. 9217, *Macmillan*, Docket No. 9218, *Hearst/Morrow*, Docket No. 9219, *Putnam Berkley*, Docket No. 9220, *Simon & Schuster*, Docket No. 9222, *Bantam*, File No. 801-0059, 5 Trade Reg. Rep.(CCH) paragraph 23 288.

In July, 1996, an Administrative Law Judge issued an initial decision finding that the International Association of Conference Interpreters (AIIC), a voluntary professional association of interpreters based in Geneva, Switzerland, and the US Region of AIIC (its US affiliate members), conspired to fix or stabilise the fees for interpretation services performed in the US, and imposed a variety of restrictions that illegally restrained competition among them. The initial order prohibits the organisations from, among other things, fixing, or otherwise interfering with price, fee or certain other forms of competition among members working in the US. The case is currently on appeal before the Commission. *International Ass'n of Conference Interpreters*, Docket No. 9270, 5 Trade Reg. Rep. (CCH) paragraph 24 080.

The Commission, in May, 1996, issued a final consent order settling charges that Dell Computer Corporation restricted competition in the personal computer industry and undermined the standard-setting process by threatening to exercise its patent rights, which Dell failed to disclose during such process, against computer manufacturers adopting the VL-bus standard. Under the final order, Dell cannot enforce its patent rights against computer manufacturers using the VL-bus, the technology of choice in computers that use "486" chips. *Dell Computer Corp.*, Docket No. C-3658, 5 Trade Reg. Rep. (CCH) paragraph 24 054.

In June, 1996, the Commission gave final approval to a consent order settling charges against RxCare of Tennessee, Inc., a leading provider of pharmacy network services in that state, that its use of a "most favoured nation" clause in its pharmacy participation agreements discourages pharmacies from discounting and thereby limits price competition among such pharmacies in their dealings with pharmacy benefits managers and third-party payers. The order bars the respondent from having such clause in its pharmacy participation agreements. *RxCare of Tennessee*, Docket No. C-3664, 5 Trade Reg. Rep. (CCH) paragraph 23 957.

Two leading manufacturers of truck-mounted fire pumps agreed to settle FTC charges that each imposed restraints requiring their customers to deal exclusively in that manufacturer's pumps, thereby reducing competition between the two firms and impeding entry into this market by other firms. The consent order prohibits the companies from engaging in the challenged practices or similar ones. *Hale Products, Inc.*, Docket No. C-3693, C-3694, 5 Trade Reg. Rep. (CCH) paragraph 24 076.

Other consent orders, final or proposed subject to public comment, are:

- *Precision Moulding Co., Inc.* (attempt to fix prices of stretcher bars for artist's canvases), Docket No. C-3682, 5 Trade Reg. Rep. (CCH) paragraph 24 049 (Final);
- *New Balance Athletic Shoe Inc.* (resale price maintenance), File No. 921-0050, 5 Trade Reg. Rep. (CCH) paragraph 24 098 (Proposed).

#### *Federal District Court Decisions*

Federated Department Stores agreed to pay a \$250 000 civil penalty for allegedly violating a 1979 FTC order prohibiting it from interfering with entry of another tenant in any shopping mall in which it operates a store. The complaint and proposed consent judgement were filed in October, 1996 in federal district court. *Federated Department Stores Inc.*, Docket No. C-2958, 5 Trade Reg. Rep. (CCH) paragraph 23 912.

***Business reviews conducted by the department of Justice***

From October 1, 1995 to September 30, 1996, the Antitrust Division responded to 24 requests for review of written business proposals. In 22 of the responding letters, the Division stated that it would not challenge the proposed conduct. The approved business practices include nine non-exclusive physician networks, three medical data and clinic networks, and three health care managing networks. In addition, the Division approved practices including: joint proposals to truck and rail carriers by transportation companies; advance pricing negotiation by a credit union representative for car sales; and the development of a national marketing program for independent automotive damage appraisers. All of these business review letters can be found at 6 Trade Reg. Rep. (CCH) paragraph 44 096; those of particular interest are described below.

On February 22, 1996, the Division approved the proposal by Southwest Power Pool, Inc. to create a computerised trading system that would allow real-time trading of electric power on a next-hour basis. The Division stated that the proposal will not likely foster price collusion and an increased efficiency could foster price rivalry to the benefit of the consumer.

On May 13, 1996, the Division stated that it would not challenge a proposal by three Texas oil-well-drilling suppliers - Baker Hughes Inteq and M-1 Drilling Fluids of Houston and Dresser Industries Inc. of Dallas - to buy jointly Chinese produced barite, a chemical used in the oil-drilling process. The Division stated its belief that the proposed joint venture will not likely have an anti-competitive effect since Chinese barite purchased by the three firms accounts for less than 35 percent of world barite production.

On March 1, 1996, the Division announced that it would not approve a proposal by a group of southern New Jersey pediatricians to form a physician network. The proposed network would have been formed by pediatricians to negotiate and contract with managed care plans to provide basic health care for children. The Division stated that the network would comprise approximately 50-75 percent of the primary-care pediatricians in several local markets for pediatric services and could likely be used to raise prices to consumers without countervailing pro-competitive benefits.

On March 8, 1996, the Division advised five groups of anesthesiologists based in Orange County, California, that it would not approve their proposal to deal jointly through a single price-setting unit with managed health care plans. The Division explained in a business review letter that the proposal would have reduced the number of anesthesia groups available to serve local hospitals in Orange County from six to two and would have likely resulted in higher health care costs. The Division also concluded that new groups were unlikely to enter the area to offset the substantial reduction in competition.

**3. 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 Pre-merger Notification Program was enacted to provide the enforcement agencies with a meaningful opportunity to review proposed transactions and to take enforcement action, if appropriate, to prevent consummation of transactions that violate the antitrust laws. Only those mergers meeting certain size or other criteria are required to be reported under the Act.

During FY 1996, 3 087 proposed mergers and acquisitions were submitted for review under the notification and filing requirements of the HSR Act. This was a record number - a nine percent increase over the number reported in the previous fiscal year. The purchase price of 836 of these transactions exceeded \$100 million. More than half involved acquisitions of only voting securities. A wide variety of

industries were involved including defense, medical equipment, industrial gases, supermarkets, pharmaceuticals, computer software systems, chemicals, cable television and funeral homes.

*DOJ review of mergers*

The Division initiated 237 merger investigations, 186 HSR and 49 non-HSR. Of the 186 HSR investigations, 102 involved second requests and/or civil investigative demands ("CIDs"). Of the 49 non-HSR merger investigations, 15 involved the issuance of CIDs.

*FTC review of mergers*

Based on its review of pre-merger notification reports, the FTC investigated 36 transactions with second requests for information.

*Enforcement of pre-merger 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. In FY 1996, four civil penalty actions were brought. In addition, a "hold separate" agreement was negotiated in a pending investigation.

In February, 1996, Sara Lee Corporation agreed to pay a record \$3.1 million civil penalty for deliberately failing to pre-notify its acquisition of Reckitt and Coleman's shoe care products assets as required by the HSR Act. *Sara Lee Corporation*, File No. 921-0023, 5 Trade Reg. Rep. (CCH) paragraph 23 972.

Automatic Data Processing agreed in March, 1996 to pay \$2.97 million for failing to include key competitive documents in a HSR filing in connection with its April, 1995 acquisition of AutoInfo, Inc.'s assets. (The documents ultimately were submitted.) *Automatic Data Processing, Inc.*, File No. 951-0113, 5 Trade Reg. Rep. (CCH) paragraph 24 006.

Other civil penalty actions are: *Foodmaker, Inc.*, File No. 941-0056, 5 Trade Reg. Rep. (CCH) paragraph 24 087 (\$1.45 million, knowing failure to make HSR filing); and *Titan Wheel International, Inc.*, File No. 941 0110, 5 Trade Reg. Rep. (CCH) paragraph 24 026 (\$130 000, failure to observe HSR waiting period).

In a pending investigation of a consummated transaction, the Commission in September, 1996 negotiated a "hold separate" agreement with Mahle GmbH, a German firm, to prevent it from exercising any control over its competitor, Metal Leve S.A., a Brazilian firm in which Mahle acquired a controlling interest without first making the required HSR filings. Civil penalties are under consideration. *Mahle GmbH*, File No. 961-0085, 5 Trade Reg. Rep. (CCH) paragraph 24 096.

*Significant merger cases*

*DOJ merger challenges or cases*

On December 12, 1995, the Division and the State of Texas filed a joint complaint and proposed consent decree in connection with the proposed merger of Kimberly Clark Corporation and Scott Paper Co. The complaint alleged that a combination of the companies as proposed would control nearly 60 percent of sales of facial tissue and more than 55 percent of sales of baby wipes, allowing them to increase prices to consumers and substantially reduce competition. Under the consent decree, the companies are required to divest Scott's baby wipes and facial tissue business. See 1996-1 Trade Cases paragraph 71 405 for the text of the final consent decree.

On March 29, 1996, the Division filed a civil antitrust suit and proposed consent decree in connection with the proposed merger of Georgia-Pacific Corporation, one of the nation's largest gypsum drywall producers, and Domtar Inc., a Canadian corporation. The complaint alleged that the merger would lessen competition for drywall gypsum, also known as wallboard or sheetrock, facilitate co-ordinated pricing activity and raise prices to consumers in the north-eastern United States. The consent decree requires Georgia-Pacific to divest plants in Wilmington, Delaware and Buchanan, New York. See 1996-2 Trade Cases (CCH) paragraph 71 560 for the text of the final consent decree.

On June 11, 1996, the Division filed a civil antitrust suit in the US District Court in Washington to block American Skiing Company's proposal to purchase S-K-I Ltd, challenging that the deal would raise prices and eliminate discounts of skiing packages. At the same time, the Division filed a proposed consent decree that would require American Skiing to sell its New Hampshire ski resorts at Waterville Valley and Mount Cranmore to preserve competition. See 1996- 2 Trade Cases (CCH) paragraph 71 627 for the text of the final consent decree.

On June 19, 1996, the Division and Attorneys General from seven states challenged the proposed merger of two of the nation's largest legal publishers. In a joint antitrust suit filed in the US District Court in Washington, the Division and Attorneys General from California, Connecticut, Illinois, Massachusetts, New York, Washington and Wisconsin alleged that the proposed merger of Thomson Corp. and West Publishing Co. would reduce competition substantially in nine markets for enhanced primary law, and in a number of markets for secondary legal sources such as treatises and legal guides, and in the on-line computer legal research market. Under the proposed consent decree, Thomson is required to divest more than 50 products. See 7 Trade Rep. Reg. (CCH) paragraph 50 803, Case No. 4217 for the text of the proposed consent decree.

On August 5, 1996, the Division filed a civil antitrust suit in the US District Court in Cincinnati to block the proposed merger of Jacor Communications Inc. and Citicasters Inc., two of the nation's largest radio station owners. The Division alleged that a combination of the two companies would control more than 50 percent of sales of radio advertising time in Cincinnati, and could enable the companies to increase prices to advertisers and substantially lessen competition. Under a consent decree filed at the same time, Jacor and Citicasters agreed to divest WKRQ-FM, a leading Cincinnati contemporary music station, to an independent buyer. See 7 Trade Rep. Reg. (CCH) paragraph 50 807, Case No. 4225 for the text of the final consent decree.

On September 13, 1996, in a joint settlement, the Texas Attorney General's office and the Division approved a deal between the two largest tortilla flour manufactures, after the companies agreed to divest a flour mill in the Texas panhandle simultaneously with the closing of the transaction. As a result of the restructuring, Archer Daniels Midland Co. was permitted to acquire 22 percent of Gruma S.A. de C.V., a Mexican company. The two companies will also be able to form a partnership to combine their US masa flour milling operations.

*Merger cases brought by the FTC*

*Preliminary injunctions authorised*

In December, 1995, the Commission sought a federal court order to enjoin, pending the outcome of an administrative trial, a proposed acquisition by Questar Corp. of certain pipeline assets of Tenneco, Inc. that allegedly would have allowed Questar to reassert a monopoly over the transmission of natural gas to industrial customers in the Salt Lake City, Utah area. The defendants abandoned the transaction after the complaint was filed. The court then dismissed the complaint without prejudice. *Questar Corp.*, File No. 961-0001, 5 Trade Reg. Rep.(CCH) paragraph 23 949.

In January, 1996, the Commission sought a federal court order to enjoin, pending the outcome of an administrative trial, a proposed transaction that would combine the two leading general acute care hospitals, Butterworth Health Corp. and Blodgett Memorial Medical Center, in Grand Rapids, Michigan. Following a hearing, a district court judge denied the Commission's request for preliminary injunctive relief. The Commission appealed and was granted an expedited hearing before the US Court of Appeals for the Sixth Circuit. *Butterworth Hospital*, File No. 951- 0126, Case No. 1:96-CV-49, 7 Trade Reg. Rep. (CCH) paragraph 71 571.

In April, 1996, the Commission was prepared to seek a federal court order to enjoin, pending the outcome of an administrative trial, a proposed acquisition of Revco D.S. Inc., by Rite Aid Corp., which would merge the two largest retail drug chains in the US and allegedly reduce substantially competition for prescription drugs sold in retail pharmacy outlets in numerous areas. The parties abandoned the transaction just before the complaint was filed. *Rite-Aid Corp.*, File No. 951-0120, 5 Trade Reg. Rep. (CCH) paragraph 24 041.

*Commission administrative decisions*

In February, 1996, the Commission gave final approval to a consent agreement with The Upjohn Co., and Pharmacia Aktiebolag, a Swedish firm, regarding their \$13.9 billion merger which raised antitrust concerns in an innovation market. The consent order, which requires divestiture of certain Pharmacia assets to a Commission-approved buyer, is designed to preserve competition in the research and development of drugs for treating colorectal cancer and to assure lower prices when those drugs reach the market. *Upjohn Co.*, Docket No. C-3638, 5 Trade Reg. Rep. (CCH) paragraph 23 914.

In April, 1996, the Commission issued a final consent order settling charges that the acquisition by the Scottish firm Devro International PLC (through its US subsidiary), of Teepak International, Inc., by combining the nation's top two producers of collagen sausage casings, likely would substantially reduce competition and result in higher prices in this market. The order requires Devro to divest the assets it uses to produce such casings in the US to a Commission-approved buyer. *Devro International plc*, Docket No. C 3650, 5 Trade Reg. Rep. (CCH) paragraph 23 940.

A final consent order was issued in May, 1996 settling charges that Litton Industries, Inc.'s acquisition of PRC Inc. would give it access to competitively sensitive, non-public information about the only other Aegis destroyer producer, thereby giving Litton a competitive advantage and result in increased prices for the US Navy's Aegis destroyer program. The consent order requires Litton to divest PRC's \$40 million systems engineering and technical assistance contract for the Aegis program and represents the first divestiture order in a defense industry market. *Litton Industries, Inc.*, Docket No. C-3656, 5 Trade Reg. Rep. (CCH) paragraph 23 983.

The Commission in June, 1996 gave final approval to a consent agreement with Compagnie de Saint-Gobain and its US subsidiary, Saint-Gobain/Norton to settle charges that its acquisition of The Carborundum Company from British Petroleum Company likely would lead to monopolies or near-monopolies in the markets for three products used in industrial furnaces and home appliances (fused cast refractories, silicon carbide refractories, and hot surface gas igniters). The consent order requires Saint-Gobain to divest businesses and associated assets in each of these markets. *Compagnie de Saint-Gobain*, Docket No. C-3673. 5 Trade Reg. Rep. (CCH) paragraph 23 985.

Lockheed Martin Corp. settled FTC charges that its \$9.1 billion acquisition of the Loral Corporation would reduce competition in the markets for air traffic control systems, commercial low earth orbit satellites, commercial geosynchronous earth orbit satellites, military tactical fighter aircraft and unmanned aerial vehicles. The final order, issued in September, 1996, among other things, requires divestiture of an air traffic control system-related contract; limits Lockheed Martin's ownership of Loral Space (a newly-created company consisting of Loral's space and telecommunications businesses); prohibits



Lockheed Martin from providing certain technical services or information regarding satellites to Loral Space; and requires firewalls to limit information flows about competitors' tactical fighter aircraft and unmanned aerial vehicles. *Lockheed Martin Corp.*, Docket No. C-3685, 5 Trade Reg. Rep. (CCH) paragraph 24 126.

The Commission in July, 1996 accepted, subject to public comment, a proposed consent agreement with Fresenius AG and its US subsidiary to divest its Lewisberry, Pennsylvania hemodialysis (HD) concentrate plant to Di-Chem, Inc., to resolve antitrust concerns stemming from Fresenius' proposed acquisition of National Medical Care, Inc. (NMC). According to the FTC complaint, Fresenius' proposed acquisition of NMC would combine two significant producers of HD concentrate in the US in a highly concentrated market, thereby increasing the likelihood of co-ordinated interaction about HD concentrate producers and likely leading to higher prices for the product. *Fresenius AG*, File No. 961-0053, 5 Trade Reg. Rep. (CCH) paragraph 24 077.

In September, 1996, the Commission accepted, subject to public comment, a proposed consent agreement with Time Warner Inc. that restructured its \$7.5 billion acquisition of Turner Broadcasting System, Inc. to settle charges that the merger would restrict competition in cable television programming and distribution. The Commission complaint alleged that the acquisition, along with related agreements, would allow Time Warner to raise unilaterally consumer prices for cable television and to limit programming choices. The proposed order would require the parties to make a number of structural changes and to abide by certain restrictions designed to break down the entry barriers create by the deal. *Time Warner Inc.*, File No. 961-0004, 5 Trade Reg. Rep. (CCH) paragraph 24 104.

Other consent orders, final or proposed, are the following: *Loewen Group International, Inc.*, Docket No. C-3677 (final) (funeral homes), 5 Trade Reg. Rep. (CCH) paragraph 24 027; *Loewen Group Inc.*, Docket No. C-3678 (final) (funeral homes), 5 Trade Reg. Rep. (CCH) paragraph 24 027; *Service Corp. International, Inc.*, Docket No. C-3646 (final) (funeral homes, crematories), 5 Trade Reg. Rep. (CCH) paragraph 24 018; *Stop and Shop Companies Inc.*, Docket No. C-3649 (final) (grocery stores), 5 Trade Reg. Rep. (CCH) paragraph 24 018; *Johnson & Johnson Inc.*, Docket No. C-3645 (final) (cranial shunts), 5 Trade Reg. Rep. (CCH) paragraph 23 994; *Praxair Inc.*, Docket No. C-3648 (final) (industrial gases), 5 Trade Reg. Rep. (CCH) paragraph 23 952; *Illinois Tool Works, Inc.*, Docket No. C-3651 (final) (industrial power sources and engine drives), 5 Trade Reg. Rep. (CCH) paragraph 23 968; *Hughes Danbury Optical Systems, Inc.*, Docket No. C-3652 (final) (deformable mirrors), 5 Trade Reg. Rep. (CCH) paragraph 23 976; *Raytheon Co.*, Docket No. C-3681 (final) (submarine satellite communications equipment), 5 Trade Reg. Rep. (CCH) paragraph 24 051; *Koninklijke Ahold N.V.*, Docket No. C-3687 (final) (grocery markets), 5 Trade Reg. Rep. (CCH) paragraph 24 071; *NGC Corp.*, File No. 961-0046 (proposed) (natural gas liquids fractionation), 5 Trade Reg. Rep. (CCH) paragraph 24 093; *Castle Harlan Partners*, File No. 961-0067 (proposed) (class rings), 5 Trade Reg. Rep. (CCH) paragraph 24 113; and *Wesley-Jessen Corp.*, File No. 961-0060 (proposed) (opaque contact lenses), 5 Trade Reg. Rep. (CCH) paragraph 24 117.

#### **4. Regulatory and trade policy matters**

##### ***Regulatory policies***

##### ***DOJ activities with respect to Federal and State Regulatory Matters***

The Division participated actively in regulatory proceedings in order to promote competition. During FY 1996, the Division filed comments in:

- Federal Communications Commission proceedings involving revision of rules and policies for direct broadcast satellite services; implementation of the local competition provisions in the

Telecommunications Act of 1996; the petition of MFS Communications Company, Inc. for pre-emption by the FCC of local entry barriers (certification requirements) in the District of Columbia; and rule-making to amend the Commission's rules to redesignate certain frequency bands and to establish rules and policies for local multipoint distribution service and for fixed satellite services.

- Department of Transportation (DOT) proceedings: the Division filed comments supporting a DOT notice of proposed rulemaking that would bar computer reservation systems ("CRSs") from requiring airlines to participate at as high a level on their CRS as they do on any other CRS. The comments also supported an exception to the rule that would permit CRSs to require equal participation from airlines that owned, were affiliated with, or marketed a competing CRS.
- Union Pacific/Southern Pacific Merger: the Department actively participated in proceedings before the Surface Transportation Board (STB) on the Union Pacific/Southern Pacific (UP/SP) merger. The UP and SP were two of only three Class I railroads (those with annual operating revenues over \$250 million) in the western United States. In April 1996, the Department filed comments and expert testimony with STB concluding that the merger would significantly reduce competition in many markets where the number of competing railroads would decline from two to one or from three to two. The Department's economic evidence also showed that the trackage rights agreement with Burlington Northern/Santa Fe proposed by the Applicants was insufficient to remedy the competitive harms of the merger. The Department further concluded that the efficiencies claimed by the parties were overstated and that the financial condition of SP did not warrant approval of the transaction. In June 1996, the Department filed a brief urging the STB to reject the merger application. The Department argued that the competitive harms arising from the merger could only be remedied by extensive divestitures, and urged disapproval as the most certain and expeditious way to restore competition. In August 1996 the STB issued a decision approving the merger application as proposed by the parties with only minor additional conditions.
- Federal Energy Regulatory Commission proceedings involving policies and procedures for Federal Power Act review of utility mergers.

In FY 1996, the Division reviewed three applications for new Export Trade Certificates submitted under the Export Trading Company Act and its implementing regulations and concurred in the issuance of two new certificates. (One application was withdrawn.) The goods covered by the certificates included leaf-tobacco and milled rice.

#### *FTC activities with respect to regulatory and state legislative matters*

The goal of the Commission's advocacy activities is to reduce harm to consumers and competition by informing appropriate governmental and self-regulatory bodies about the potential effects, both positive and negative, of proposed legislation, rules or industry guides or codes. The following are examples of some of these activities in FY 1996.

#### *Federal agencies*

FTC staff commented on Federal Communications Commission (FCC) policies for awarding licenses for local multipoint distribution service (LMDS) to local phone or cable companies. Staff said that: *i*) local phone or cable companies that acquired a LMDS license for the same geographic area in which they offer their current service, given enough market power, could either warehouse the LMDS license to forestall a third party from coming in and competing, or could raise the price of both services

they offer; and *ii*) until effective competition is present in these markets, the acquisition of LMDS spectrum licenses by competing local exchange carriers and cable operators presents potentially significant risks.

FTC staff filed comments with the Copyright Office on a recommendation to extend the cable compulsory license to Open Video Systems (OVS), and place copyright liability on the firm providing the programming on the OVS. Staff said that applying the cable compulsory license to OVS would lead to an allocation of resources that better reflected the relative costs of different video distribution methods, and that it would reduce that OVS's cost of acquiring programming and make its acquisition costs comparable to that of other distribution technologies.

#### *States*

FTC staff supported proposed legislation in Tennessee that would permit veterinarians to practice as employees of non-veterinarians under certain conditions. Allowing new business formats, which Tennessee's law now prohibits, could enhance competition and afford consumers a wider selection of services at lower costs.

FTC and DOJ staff opposed the Virginia State Bar's proposal to prevent non-lawyers and title company attorneys from handling closings of real estate transactions and refinancings. They argued that the proposal would increase costs to consumers who would not otherwise hire an attorney and would lead to higher prices for lawyers' settlement services by eliminating competition from lay settlement services.

FTC staff opposed a proposed rule by the Washington legislature requiring candidates for Certified Public Accountant status to earn at least 150 semester hours of undergraduate academic credit since this would raise the educational entry requirements for CPA licensure, likely resulting in increased costs of entry and higher prices for CPAs.

#### *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 US international trade policy. The Division participates in interagency trade policy discussions chaired by the Office of the US 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 US 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 and FTC participate in a number of negotiations and working groups related to regional trade agreements. The Division chairs the US delegation to a working group on trade and competition under the North American Free Trade Agreement, and participates with the Office of the US Trade Representative, the Federal Trade Commission, and State and Commerce Departments in competition policy working groups associated with the Free Trade Area of the Americas and Asia-Pacific Economic Co-operation. The antitrust agencies will also play an important role in the working group to be established in 1997 by the World Trade Organisation to study issues relating to the interaction between trade and competition policy.

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 US 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 co-chairs (with the Office of the US Trade Representative) the Deregulation and Competition Policy portion of the US-Japanese Framework discussions. In these discussions, the United States has urged the Japanese government to strengthen its enforcement of Japan's anti-monopoly law, to make its administrative procedures fair and open, and to accelerate an effective program of deregulation to open markets to competition.

## 5. New studies related to antitrust policy

### *Antitrust Division economic analysis group discussion papers*

The Division issued nine Economic Analysis Group Discussion Papers during the period October 1, 1995 through September 30, 1996.

- 96-1 WERDEN, Gregory J., "A Robust Test for Consumer Welfare Enhancing Mergers Among Sellers of Differentiated Products," EAG 96-1, June 14, 1996. Published at 44 *Journal of Industrial Economics* 409 (1996).
- 96-2 WERDEN, Gregory J., "Simulating the Effects of Differentiated Products Mergers," EAG 96-2, June 24, 1996. Revised versions forthcoming under different titles in *George Mason Law Review* and Julie A. Caswell & Ronald W. Cotterill eds., *Strategy and Policy in the Food System: Emerging Issues*.
- 96-3 McCABE, Mark J., and James G. HEWLETT, "Dynamic Behaviour of Regulated Firms: Evidence from Nuclear Utilities," EAG 96-3, July 1, 1996.
- 96-4 DUNHAM, Wayne R., "Moral Hazard and the Market for Used Automobiles," EAG 96-4, July 11, 1996.
- 96-5 ALEXANDER, Cindy R., and Mark A. COHEN, "New Evidence on the Origins of Corporate Crime," EAG 96-5, July 12, 1996.
- 96-6 EINHORN, Michael A., "INTELSAT: A Reform Proposal," EAG 96-6, July 15, 1996.
- 96-7 ALEXANDER, Cindy R., and Mark A. COHEN, "Why Do Corporations Become Criminals? An Agency Explanation," EAG 96-7, July 16, 1996.
- 96-8 WERDEN, Gregory J., and Luke M. FROEB, "The Entry Inducing Effects of Horizontal Mergers," EAG 96-8, September 20, 1996.
- 96-9 RASKOVICH, Alexander, "Contracts to Mitigate Deadweight Loss," EAG 96-9, September 23, 1996.

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*

The following may be obtained from the Federal Trade Commission, Division of International Antitrust, 6th and Pennsylvania Ave., N.W., Washington, D.C. 20580.

*Economic reports*

- The Salt Producers Discount Practices Before and After the Robinson-Patman Act and the FTC's Challenge to Them: The Morton and International Salt Cases, John L. Peterman, October 1995.
- Disentangling Regulatory Policy: The Effects of State Regulations on Trucking Rates, Timothy P. Daniel and Andrew N. Kleit, November 1995.
- The Effectiveness of Collusion Under Antitrust Immunity: The Case of Liner Shipping Conferences, Paul S. Clyde and James D. Reitzes, January 1996.

*Working papers*

- The Political Economy of Federal Trade Commission Administrative Decision Making in Merger Enforcement, (WP#210), Malcolm B. Coate and Andrew N. Kleit, November 1995.
- A Game Theory Model of Celebrity Endorsements, (WP #211), Mark N. Hertzendorf, March 1996.
- Entry Policy and Entry Subsidies, (WP #212), James D. Reitzes and Oliver R. Grawe, April 1996.



## EUROPEAN COMMISSION\*

(1996)

### Executive Summary

In 1996, as a result of the globalisation of trade and the internationalisation of economic phenomena, there continued to be a considerable need for adjustment of the structures of European economy. Competition policy is an important factor in helping Europe adapt to this new competitive environment brought about by globalisation. It helps ensuring that European businesses and consumers are provided with the best possible services at the lowest possible prices. It also plays a key role in the implementation of the single market, whose mechanisms ensure a better allocation of resources and an optimum efficiency of the economy.

During the year the Commission has taken a number of important steps to modernise its legislative framework. It has adopted a new block exemption on technology transfer agreements which replaced two regulations on know how and patent licensing. It has also pursued its policy of balanced liberalisation in sectors traditionally subject to monopoly such as the telecommunications, postal, energy, and transport sector. As regards merger control, the Commission adopted a proposed amendment to the Merger Regulation. The Commission also finalised its Green Paper on vertical restrictions of competition, which was published in January 1997. To reach greater involvement of the national authorities, the Commission published a draft notice on co-operation with national competition authorities. In order to make the best use of its limited resources in combating cartels, the Commission adopted a notice on the non-imposition or reduction of fines.

The campaign against restrictive practices and abuses of dominant position remains at the forefront of the Commission's competition activities. In a series of investigations the Commission took action against exclusionary practices blocking parallel imports or impeding market access by new entrants. In 1996 the Commission has particularly been dealing with problems of restrictive conduct in sectors which are in the process of liberalisation, such as telecommunications, transport and energy.

In the merger control sphere, the number of decisions taken by the Commission was 15 percent higher than in the previous year. Particularly in the media sector, there has been an increase in the number of cases. Three of the proposed operations were prohibited and two operations were given the green light after an in depth investigation subject to conditions and in one case the operation was aborted by the parties.

The Commission continued to work for the gradual development of co-operation and minimum rules at world level in the area of competition. It took an active role in the work on competition of the OECD, WTO and other international organisations. It co-operated with the competition authorities of third countries on the basis of existing bilateral agreements, and it entered into negotiations on new bilateral agreements. On 18 June, it adopted a communication to the Council proposing the setting-up, within the World Trade Organisation, of a Working Party to begin exploratory work, starting in 1997, on the establishment of an international framework of competition rules. The Commission has prepared opinions

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\* The original language of this document is English

on accession of the Countries of Central and Eastern Europe (CEECs) to the Community. They include a detailed assessment of the measures adopted by those countries in order to develop effective competition policies. The Commission also continued to provide training and support to the competition authorities in these countries.

## **1. Changes to competition policy**

### *Anti Trust (articles 85 and 86)*

#### *Technology transfers*

On 31 January 1996 the Commission adopted a new block exemption Regulation (Commission Regulation (EC) No 240/96) on technology transfer agreements, which came into force on 1 April 1996 and remains in force for a period of ten years. The new exemption replaces two former regulations on know how and patent licensing agreements. The implementation of these former regulations was not without difficulties, due to their over-interventionist approach and legal uncertainty on their application to mixed agreements. The new Regulation provides a single legal instrument and comprises a series of improvements and simplifications. It also reflects the Commission's concern to promote the rapid dissemination of technologies and innovation in the European Union.

The Regulation grants automatic exemptions to all licensing agreements that include certain restrictions of competition normally caught by Article 85(1), essentially territorial restrictions between parties or licensees. It also contains a blacklist of clauses or restrictions that are not permitted. These include inter alia restrictions on prices, quantities and bans on exploiting competing technologies.

The Commission can withdraw the benefit of the block exemption where the licensed products are not exposed to effective competition in the licensed territory. Particular attention will be paid to situations in which the licensee's market share exceeds a threshold of 40 percent.

#### *Decentralisation*

In September the Commission published a draft notice on co-operation between national competition authorities and the Commission in handling cases falling within the scope of Articles 85 or 86 of the EC Treaty. The draft Commission notice provides for machinery to ensure close liaison with the national authorities and prevent contradictory decisions. The Commission invites the Member States which have not already done so to adopt legislation enabling their competition authorities to apply Articles 85(1) and 86 effectively. However, it must be emphasised that the draft notice is intended to form part of the current legal framework in which the Commission has sole power to grant exemptions under Article 85(3).

#### *Leniency programme*

On 10 July 1996 the Commission adopted a notice on the non-imposition or reduction of fines in cartel cases. Combating secret cartels, being most harmful to consumers and to the European Community, is a priority task for the Commission. However, the campaign against the most harmful types of cartels is a difficult task and one which is costly in terms of human resources. The notice specifies the conditions under which companies co-operating in the preliminary investigation or proceedings in respect of an infringement can receive immunity from fines or a reduction in the fine which would otherwise have been imposed upon them.

Since the publication of the notice a number of firms have approached the Commission. The Commission hopes that the notice will dissuade firms from engaging in the most harmful and reprehensible anti-competitive practices.



*De Minimis agreements*

On 22 January 1997 the Commission adopted a draft revised notice on agreements of minor importance which do not fall under Article 85(1) of the EC Treaty. The current 1986 notice, last amended in 1994, sets quantitative criteria under which agreements that restrict competition are not caught by the ban on restrictive agreements if they are unlikely to have an appreciable effect on trade between Member States and on competition within the common market. One of the main objectives of the review of the current notice is to provide firms with a satisfactory degree of legal certainty.

The Commission proposes to abolish the turnover threshold which restricted the scope of the notice to promoting co-operation between small and medium-sized enterprises (SMEs). The new notice draws a clear distinction between horizontal and vertical agreements. In the case of horizontal agreements, the market share threshold will be maintained at its current level of five per cent. In the case of vertical agreements, which are generally less harmful to competition, the threshold should be increased to ten percent. However, the applicability of Article 85(1) cannot be ruled out in the case of certain agreements which, by their very nature, represent serious restrictions of competition, including price fixing, production or sales quotas, and market sharing. Even so, the Commission would take action on such agreements only, and exceptionally, to the extent that Community interest so required.

*Access to the file*

Access to file is a key element in administrative proceedings, enabling firms to defend themselves properly, while reconciling the need to protect sensitive information and the public interest in having infringements of the competition rules brought to an end. On 23 January 1997 the Commission adopted a notice on internal rules of procedure for processing requests for access to the file in cases pursuant to Article 85 and 86 of the EC Treaty, Articles 65 and 66 of the ECSC Treaty and Council Regulation (EEC) No 4064/89. The notice deals with the scope and limits of access to the file, and the practical procedures for access. It also sets out criteria for distinguishing between non-communicable and communicable documents. The Commission believes that the new procedures will provide a pragmatic and effective solution to most of the problems encountered in connection with access to the file, while ensuring that firms are fully able to exercise their right to be heard.

*Green paper on vertical restraints*

On 22 January 1997 the Commission adopted the Green Paper on vertical restraints in EU competition policy. The two current block exemption Regulations covering vertical restraints are to expire by the end of 1999. The Green paper sets out different alternatives for future policy and asks for public consultation on four (not exhaustive) options, i.e. (i) maintain current system, (ii) wider block exemptions, (iii) more focused block exemptions, (iv) reduce the scope of Article 85(1). The third option proposes to limit the exemption given by current block exemptions to companies with market shares below a certain threshold. The last option proposes for parties with a market share less than, for example, 20 percent to introduce a rebuttable presumption of compatibility with Article 85(1) ("the negative clearance presumption").

*Car distribution*

Since 1 October 1996 the new block exemption Regulation relating to the distribution and servicing of motor vehicles (Commission Regulation (EC) No 1475/95) is in force. In its biannual studies on car prices within the Community, the Commission found that car prices within the Community still differ substantially. As price differences are the strongest incentive for parallel trade, end consumers increasingly seek to purchase a vehicle in Member States where prices and other sale conditions are the most favourable. A core principle of the new Regulation is the freedom for European consumers to purchase a new motor vehicle, either directly or through an authorised intermediary, wherever they wish in

the European Union. Contractual provisions which restrict this freedom by the manufacturer, the supplier or another undertaking within the network are blacklisted and are automatically void. The revised group exemption establishes a balance between the supplier's interest in safeguarding its selective dealer network and the interest of European consumers in buying a car wherever they wish in the European Community.

#### *Maritime transport*

On 24 July 1996 the Commission adopted Regulation (EC) No 1523/96 excluding from the scope of Regulation (EEC) No 1617/93 consultations on tariffs for the carriage of freight. Regulation (EEC) No 1617/93 exempts from the prohibition of Article 85(1) the holding of consultations on tariffs for the carriage of passengers and freight on scheduled air services. The reasons behind this Regulation were, the need to give airlines time to adjust to the introduction of competition and the wish to facilitate interlining agreements. Due to the change of industry market conditions, the Commission considered that the airlines had sufficient time to adapt to a more competitive environment and that there was no longer any justification for an exemption. The withdrawal of the exemption took effect from 1 July 1997.

#### *State monopolies and monopoly rights*

##### *Telecommunications*

Promoting the liberalisation in the field of telecommunications, the Commission adopted two directives in 1996.

##### *Mobile telephony liberalisation directive*

On 16 January the Commission adopted a Directive opening up to competition the European market in mobile and personal communications. The directive requires the Member States to abolish special or exclusive rights still remaining in this field and to establish licensing procedures which are in accordance with Community law. The introduction of competition in the mobile market is important where it reduces the potential for increases in local fixed network charges to consumers and helps new entrants gain access to the market.

##### *Full competition directive*

On 13 March the Commission adopted a Directive envisaging full liberalisation of all telecommunication services and infrastructures by 1 January 1998. Exclusive rights to provide voice telephony and public telecommunications networks must be eliminated before that date. The Directive also provides that by 1 July 1996 the use of alternative infrastructures must be liberalised for the provision of telecommunications services other than public voice telephony, for which the deadline remains set at 1 January 1998. The Directive also defines the principles with which the national rules must comply from 1998, in particular concerning interconnection, the granting of licenses and the financing of universal service. On the same date of adoption of this Directive the Commission also issued a communication on the concept of universal service and its development in the new, fully liberalised telecommunications environment. On 27 November the criteria for assessing national schemes for financing the provisions of universal service were published.

##### *Energy*

The Council's Directive on common rules for the internal market in electricity, adopted on 19 December 1996, provides for a gradual opening of the electricity market over six years. The first opening, to be effective by the beginning of 1999 at the latest, is provided for a proportion which is represented by the share of Community consumption accounted for by customers using more than 40 GWh/year per site in 1997, which threshold will be reduced progressively until reaching nine GWh/year

after six years. The Directive incorporates the option of a single-buyer system as an alternative to negotiated third-party access to the network. Such a system allows electricity buyers to benefit from differences between the prices offered by their supplier and those available from an alternative supplier, inside or outside their Member State, while remaining a customer of the monopoly supplier. The categories of electricity buyers who will be able to choose a supplier under the Directive (“eligible customers”) will be decided by the Member States. Customers using more than 100 GWh/year must be included. As regards the protection of public service obligations, the Directive allows Member States to define public service obligations imposed upon electricity undertakings.

On 3 December 1996 the Energy Council stated that it would adopt a common position on a Directive in relation to the internal market in gas in May 1997.

#### *Postal services*

At a Council meeting held on 18 December 1996 an agreement in principle was reached on a proposal for a European Parliament and Council Directive on common rules for the development of postal services. It provides for the maintenance of the universal service and a more extensive liberalisation of postal activities and will cease to be applicable on 31 December 2004.

#### *Transport*

On 15 October the Council adopted a Directive on ground-handling activities at airports in the European Union. It provides for opening up to competition ground-handling services at airports, including self-handling by airlines. In the case of certain services (baggage handling, ramp handling, fuel and oil handling), Member States may limit operators to two, of whom at least one must be independent of the airport and the dominant carrier. In any event, suppliers of ground-handling to third parties must maintain transparency as to accounts and the airport may not finance ground-handling services from income deriving from its monopoly position.

#### *Mergers*

The Commission’s proposal for a review of the Merger Regulation was transmitted to the Council, the European Parliament and the Economic and Social Committee in September 1996. Key issues proposed were, (i) a lowering of the required turnover thresholds from ECU five billion to ECU three billion for world-wide turnover and a reduction from 250 ECU million to ECU 200 million for Community-wide turnover, (ii) for concentrations requiring simultaneous notification in at least three Member States, thresholds of ECU two billion and 100 million respectively were introduced, (iii) an extension of the Regulation to all full-function joint ventures.

While the reports of both the European Parliament and the Economic and Social Committee were favourable to the Commission’s proposal, there was no qualified majority in the Industry Council on the reduction of the existing turnover thresholds.

In April 1997, the Council finally approved the following four major changes to the Merger Regulation: (a) the Merger Regulation will in future apply to all structural joint ventures fulfilling the turnover thresholds; in parallel with this extension of its scope, an Article 85-type analysis has been incorporated into the Merger Regulation: structural co-operative joint ventures will not only be subject to the dominance test but will also be assessed under the criteria of Article 85(1) and (3); (b) in order to prevent multiple national filings a supplementary set of thresholds has been introduced : transactions which do not meet the existing thresholds, but satisfy a new set of reduced thresholds have Community dimension and must be notified under the Merger Regulation; (c) a new method of applying the thresholds to banks and financial institutions has been introduced; and (d) changes to the procedures and timetables.

### ***International co-operation***

#### *Central and Eastern Europe*

At the request of the European Council (Madrid, 15 and 16 December 1995), the Commission prepared opinions on the accession of each of the associated countries (Poland, the Czech Republic, Hungary, Slovakia, Slovenia, Bulgaria, Romania, Lithuania, Latvia and Estonia). These opinions include a detailed assessment of the measures adopted by those countries in order to develop effective competition policies.

The implementing rules for antitrust with the Czech Republic, Slovakia and Hungary were officially accepted by the Association Councils on 31 January, 27 February and 16 July respectively.

The Commission together with the authorities of the Member States have continued to provide technical assistance, either through advice and training provided *in situ* or through training courses in the Commission or the Member States.

All aspects of co-operation between the EU and associated countries were discussed at the second annual conference of heads of competition authorities which was held this year in Brno at the invitation of the Czech authorities.

#### *North America*

Following the Council's approval of the Agreement between the European Community and the United States, relations with the US competition authorities have been significantly strengthened. In many cases information was exchanged and the competition authorities consulted each other in the analysis of cases and possible remedies and endeavoured to co-ordinate procedures when they were both investigating the same cases.

On 16 October 1996 a bilateral high-level meeting was held in Washington between officials from the Commission, the FTC and DoJ and dealt with various aspects of the competition policies pursued by both parties and other matters of common interest.

On 8 October the Commission adopted a report to the Council and the European Parliament on the application of the Agreement over the period from 10 April 1995 to 30 June 1996. A second report covering the period of 1 July to 31 December 1996 was adopted 4 July 1997 and supplements the first.

On 25 October 1996 the Commission was granted a negotiating mandate by the Council for an agreement with the United States which would strengthen the positive comity provisions contained in the 1991 Agreement. Negotiations have resulted in a draft Agreement and it is expected that the Council, having received the opinion of the European Parliament, will approve the Agreement in the course of 1997. The draft Agreement provides that a competition authority will normally defer or suspend the application of its competition rules in respect of certain anti-competitive activities which occur principally in and are directed principally towards the other Party's territory, where that other Party is prepared to deal with the matter.

The Commission has also been negotiating a bilateral agreement with Canada which will probably be adopted beginning 1998.

#### *WTO*

On the basis of a report of the group of experts (usually known as the Van Miert report), the Commission proposed in a communication to the Council dated 18 June that the World Trade Organisation should set up a working group which would be responsible for initial work on the development of an

international framework of competition rules. The Council and several Member States supported this initiative and a decision was adopted by the Singapore Conference on 11 December. The initiation of discussions within the WTO is important so as to get the developing countries to introduce competition rules. Some points which the Commission proposed to discuss include the identification and adoption of common competition principles at international level, between competition authorities and dispute settlement in the competition area.

*Mediterranean countries, Japan and Latin America*

At the beginning of 1996 the new agreement on customs union containing detailed binding rules on competition policy with Turkey came into effect. Negotiations on association agreements with Egypt, Jordan, Lebanon, the Palestinian Authority and Algeria are under way.

The annual bilateral meeting between DG IV and the Japanese Fair Trade Commission was held in Brussels on 29 October. Principal developments in legislation and the application of the competition rules were discussed.

During 1996 relations with Latin American competition authorities intensified through the development of competition policies in this region and of regional . New contacts were made, in particular with Brazil, Argentina, Mexico, Peru and the Andean Pact countries.

## **2. Enforcement of competition law and policy**

### *Articles 85 and 86*

During the year the Commission registered 471 new cases, of these were 209 notifications, 168 complaints and 94 cases opened on the Commission's own initiative. Although the number of new cases is lower than in 1995, it exceeds the average number of incoming cases over the last nine years by more than ten percent. During the year the Commission closed 386 cases in all, of which 365 through an informal procedure and 21 by formal decision.

### *Partitioning the common market by means of distribution agreements*

The Community competition rules continue to play a fundamental role in the creation and consolidation of the single market. In the distribution field, certain restrictions may be authorised with a view to improving distribution, but they must not be excessive and must never lead to a total partitioning of markets.

### *Systemform GmbH*

In a decision of 4 December 1996 the Commission imposed a fine on the German manufacturer of machinery for handling large computer printouts, for having operated a distribution system that divided up the European market for its products along national lines. The distribution contract contained a total ban on the distributor selling Systemform products outside its allotted territory and often contained a ban on supplying customers established in the allotted territory who proposed to export the products. The contracts also limited the distributors' freedom to set their own resale prices.

### *Adalat*

The differences in the price charged for the same pharmaceutical product from one Member State to another, which are due to a large extent to the diversity of national price control and social security systems, induce certain operators to make a profit by engaging in parallel trade. The Commission has

waged a steady campaign against agreements and conduct restricting parallel trade in pharmaceutical products.

For example, the price of the drug Adalat marketed by the Bayer group varies considerably from one Member State to another. In the United Kingdom in particular, the price at which it is sold is far higher than in France and Spain. The pharmaceutical wholesalers in France and Spain used to order larger quantities of Adalat than they required for supplying the domestic market. The surpluses were exported to other Member States, including the United Kingdom. Bayer France and Bayer Spain had set up a system for identifying exporting wholesalers and were no longer prepared to supply them with all of the quantities of Adalat which they ordered. The Commission found that the conduct of Bayer France and Bayer Spain showed that they had imposed an export ban which formed part of the continuing commercial relations between themselves and their respective wholesalers.

*Practices employed by dominant firms to eliminate competitors*

Certain competitive behaviour, which would not normally infringe EC competition rules, may do so when implemented by firms in a dominant position. This is the case for example where firms engage in exclusionary practices, i.e. conduct which eliminates a competitor or restricts or impedes its activities. Exclusionary practices may be directed against existing competitors on the market or they may be intended to impede market access by new entrants.

In 1996 the Commission has particularly been dealing with problems of restrictive conduct in sectors which are in the process of liberalisation such as telecommunications, transport and energy.

*Pelika RAY*

Pelika RAY is the Finnish State-owned company that operates amusement machines in Finland. The State monopoly for the operation of amusement machines in Finland ended at the beginning of 1995. However, Pelika RAY had concluded contracts preventing the owners of its premises taking amusement machines from any of its new competitors. Following discussions with the Commission, Pelika RAY has voluntarily lifted this restriction, so allowing effective competition between itself and other operators and increasing consumer choice.

*Novo Nordisk*

Novo Nordisk, Europe's leading insulin producer, introduced in 1985 a new method of insulin self-injection, the so-called 'insulin pen' system. Other companies now also produce similar pen delivery systems, including manufacture of various components, some of which are compatible with the Novo Nordisk system. Following a complaint the Commission found that Novo Nordisk abusively disclaimed liability for the malfunction of its pen products, or refused to guarantee such products, when they were used in conjunction with the compatible components of other manufacturers. Novo Nordisk agreed no longer to use disclaimers in such circumstances.

*IRI/Nielsen*

In 1996 the Commission opened a formal procedure against AC Nielsen Company (Nielsen) for infringement of Article 86. Nielsen was found to abuse its dominant position in the European markets for retail tracking services in order to prevent Information Resources Inc. (IRI, complainant in this case) from establishing a competitive presence there. In particular, Nielsen had concluded exclusivity contracts for the purchase of market data from retailers as well as contracts including restriction of the retailer's freedom to supply data to any competing retail tracking services provider. In relation to the sale of services to multinational customers, Nielsen applied discounts in exchange for commitments from customers to call upon its services in a wide range of countries. This involved the bundling of countries where Nielsen was

in a dominant position in countries that IRI was entering. Negotiations between Nielsen and the Commission resulted in an undertaking from Nielsen that addresses the main competition concerns and ensures a level playing field in the European markets for retail tracking services.

The Antitrust Division of the US Department of Justice was also investigating Nielsen's contractual practices. As most of the alleged abuses took place in Europe, the Commission took the lead in investigating them, which nevertheless was done in close with the US Department of Justice including exchanges of confidential information with the consent of the parties. In view of the results achieved on the European side, the US Department of Justice also decided to close its investigation.

### *Telecommunications*

Competition policy continues to play a highly active role in enabling the information society to grow, both in terms of infrastructure and in terms of services. The liberalisation of most information society markets has, depending on the services, already been achieved, been set in train or been decided on for 1998. An important factor is the rapid pace of technological change, which necessitates substantial investment in order to develop products and the requisite infrastructure and considerable marketing expenditure in order to convince users to adopt the new services. Moreover, some aspects of the information society are rapidly becoming globalized. These developments are triggering numerous restructuring operations in the telecommunications and media sectors in the form of mergers, alliances and joint ventures.

### *Atlas*

In July the Commission authorised the Atlas project, a joint venture between France Télécom (FT) and Deutsche Telekom (DT) aimed at providing telecommunications services to large users in Europe. The services provided by Atlas include network services, outsourcing and very small aperture satellite (VSAT) services. The Commission also authorised the proposed GlobalOne joint venture between Atlas and the US company Sprint Corporation for the supply of the above services world-wide. In the relevant markets, the services provided to corporate users raised important competition issues. This is the case, for example, with the market for the transmission of data via terrestrial networks, where DT and FT held market shares in excess of 70 per cent in Germany and France respectively, buttressed by a legal monopoly over the supply of infrastructure. The Atlas/GlobalOne authorisation was given on the condition of the granting of the first two infrastructure licences to France and Germany.

### *Unisource and Uniworld alliances*

Unisource is an alliance between PTT Telecom of the Netherlands, Telia of Sweden and Swiss PTT, which is being joined by Telefónica of Spain. The Uniworld transaction is an alliance between Unisource and AT&T. The Commission intention to take a favourable view of these cases has been published in two notices, which explain in detail changes to the original agreements and undertakings given by the parties to make the transactions acceptable under EU competition law.

Following the public announcement in April 1997 that Telefonica and BT had entered into a strategic alliance, the Commission had to examine the consequences of the new alliance on the participation of Telefonica into Unisource and to review its proposed decision which is expected later in 1997.

### *Media*

The European audio-visual sector is currently undergoing profound and rapid change in the form of (i) technological developments enabling an increase in the number of distribution channels for products and programmes, (ii) strategic alliances between operators, and agreements between operators, programme

owners and sometimes even the owners of infrastructure, and (iii) ever-increasing investment (notably in rights). As the sector has a strong growth potential and entry barriers may be very substantial, steps must be taken to ensure that the market is not foreclosed and that competition is not distorted by certain alliances or concentrations or by difficulty in gaining access to programmes.

The problem of access to exclusive rights is particularly important in relation to sports owing to the ephemeral nature of televised broadcasts of sports events, the concentration of rights in the hands of sports federations, thereby reducing the number of rights available on the market, and the relative inelasticity of viewer demand. Given the growing number of cases related hereto, the Commission has embarked upon a wide-ranging consultation exercise involving the application of the competition rules in this area.

#### *Air Transport*

The Commission holds a favourable attitude towards between airlines provided it does not rule out opportunities for real competition from new operators on the main routes.

#### *Lufthansa/SAS*

On 16 January the Commission therefore conditionally approved for a period of ten years a agreement between Lufthansa and SAS setting up an integrated air transport system. The conditions aimed at allowing other airlines to operate services on routes between Germany and Scandinavia and in particular the giving-up of slots at certain saturated airports.

A number of European airlines have recently concluded alliance agreements with US airlines. Although the Commission did not adopt a final position in 1996 on the applicability of Articles 85 and 86, it is felt that these agreements could have appreciable anti-competitive effects on routes between the US and Europe and on certain intra-Community routes.

#### *Sports*

#### *UEFA*

Following the judgement of the Court of Justice in *Bosman* the Commission sent an official warning to FIFA and UEFA in connection with an infringement proceeding based on Article 85(1) of the EC Treaty and Article 53(3) of the EEA Agreement. The warning focused on rules governing the international system of transfers and on UEFA nationality clauses. FIFA and UEFA informed the Commission that the international system of transfers would no longer be applied to players who, at the end of their contract, changed clubs (in different countries) within the EEA. UEFA confirmed that its Executive Committee had decided to abolish formally with immediate effect the nationality clauses ("3 & 2" rules, referring to the limit on the number of foreign players in national or international competition between clubs).

#### *Financial services*

#### *Banque Nationale de Paris/Dresdner Bank*

On 24 June 1996 the Commission authorised for a period of ten years an exclusive co-operation agreement at world level between Banque Nationale de Paris and Dresdner Bank. The agreement provides inter alia that, in France and Germany, each party will make its products available to the other in order that it might distribute them through its network. On this point, the Commission insisted on amending a clause which gave each party an unlimited right to veto any co-operation agreement which the other wished to conclude with a competitor present on its domestic market.



*States monopolies and monopoly rights*

Liberalisation of the traditionally monopolised sectors is a crucial step in the establishment of a single market for the benefit of European consumers. The Commission attaches particular importance to ensuring that the benefits of liberalisation are not jeopardised by monopolistic and/or discriminatory practices. Such practices very often result from State measures and must be examined in the light of Article 90 of the EC Treaty.

*Telecommunications**Airtel M|vil*

On 18 December the Commission took a decision under Article 90 addressed to Spain for discriminating against Airtel M|vil and in favour of the public operator Telefónica. The latter was granted a GSM license without an initial license fee, while Airtel M|vil was required to pay an entry fee for her GSM license. This gives Telefónica a competitive advantage allowing it to strengthen its dominant position to the detriment of the second GSM operator. The Commission requested the Spanish government to refund the payment paid by Airtel or to take equivalent corrective measures.

*Transport**Olympic Airways*

With particular reference to ground-handling activities the Commission initiated proceedings under Articles 90 and 86 against Greece concerning the exclusive right granted to Olympic Airways to provide services to third parties. The Greek government undertook to liberalise airport services a year earlier than envisaged under the Council Directive (see above).

*Helsingør harbour*

The Danish authorities refused to grant access to the harbour facilities at Helsingør to other operators able to compete against ScandLines A/S, a company jointly controlled by the Danish State enterprise DBS and the Swedish enterprise SweFerry, which enjoyed exclusive rights to carry motor vehicles by ferry between Helsingør and Helsingborg in Sweden. The Commission considered that the refusal to grant access to essential infrastructure constituted a State measure protecting and strengthening the position of a public operator and a breach of Articles 90 and 86 of the EC Treaty. Following discussions the Danish Government agreed to provide access to a new ferry operator selected on the basis of a tendering procedure.

*State monopolies of a commercial character*

The Commission continued its efforts to secure compliance with Article 37 of the EC Treaty. The adjustment of national monopolies of a commercial nature in the new Member States received particular attention.

The adjustment of the Austrian alcohol monopoly was completed by the discontinuance with effect from 1 January 1996 of the exclusive rights of importation and wholesale distribution of alcoholic beverages originating in other Member States.

In Sweden and Finland exclusive rights of importation, exportation, wholesale distribution and production of alcoholic beverages were discontinued in 1995. Since then, the Commission concentrated on retail sales and is monitoring the activities of these monopolies on the basis of reports on retail-sales,

drawn up by the Swedish competition authority and the Finnish product-control agency, while reserving the right, in response to any complaints submitted to it, initiate formal proceedings if non-discrimination is not being secured effectively.

Austria's national monopoly of manufactured tobacco is required gradually to be adjusted by 31 December 1997 at the latest. The Commission initiated infringement proceedings against Austria, because the new legislation lays down unjustified conditions for new operators, entailing discrimination in favour of the former national monopoly.

### *Mergers*

This year, concentrations falling under the Merger Regulation increased substantially over 1995. This indicates a continuing trend towards further integration of the European companies and markets. The Commission received 131 notifications and took 125 final decisions. Activity in 1996 was about 15 percent higher than the previous year.

### *Media cases*

In recent years, there has been a significant increase in the number of cases in the media sector dealt with by the Commission under the Merger Regulation. Until recently, the notified concentrations concerned mainly joint ventures which focused on a national media market. Lately, there has been a trend towards cross-border alliances in the TV sector with European-wide perspective.

### *Holland Media Groep (HMG)*

In September 1995, HMG (Dutch TV joint venture between RTL, Veronica and Endemol) was prohibited and the Commission invited the parties to propose measures to restore effective competition on the Dutch TV advertising and production markets. The complete withdrawal of the largest Dutch TV producer, Endemol and the proposed transformation of RTL 5 from a general interest to a news channel removed the competition problems. The concentration could therefore be cleared in 1996 in its substantially modified form.

### *Cablevision*

In July 1995, Telefónica and Sogecable (Canal Plus Spain) agreed to merge their activities relating to the supply of services to operators of cable, audio-visual and television services into a joint venture, Cablevision. On 1 March 1996, the Spanish Government authorised Cablevision as a concentration with a national dimension. However, the Commission took the view that the operation required notification under the Merger Regulation and the parties finally submitted a notification on 31 May. Having serious doubts about the compatibility of the operation with the common market, the Commission initiated a in-depth investigation.

The Commission notably believed that the concentration could lead to foreclosure effects by preventing the entry of new competitors into the market of services to operators of cable, audio-visual and television services, and it could also delay the effects of the forthcoming liberalisation of the market for voice telephony in Spain. Three days after the opinion of the Advisory Committee on Concentrations was delivered, Telefónica and Canal Plus announced the demerger of Cablevision and the revocation of the strategic alliance between the two companies.

### *Other in depth investigations*

### *Ciba-Geigy/Sandoz*

In July the Commission approved the proposed merger between Ciba-Geigy and Sandoz into Novartis. The decision was granted under the condition that the parties comply with an undertaking given in the area of animal health.

The activities of Ciba-Geigy and Sandoz overlapped in four areas : health care, animal health, crop protection and seeds.

The Commission decided to open proceedings because of serious concerns with regard to a possible creation of a dominant position in a number of markets, not least because of the combination of Ciba-Geigy's and Sandoz tremendous research and development potential. However, further investigations eliminated all but one concern. Even in overlapping markets, market share additions were found, in most cases, not to be significant, and where they are, the merger will nevertheless not lead to a dominant position. Novartis will continue to face competition in all areas from a number of major competitors, including Glaxo Wellcome, Upjohn Pharmacia, Bayer, BASF and many others. The Commission also examined very closely the R&D activities of the merging parties. While the merger will result in a significant combined R&D potential, enough other companies have the required "critical mass" at their disposal to alleviate concerns. The parties were found to have a particular strength in the field of gene technology and gene therapy. However, given a number of uncertainties linked notably to the unclear patent situation, as well as to doubts about the success of the method of treatment and about the possibility of technically circumventing the patents, the Commission concluded that it can not be said with sufficient probability that the merger will lead to the creation or strengthening of a dominant position on any future market.

The remaining competition problem related to the market for small animal ectoparasiticides, mainly products for treatment of fleas and ticks in cats and dogs, where the parties have a particularly strong position in the important segment of Insect Growth Regulators (IGR's). The parties have undertaken to grant non-exclusive licences for one of their IGR active ingredients (methoprene).

#### *Kimberly-Clark/Scott paper*

Kimberly Clark Corporation (USA) and the Scott Paper Company (USA) are two major tissue paper and related product manufacturers with world-wide businesses in the consumer and industrial areas. Their proposed merger gave rise to concerns in the UK and Irish markets for toilet tissue, kitchen towels and facials/hankies. The parties' control of the two leading brands in the UK and Ireland, namely Kleenex and Andrex, which are essential brands for retailers to stock, coupled with their position as the leading supplier of private-label products and overall market strength, made the creation of a dominant position likely. In particular, the Commission considered that after the merger there would no longer be sufficiently strong interbrand competition. These concerns were finally removed by the parties offering a complex divestiture package including both production capacity and brands.

#### *Gencor-Lonrho*

The Commission decided to oppose the proposed merger of Gencor's and Lonrho's platinum mining interests, finding that the merger would create a position of duopolistic dominance in the world-wide platinum and rhodium markets.

#### *Saint-Gobain/Wacker-Chemie/NOM*

The Commission decided to oppose the creation of a joint venture in the silicon carbide sector between Société Européenne des Produits Réfractaires (SEPR) belonging to the Saint-Gobain group, Elektroschmelzwerk Kempten (ESK) part of the Wacker Chemie group and NOM, an investment company for the development of the north Dutch provinces owned by the Dutch state.

The proposed operation would have grouped together the two most important producers of silicon carbide in the European Economic Area. It would have enabled them to attain market shares of more than 60 percent in both markets concerning the European Economic Area for silicon carbide for abrasive and heat-resistant applications.

*Referrals under articles 9 and 22*

Pursuant to Article 9 of the Merger Regulation, the Commission may refer a notified concentration to the competent authority of a Member State on its request if, on a distinct market in the Member State concerned, the concentration threatens to create or strengthen a dominant position.

*Gehe/Lloyds Chemists*

In March 1996, the Commission decided that the public bid by Gehe for Lloyds Chemists should be referred to the UK competition authorities. Both companies are large players in the UK business of pharmaceutical wholesaling and retailing.

*RWE/Thyssenagas and Bayernwerk/Isarwerke*

In November 1996, two cases in the energy sector were referred to the German competition authority. RWE Energie AG intended to acquire a share of 50 percent in Thyssenagas GmbH from VIAG's subsidiary Bayernwerk AG and the latter was to acquire RWE's share in Isarwerke GmbH. Both of the proposed concentrations fell within the scope of the EC Merger Regulation and were notified to the Commission. The possible competition problems in both of these cases concerned regional markets and therefore the Commission referred the cases back to the Bundeskartellamt for further investigation.

*Kesko/Tuko*

Following the request from the Finnish Office of Free Competition, the Commission examined the acquisition of Tuko by Kesko, both Finnish companies active in the sale of daily consumer goods in Finland. The concentration created a dominant position which significantly impeded effective competition on the retail and cash and carry markets for daily consumer goods in Finland. Moreover it effected intra-EC trade and created entry barriers to potential competitors from other Member States. The Commission therefore prohibited the concentration.

On 19 February 1997 the Commission adopted a decision under Article 8(4) of the Merger Regulation ordering Kesko to divest the daily consumer goods business of Tuko to a purchaser which must be a viable existing or prospective competitor, independent of and unrelated to the Kesko group and possessing the financial resources and proven expertise which enables it to maintain and develop the divested business as an active competitor to Kesko.

*Judgements of community courts*

In 1996, the Court of First Instance (CFI) and the European Court of Justice (ECJ) have clarified important aspects of EC competition rules.

*Viho against Commission (Case C-73/95 P)*

The ECJ has confirmed the application of the single economic unit principle which shields intra-group arrangements from scrutiny under the competition rules.

*Grand Garage Albigeois SA and Others/Garage Massol SARL (Case C-226/94) and Nissan France SA and Others/Jean-Luc Dupasquier du Garage Sport Auto and Others (Case C-309/94)*

The Court gave preliminary rulings under Article 177 of the EC Treaty on the interpretation of Commission Regulation (EEC) No 123/85 (on the application of the Treaty to certain categories of motor vehicle distribution and servicing agreements). It was ruled that this Regulation must be interpreted as not preventing a trader, who is neither an approved reseller in the distribution network of a manufacturer of a particular make of motor vehicle nor an authorised intermediary, from undertaking parallel imports and operating as an independent reseller of new vehicles of that make. Nor does that Regulation prevent an independent trader from carrying on at the same time the business of authorised intermediary and that of non-approved reseller of vehicles acquired by way of parallel imports.

*Groupement d'Achat Edouard Leclerc against Commission (Case T-88/92)*

The CFI confirmed two decisions of the Commission in 1991 and 1992 extending the categories of products meriting selective distribution to perfumes and other luxury cosmetic products.

*Tetra Pak International SA against Commission (Case C-333/94)*

The ECJ examined the relationship between conduct on the dominated market and the abuse on a distinct, but associated market. The ECJ stated that Article 86 gives no explicit guidance as to the requirements relating to where on the product market the abuse took place. It pointed out that the application of Article 86 presupposes a link between the dominant position and the alleged abusive conduct, which is normally not present where conduct on a market distinct from the dominant market produces effects on that distinct market. In the case of distinct, but associated markets, as in the present case, application of Article 86 to conduct found on the associated, non-dominated market and having effects on that associated market can only be justified by special circumstances. The Court concluded that, given the quasi monopoly enjoyed by Tetra Pak on the aseptic (packaging) markets and its leading position on the distinct, though closely associated, non-aseptic markets placed it in a situation comparable to that of holding a dominant position on the markets in question as a whole.

*Compagnie Maritime Belge SA and Others against Commission (Case T-24/93, T-25/93, T-26/93)*

The CFI confirmed that it is settled case-law that Article 86 is capable of applying to situations in which several undertakings together hold a dominant position on the relevant market. The CFI also confirmed its previous case-law that, in order for such a collective dominant position to exist, the undertakings in question must be linked in such a way that they adopt the same conduct on the market.

*Métropole Télévision against the Commission*

The Court annulled the Commission's decision of 1993 granting an exemption to EBU's rules on the acquisition of television rights to sports events, the exchange of sports broadcasts in the context of Eurovision and the contractual access of third parties to such broadcasts. The EBU is a trade association consisting mainly of public service broadcasters which assists in promoting co-operation amongst broadcasting members, in particular, with regard to programme exchanges. The Court found that the Commission had not carried out a sufficient examination of the membership rules of the EBU to determine whether they are objective. Further, prior to granting exemption, the Commission was wrong in omitting to examine whether the rules were applied fairly when new television channels applied for EBU membership. The Court also decided that, although public interest considerations may be one of several factors relevant in granting an exemption, the Commission did not adduce sufficient evidence to show that such considerations required exclusivity of rights to transmit sports events and that that exclusivity was indispensable to allow members a fair return on their investments.

Some other important judgements clarified the procedural rules regarding matters such as the disclosure of business secrets and the rejection of complaints.

*Postbank NV against Commission (Case T-353/94)*

The CFI annulled a Commission decision authorising third parties to produce confidential information before a national court which they had obtained from the Commission for other purposes. The CFI found that the Commission had failed in its obligation of professional secrecy because it had not given Postbank an opportunity to state its view, despite its repeated objections to the disclosure of its business secrets in question, or taken any measure to protect the confidentiality of the information concerned.

*Casper Koelman against the Commission (Case T-575/93)*

The CFI stated that the Commission, while rejecting a complaint, must indicate the reasons why it does not prompt to initiate a procedure. It held that the Commission is, nonetheless, entitled to explain why it considers that an agreement which falls within the scope of Article 85(1) satisfies the conditions for exemption under Article 85(3) without previously adopting a decision of exemption.

### **3. New reports and studies on competition policy issues**

European Community competition policy 1995, 11 languages, (available on request through DG IV's Cellule Information)

European Community competition policy 1994, 11 languages, (available on request through DG IV's Cellule Information)

XXV Report on competition policy 1995, available in 11 languages through the Office for Official Publications of the European Communities, 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)

XXIV Report on competition policy 1994, available in 11 languages through the Office for Official Publications of the European Communities, 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 (Autumn/Winter 1995, Spring 1996, Summer 1996 and Spring 1997).

Green paper on vertical restraints in EC competition policy, COM (96)721-(Ed. 1997). Catalogue No CB-CO-96-742-xx-C.

Community Competition Policy in the Telecommunications Sector, a compendium prepared by DG IV. It contains directives under art. 90, Decisions under Regulation 17 and under the Merger Regulation as well as relevant judgements of the Court of Justice. Copies available through DG IV-C 1 (tel. +3222-2968623, fax 322-2969819).

Brochure explicative sur les modalités d'application du Règlement (CE) No. 1475/95 de la Commission concernant certaines catégories d'accords de distribution et de service de vente et d'après vente de véhicules automobiles. Copies available through DG IV-F-2 (tel. +322-2951880, 2950479, fax. +322-2969800)

The institutional framework for the regulation of telecommunications and the application of EC competition rules, Final Report (Forrester Norall & Sutton). Catalogue No: CM-94-96-590-EN-C.

Competition aspects of access pricing-Report to the European Commission December 1995 (M. Cave, P. Crowther, L. Hancher). Catalogue No: CM-94-96-582-EN-C

Interim report of the multimodal group - Presented to Commissioner Van Miert by Sir Bryan Carsberg, Chairman of the Group. Catalogue No : CM-95-96-350-EN-C

Study of exchange of confidential information agreements and treaties between the US and Member States of EU in areas of securities, criminal, tax and customs (Ed. 1996) Catalogue No : CM-98-96-865-EN-C

Competition Aspects of Interconnection Agreements in the Telecommunications Sector (Ed. 1995) Catalogue No : CM-90-95-801-EN-C





## RUSSIAN FEDERATION\*

(1996)

### Introduction

State Anti-monopoly Committee of the Russian Federation - SAC Russia (till March 1997 - SCAP Russia) was established in 1990. Its activity in the field of competition policy is carried out on the basis of the Law of the Russian Federation "On Competition and Restriction of Monopolistic Activity on Goods Markets" adopted in 1991, and amended in 1995.

The Report contains the review of current Russian competition law, information on the scope of legal implementive practice, examples of cases investigated by anti-monopoly bodies for the most typical violations of anti-monopoly legislation.

### 1. Main achievements of SAC of Russia in 1996

#### *Bills elaborated on the following issues*

- anti-monopoly control over financial markets (passed by the State Duma in first hearing);
- amendments to the Law "On Competition ..." (administrative entities);
- amendments to the current legislation resulting from the adoption of Federal Law "On Advertising"

Anti-monopoly bodies brought to the light of day about 1 000 instances of restriction of competition by executive governing bodies, of which 500 were prosecuted.

Regulation of economic concentration on commodity markets requires great efforts on behalf of anti-monopoly bodies: annually around 2 500 requests for permission to acquire stock (shares) in the statutory capital of commercial organisations are examined.

At the same time the number of requests to anti-monopoly bodies related to setting up economic entities, their mergers, restructuring and liquidation has fallen off.

In the process of monitoring compliance with legislation on advertising 11 writs were issued to central TV channels, serious legal prosecution was undertaken with regards to ORT, VGTRK and NTV channels, advertising companies "Medaservice", "Videointernational" for infringement of legislation on advertising, resulting in clearing TV advertising space from illegal commercials for tobacco and alcohol products.

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\* The original language of this document is English.

Work in the field of legal protection of intellectual property and prevention of unfair competition, related to illegal usage of intellectual property was expanded. 200 cases were prosecuted for infringement of Article 10 of the Law “On Competition...”

On 24 December 1996 a Plenary meeting of the Supreme Court of the Russian Federation (prepared in co-operation with SAC Russia) was dedicated to issues of application of the new version of the Law “On Consumer Rights Protection” and the civil law in the Russian Federation.

Anti-monopoly bodies unveiled about 25 000 infringements of consumer protection legislation, of which about 18 000 infringements were voluntarily eliminated, and 2 500 - were prosecuted.

### ***Changes in competition legislation***

#### *New provisions of competition legislation*

- dynamic changes in the Russian economy, adoption of a new Constitution of the Russian Federation and a new Civil Code of the Russian Federation required corresponding amendments to the Law of the Russian Federation «On Competition and Restriction of Monopolistic Activity on Consumer Markets». The amendments came into force on 25 May 1995, and covered nearly all the Articles of the current Law:
- the concept of anti-monopoly legislation was introduced;
- the scope of application of the Law was defined more exactly;
- definitions of a goods market, dominant position of economic entities were modified;
- such concepts as monopolistic price and group of entities were introduced;
- terminology on unfair competition in the field of intellectual property was brought in compliance with current legislation.

Articles 17, 18 and 19 have undergone the most substantive changes.

Article 17 of the Law deals with prevention of monopolistic (oligopolic) mergers and associations by requiring preventive control over setting up, liquidation, mergers and other kinds of restructuring of commercial organisations with the aim to restrict market concentration by a selective banning of certain kinds of “large” mergers or similar agreements, entered into by economic entities and which may result in the growth of concentration on the market. At the same time Article 17 now excludes mention of a preventive control over enhancement of statutory capital of a commercial entity.

The new version of Article 18 contains a provision on anti-monopoly control over acquisition of stocks or shares in the statutory capital of commercial entities:

- a benchmark level of 35 percent of the market share has been established for the purchaser of stock/shares and the commercial organisation being purchased;
- a minimum size for the lot of shares, requiring preliminary approval by anti-monopoly bodies is set as 20 percent of usual (voting) shares;
- provisions of this Article are extended to cover assignation of control over usual shares (trust management).

Article 19 on compulsory division of economic entities has been seriously edited. This procedure is an extreme measure as regards an entrepreneur abusing his dominant position. It can be applied in a case when all other possibilities of improving competitive relations in the market have been exhausted.

Provisions on liability for infringement of the Law “On Competition and Restriction of Monopolistic Activity on Commodity Markets” (Articles 22-24) have undergone changes as well. Expanded are corpus delicti which allow fines to be levied without preliminary writ. They are as follows:

- monopolistic activity;
- unfair competition;
- violation of requirements on obtaining agreement from anti-monopoly bodies on issues concerning creation, reorganisation and liquidation of economic entities and acquisition of corresponding packages of shares of enterprises;
- non-submittal of information in due time at the request of anti-monopoly bodies.

Administrative liability of administrative persons guilty of registration of enterprises and its associations without anti-monopoly bodies’ consent is stipulated.

The changes in the Law concern raising the limit of fines and defining its maximum level (as a certain number of minimum monthly salaries, percentage from the economic entity’s turnover, income from illegal deals made by the purchaser of shares).

A system for levying fines from economic entities and transferring them to the federal budget is set. Economic entities retain the right (that being the guarantee from abuse of their rights) to protest against the decisions of anti-monopoly bodies in the Court of Arbitration.

Changing the amount of fines and the order of their charging make it possible to strengthen the preventive role of the Law, motivating economic entities to follow requirements of the anti-monopoly legislation.

The new version of the Law “On Competition ...” and other laws of competition-consumer and external economic relations area led to amendments in other legislation (i.e. the Code of the Russian Federation on administrative infringements, the Law of the Russian Federation “On Privatisation of State and Municipal Enterprises in the Russian Federation”, federal Laws “On State Material Reserve”, “On Supply of Production for Federal State Needs”, “On Measures on Protection of Economic Interests of the Russian Federation in foreign trade”).

#### ***Preparation of interdepartmental norms and regulations***

To insure commonality of application of the law, legal setting of required procedures when investigating cases of it’s infringement by anti-monopoly bodies, SAC Russia is constantly developing and improving the corresponding regulatory base, including departmental regulations with obligatory registration by the Ministry of Justice of the Russian Federation and their official publication:

- decree of the Government of the Russian Federation “On the Register of Economic Subjects, with the share on a Market of Certain Goods exceeding 35 percent”;
- rules on investigating cases of infringement of anti-monopoly legislation (registered at Ministry of Justice of the Russian Federation);

- rules for investigation of cases with reason to suspect infringement of the law on advertising (registered at the Ministry of Justice of the Russian Federation);
- procedures for submitting to anti-monopoly bodies of appeals and notifications in compliance with the requirements of Articles 17 and 18 of the Law of the Russian Federation “On Competition and Restriction of Monopolistic Activity on Goods Markets” (registered at the Ministry of Justice of the Russian Federation);
- rules for carrying out expert analysis and assessment of competition environment on goods markets (registered at the Ministry of Justice of the Russian Federation);

Below is a list of methodological recommendations elaborated by the Anti-monopoly Committee and ready for getting an approval on the issues as follows:

- exposing and prevention agreements and concerted actions;
- exposing and prevention actions made on behalf of power bodies’ that put obstacles to competition development;
- assessment of consequences of the protective measures for domestic market proposed for introduction.

## **2. Implementation of competition policy**

### ***Prevention of dominant position abuse***

Abuse of a market dominant position by an economic entity, as a form of monopolistic activity, is the most typical infringement of anti-monopoly legislation - 61 percent of all the cases investigated by SAC Russia and its Regional Offices in 1996. This index has been stable within the last three years.

In 1996 Regional Offices, SAC Russia received 1 862 appeals concerning abuse of dominant position on a goods market (1 859 - in 1995). 731 of them were resolved without recourse to courts. 565 cases were prosecuted, on 343 of them (61 percent) the decision was to order or to recommend elimination of infringements.

Cases, dealing with abuse by economic entities - natural monopolists (provision of water-, gas, energy and heating, transportation and communication, sea- and airports’ services) have their specific aspects. Below are examples of some of the most interesting of those investigated.

In January 1996 Arkhangelsk Regional Office, SAC Russia took to court a case against the local telephone company and its branch enterprise for a substantial increase of tariffs, charged for linking up and use of telephone lines. The telephone company and its branch enterprise figure in the Register of enterprises with relevant market shares in excess of 35 percent (on city and regional geographic markets respectively).

In the process of investigation, it was determined that the tariff has been increased unilaterally, without warning consumers or asking their consent. Payment was taken from the consumers’ accounts without permission. Furthermore monthly telephone subscription in the region and in the city differed substantially, though the terms for obtaining a license from the Ministry for Telecommunications of the Russian Federation require a common price policy for the same type of service rendered to every category of users.

Arkhangels Regional Office evaluated these actions as infringement of Article 5 paragraph 1 of the Law of the Russian Federation "On Competition" by a group of persons. Concrete infringements were as follows:

- increase of tariff for services without the consent of the clients or any economic reason.

Arkhangelsk Regional Office, SAC Russia sent an order to the telephone company and its branch enterprise to stop infringement of the anti-monopoly Law, including the following conditions:

- provide a common tariff policy as required by the license issued, including lowering unreasonably increased city tariff for the use of telephone lines for security purposes;
- desist from unreasonable demands for money transfer and unilateral expropriation of such moneys.

In response to the order the telephone company doubled the regional tariff, raising it up to the level of that for the city. In the process of analysing the tariffs it was determined that the tariff set by the telephone company was monopolistically high. It was assessed as imposing unfavourable terms on consumers.

Arkhangelsk Regional Office sent out a further order with the demand to stop the infringement of Article 5 and return the tariffs to previously set levels.

The company appealed against the Order to the Court of Arbitration of the Arkhangelsk Region, claiming that the Order on tariff reduction was not within the competence of the Regional Office and the plaintiff had the legal right to set its own prices.

The Court of Arbitration of the Arkhangelsk Region refused the appeal.

On the basis of the decision made by the commission of Archangelsk Regional Office in respect of the above case, the consumer went to the Regional Court of Arbitration demanding refund of the money illegally taken from its account to cover the increased tariff. The Court ruled in favour of the consumer adding to this amount interest for using the money in the period of its illegal expropriation. The Appeals Instance of the Arbitrage Court refused the appeal of the telephone company.

The cassation complaint that was lodged was also denied.

One of the most widely encountered infringements is nonfulfilment of the provisions of legal acts on price formation. In 1996, 506 complaints were accepted for investigation, 150 of them were taken to court, and out of those in 100 cases writs were issued.

All in all in 1996 setting of monopolistically high prices led to investigation of 91 complaints, opening of court proceedings for 22 cases, in 11 cases writs and/or recommendations were issued.

Monitoring of 230 prices on different kinds of goods and services, carried out by anti-monopoly regional offices shows that more than one third of enterprises, occupying dominant positions on certain markets, raise prices from time to time to excessive levels. More than a 100 instances of excessive price hikes for different goods, works and services along with a goodly number of infringements of the legally prescribed pricing procedures, were exposed.

Nizhny Novgorod Regional Office, SAC Russia, acting on a complaint by a number of economic entities, investigated the case of a price-hike for gasoline and diesel fuel (25 percent over the wholesale

price of the fuel industry of the Region) undertaken by AO "NORSI", dominating the wholesale market of gasoline and diesel fuel.

Having analysed the level of capacity utilisation, prices set by AO "NORSI", production volumes and sales figures for gasoline and diesel fuel on the Nizhny Novgorod Regional market, the level of wages and employment figures, the commission of the Regional Office classified actions of AO "NORSI" as infringing Article 5, paragraph 1 of the Law "On Competition ..." in the part concerning setting monopolistically high prices. The decision of the Commission to issue an order to AO "NORSI" to stop the infringement and recommendation that the income illegally gained from August till October 1995 be transferred to the budget of the Region was met by a Court appeal. The Court of Arbitration however confirmed the inclusion of AO "NORSI" in the Register as a monopolist on the wholesale market of oil-products in Nizhny Novgorod Region. In the long run AO "NORSI", following the order of the Regional Office, SAC Russia, transferred its extra income to the budget of the Nizhegorodskaya Region.

At the end of 1994 SAC Russia, agreed to an acquisition by "Semi-Tech (Global) Company Ltd." of a package of shares amounting to 70 percent of foundation capital of AOZT "Concern Podolsk".

The sale of this package of shares of the Concern to "Semi-Tech (Global) investment company (Hong-Kong)" meant its actual inclusion into the international financial group "Semi-Tech". This group is a holder of controlling interest of the biggest world producers of household sewing machines: "Zinger" and "Pfaff" companies. In 1993 the share of its member companies on the world market was estimated at 37 percent.

The Committee took under consideration the documents reflecting investment intentions as well as the difficult financial situation of the Russian enterprise. Both the investor and the issuer guaranteed that the production of household sewing machines in Podolsk would continue. The enterprise planned to produce 350 000 household sewing machines in 1995.

Taking into consideration the expected positive social and economic effects of the deal, SAC Russia gave its agreement. At the same time AOZT "Concern Podolsk" was informed that post-registration control would be carried out as regards actual implementation of its intentions to continue and modernise the production of sewing machines by the Concern enterprises and to follow the provisions of Articles 5 and 6 of the Russian Law "On Competition ...".

But in the first half of 1995 production of household sewing machines at the "Concern Podolsk" was reduced six times to 34 800 unites. From 1 July 1995 production of domestic sewing machines was totally discontinued.

The potential demand for machines was calculated at 300 thousand unites per year in 1995-1996:

- sewing machines produced by AOZT "Concern Podolsk" are much in demand by consumers, 55 percent of the families (families with average income) would prefer to purchase the relatively cheap, simple and reliable domestic models;
- stocks in trade were reduced 4.5 times in the first half of 1995, at the same time the volume of imports of household sewing machines remained the same;
- it was determined that sometimes the demand of the trading organisations was not satisfied by the "Concern Podolsk"; though traders did not refuse deliveries of household sewing machines, under the agreements made in 1995;

- cessation of household sewing machines production by “Concern Podolsk” could lead to shortages of the product on the market.

So, decrease in production and termination, from 1 July 1995, of production of household sewing machines took place with no regard to demand.

At the same time, analysis of financial and other results of the enterprise showed that due to reduction of quantity of productive unit costs escalated, while profitability declined. Notwithstanding the situation “Concern Podolsk” had not undertaken any organisational or technical measures to raise the effectiveness of production, in particular, to reduce costs, through cuts in administrative/managerial staff, etc. Furthermore the possibilities of a marketing policy have not been used in full.

AC Russia came to a conclusion that “Concern Podolsk” abused its dominant position. In November 1995, SAC Russia Commission ordered “Concern Podolsk” to stop infringement of Article 5 of the Russian Law “On Competition ...” as regards reduction and discontinuation of underproduction of goods in demand or consumers orders (if production is possible without loss) and providing, till 1st April 1996, production of household sewing machines in volumes, that will satisfy the demand.

In mid-April 1996 the administration of AOZT “Zinger” informed SAC Russia on measures taken from November 1995 and through 1996 in compliance with the Order and its plans for further expansion of production of new models of household sewing machines on the basis of new technology of “Zinger” firm in 1996. By 1st April 1996 “Zinger” carried out the assembly of 35 500 household sewing machines. To expand the production of the new model of household sewing machines a subsidiary of AOZT “Zinger” - ZAO “Plant for production of household sewing machines” contracted to deliver in 1996, 114 000 sets and parts for household sewing machines “Zinger”. Moreover ZAO “Plant for production of household sewing machines” is setting up its own production of certain components and parts.

Estimates were also presented showing that renewal of production of household sewing machines of its own design by AOZT “Zinger” in Podolsk in quantities of 300 000 units per year would lead to substantial losses. As a result the administration of AOZT “Zinger” made a decided to produce household sewing machines at a subsidiary enterprise - “Shveimash” in Gus-Khrustalnyi, Vladimir Region, where profitable production using equipment transferred from Podolsk was possible.

SAC Russia noted the information from AOZT “Zinger” on renewal of production and its plans for further expansion. So, the prescription of SAC Russia to stop infringement of anti-monopoly legislation has been fulfilled.

At the same time the Committee continues to monitor the market of household sewing machines to follow changes in the position of main suppliers of this product and the level of demand satisfaction in different segments of the market.

### ***Monitoring anti-competitive agreements***

In 1996 Regional Offices, SAC Russia investigated 50 complaints containing grounds to suppose infringement of Article 6 of Russian Law “On Competition and Restriction of Monopolistic Activity on Goods Markets” (67 complaints in 1995). 28 cases were taken to court under this Article.

Among agreements between economic entities restricting competition, agreements curtailing market access, refusal to deal with certain sellers or purchasers should be pointed out.

Analysis of the situation permits to conclude that the reason for low activity in exposing and preventing anti-competitive agreements and collusive actions are the following:

- insufficient legal competence or economic dependence of economic entities, that do not permit them to appeal to anti-monopoly bodies for protection against anti-competitive agreements and collusive behaviour;
- absence of the procedure for notification of agreements, that deprives anti-monopoly bodies of a reliable source of information on agreements made;
- excessively liberal definition of anti-competitive agreements. The practice of investigating agreements shows that restrictive consequences for competition may result even if the agreeing parties have lower market shares than stipulated by prohibitions contained in Article 6 (1 and 2) of the Law of the Russian Federation “On Competition ...”;
- absence of clear criteria for allowing exemptions for agreements from the general prohibition. Up till now legal practice of anti-monopoly bodies had no precedents on exemption from banning anti-competitive agreements (concerted actions) as stipulated in Article 6(3);
- absence of methodological guidance on revealing, proving and prevention of anti-competitive agreements, that leads to incorrect qualification of cases, and failure to prove infringements committed.

The last two points made anti-monopoly bodies be careful in respect to carrying out investigations aimed to expose and prevent agreements (concerted actions).

To strengthen and stir up control over anti-competitive agreements, SAC Russia is working out Methodological recommendations on exposing, proving and prevention of agreements (concerted actions) and amendments to Article 6 of the Law “On Competition ...”.

The case taken to court by Altay Regional Office, SAC Russia, on the result of the inspection carried out at the Regional Association for poultry farming “Altaiptitsa”.

The Association was established to co-ordinate production and sale of poultry products. The establishing documentation was not presented to the Regional Office, SAC Russia as stipulated by Article 17 of the Russian Law “On Competition ...”. As a result, the Association empowered itself to co-ordinate financing and production, namely setting a single price for eggs on the market of Altay Region.

By the decision of the Commission of Altay Regional Office, SAC Russia, a writ was issued demanding a stop of the infringement of provisions stipulated by Articles 6, 17 of the Law of the Russian Federation “On Competition ...” and to exclude from the charter of the Association provisions on co-ordination of financial and production activity of poultry factories - members of the Association, reinstating the poultry factories’ right to set their own prices for the eggs they produce. The Association “Altayptitsaprom” was fined ten minimum monthly wages.

### ***Control of mergers of commercial entities and acquisition of stock***

During the past two years economic concentration has increased both during the process of privatisation and as a result of redistribution of property of privatised enterprises. This is primarily horizontal integration. Vertical integration is actively taking place within the framework of large economic groups. This integration may significantly restrict competition, impede access of other economic entities operating on the same market to inputs such as factors of production, sources of raw materials, distribution network.



In 1995-1996 the State Anti-Monopoly Committee and its territorial branches considered more than 5 500 claims relating to creation and reorganisation of commercial entities and associations thereof, and purchase of large parcels of stock. Each fifteenth claim concerning economic concentration was dismissed by anti-monopoly bodies. Over two billion roubles worth of fines for violations of anti-monopoly legislation were transferred to the federal budget.

Reorganisation of "Kirovfarmatsiya". The Administration of Kirov oblasts issued a resolution "On Pharmaceutical Service of Kirov Oblast" and created a unitary state-owned enterprise "Kirovfarmatsiya". The formerly independent drug depot, the testing lab, all pharmacies of the city of Kirov, all optician's stores and the pharmaceutical plant were united in this new enterprise. The enterprise was assigned the functions of state management, control and supervision of all pharmacies and pharmaceutical enterprises irrespective of the form of ownership and subordination. The Collegium of Kirov Territorial Branch of the State Anti-Monopoly Committee considered the case a violation of Articles 7 and 17 of the Law of the RSFSR "On Competition" by the Administration of Kirov Oblast and the Department of Health Care while creating the state-owned unitary enterprise "Kirovfarmatsiya" and issued an order cancelling the resolution "On Pharmaceutical Service of Kirov Oblast" and the resultant illegal creation of the enterprise.

The order was not obeyed, and the territorial branch of the SAC filed a claim in arbitration court to have the resolution invalidated. The arbitration court ruled in favour of the anti-monopoly body. Besides, the Committee for the Management of Property undertook action to reorganise the state-owned enterprise "Kirovfarmatsiya" by breaking it up into independent legal entities. Most pharmacies are now independent, their turnover has increased, the drugs on sale have become more varied.

The Territorial Branch in Mordovia has refused the request for acquisition by a state-owned enterprise "Mordovlesprom" of other state-owned enterprises "Khimleskhoz", "Lespromkhoz A" and "Lespromkhoz B".

"Mordovlesprom" claimed that as a result of reorganisation production would go up, equipment would be modernised, new jobs would be created, and foreign investment would be secured. Meanwhile the reorganised enterprises failed to produce any long-term programs for their joint development. Claims that agreement had been reached with potential investors were not supported by any letters of intent either other documents.

The review carried out by anti-monopoly bodies has shown that in terms of commercial timber production and timber deliveries the state owned enterprise "Mordovlesprom" is holding a dominant position on the regional market. Acquisition by the said enterprise of the state owned enterprise "Lespromkhoz B" will radically change the concentration of production and weaken competition in the forestry industry of the region, whereas the acquisition of "Khimleskhoz" and "Lespromkhoz A" will not change the competitive environment. In view of this, the anti-monopoly bodies proposed that the requesting entity should change the original plan of acquisition and exclude "Lespromkhoz B" from it, being one of the largest enterprises of the forestry industry of the region as it is. The enterprise agreed with the anti-monopoly bodies.

The above cases can be regarded as typical examples of prevention of horizontal mergers, as a result of which certain companies could become dominant on the commodity market and acquire significant economic power.

In the event of purchase of large parcels of stock of enterprises that hold a dominant position on the market, the anti-monopoly bodies, before giving consent to such transactions, put forward specific requirements to the buyers of controlling stock.

Here are some examples of such requirements.

In order to prevent reduction or termination of production by a monopolist, unwarranted increase (decrease) of prices on goods supplied to the market of the Russian Federation, and withdrawal of goods the economic entities shall:

- inform the SAC of Russia on a regular basis of their production and sales volume, and explain the reasons for changes in volumes;
- inform the SAC of Russia of prices on manufactured goods and explain the reasons for their changes.

In order to prevent restriction of competition by discriminating consumers and suppliers, ensure free access to the market for other economic entities:

- the economic entities shall notify the SAC of Russia of their intentions (decisions) to change the supply or sales policy of the enterprise.

Similar and other requirement were put forward to the Swedish company Sandwig AB when it was purchasing stock of a Moscow hard alloys plant, to the Cyprus Stratton Paper Company Ltd. as a prerequisite for the SAC consent to its take-over of the Russian enterprise Segezhbumprom, to the Russian UNEXIM bank for acquisition of voting shares of RAO Norilsknikel, to the German company Robert Bosch GmbH, taking control of Engels plant of automobile and tractor spark plugs, to the American company ICN Pharmaceuticals Inc. for purchasing controlling stock of a Kursk pharmaceutical plant.

The biggest deals approved by the SAC of Russia in 1996 are:

- purchase of 51 percent of voting shares of AOOT Holding Company Ust-Ilimsky Lesopromishlenniy Complex (purchased by ZAO Polimit - MENATEP Group);
- purchase of 45 percent of shares of AO YUKOS at the investment tender (purchased by ZAO Laguna - MENATEP group);
- purchase of a large parcel of stock of AO SIDANKO (purchased by ZAO Interros-oil - MFC Group);
- purchase of Voskresensk cement plant, Voskresenscement and Afanasyevsk quarry of cement raw materials (purchased by a branch of the big French enterprise Financier Lafarge);
- merger of Irkutsk and Uralsk aluminium plants.

One of the most vital problems that the SAC is facing now, in terms of control of economic concentration on commodity markets, are the ones related to creation and activities of financial industrial groups, purchase of stock of Russian enterprises by groups of interrelated legal entities and individuals, prevention of collusive deals during privatisation of largest Russian enterprises.

In 1996 the SAC of Russia has issued certificates of compliance with anti-monopoly laws to 53 financial industrial groups that are being created in accordance with the Federal Law "On Financial Industrial Groups."

One of the basic principles of regulation of the process of FIG creation is the intentional creation of at least three groups on one federal (regional) commodity market, or availability of competitors on the said market.

In 1996 the certificates were issued to such FIGs as:

- Consortium “Rossiysky Textile”; Yakovlevsky Textile Holding; Russian Fur Corporation - in light industry;
- Sibagromash, ROSSA-Prim, Spetsialnoye Transportnoye Mashstroyeniye, AVIKO-M. TOCHNOST - in machine building industry;
- Belovskaya, Zerno-Khleb-Muka, Kamenskaya Agro-Industrial Financial Group, Center-Region - in food processing industry;
- Formash, Intekhimprom, Aramidi I Technologii - in chemical industry.

The review of materials on creation of Rosvagonmash FIG however has shown that it may negatively affect competition, as the new FIG would include all railways and quite a few enterprises holding monopolistic positions in a number of sectors of transport machine building. The Ministry of Rail Transport of Russia was instructed to reconsider the list of participants for developing joint investment projects and programs that are to form part of the organisational project of Rosvagonmash FIG.

The anti-monopoly control carried out by anti-monopoly bodies prevents creation of large monopoly structures under the aegis of financial industrial groups, and also prevents negative effects of their activity on competition on the domestic market.

At the same time, the integration processes, leading to setting up FIGs, including transnational ones, are a prerequisite for world market entry by competitive Russian institutions, comparable to large foreign companies in terms of their production potential and scale of production.

Anti-monopoly bodies also carry out preliminary control of creation of unions and associations of commercial entities, that are being set up in order to co-ordinate the entrepreneurial activity of their participants. The main task of anti-monopoly bodies is to prevent illegal cartel agreements within the framework of such unions and associations.

In 1996 the central office of the SAC of Russia alone approved the creation of 45 unions and associations.

The biggest among them are: Volzhskaya Association of River Craft, National Association of Importers, Association of Financial Industrial Groups, Association of Travel Agencies, Union of Sugar Manufacturers, Association of Salt Manufacturers.

The greatest concern for anti-monopoly bodies is the desire to unite among manufacturers and traders of substitute goods. In such cases anti-monopoly bodies either dismiss applications or issue strict requirements limiting the possibility of association members' concluding anti-competitive agreements.

For instance, the SAC of Russia proposed that the Union of Sugar Manufacturers of Russia collect and disseminate information on production, sale, consumers, suppliers, prices and such only under condition that:

- information concerning specific enterprises shall neither be published nor disseminated among the members of the Association;

- data for dissemination shall not contain current information (information for dissemination shall be at least 30 days old).

These proposals were included as part of the founding documents of the Union of Sugar Manufacturers.

It should be noted that commercial entities are trying to conceal actual proprietary and managerial interrelations that accompany the financial and industrial integration of Russian enterprises. Such cases are investigated and proceedings are initiated for violation of anti-monopoly legislation. The proceedings result in fines, orders to restore the infringed competitive environment. In the event it is deemed that competition is endangered, deals (or actions) are invalidated by court decisions. No period of limitations is envisioned for such violations.

### **3. Developing and implementing trade policies and protecting the principles of Fair Competition**

Requirements put forward to the Russian Federation by the WTO include creation of economic regulatory mechanisms in accordance with internationally accepted practices, and, on the whole, promote competition. In this respect the policy pursued by the SAC of Russia is in line with measures that the country will have to take in order to integrate into world economy. The major task of the Committee is to develop a weighed economic policy ensuring balanced measures aimed both at opening Russian markets to foreign competitors and retaining reasonable protectionism, along with those aimed at protecting domestic manufacturers and the interests of consumers.

The SAC of Russia is involved in the activities of the Commission of the Government of the Russian Federation on protective measures in foreign trade, customs and tariff issues. The SAC has exposed the intentions of certain Russian manufacturers to resort to measures of tariff protection without increasing competitiveness of their products on world markets. Under such conditions import restrictions would result in decrease of competition on domestic markets. The Commission studies the situation on the commodity market, potential effects of protective measures and takes decisions that prevent granting unwarranted privileges and restricting competition.

In 1996 the policy of the State in the sphere of protection of domestic manufacturers became more systematic and, on the whole, in keeping with the requirements of the WTO. Nevertheless, there were several cases of protectionism that impeded competition.

Today, when competitive relationships between enterprises are beginning to form in Russia, reputation is becoming one of the major factors of competitiveness. Company identity is established through the use of logos and trade and product marks, and their interest in the legal protection of such is growing. Cases of trade mark infringements are, as a rule, widely covered in the press and attract public attention.

In 1996 the territorial bodies of the SAC considered 163 cases concerning violation of anti-monopoly laws in the part prohibiting unfair competition. Eighty four cases were initiated by economic entities, 74 cases - by territorial bodies.

54 violations were discontinued without instituting proceedings, in 23 cases requests to institute proceedings were dismissed.

158 proceedings were instituted under the articles on unfair competition, and 120 orders were issued by anti-monopoly bodies.

The results of 1996 show that competition between economic entities is developing, as the number of cases of unfair competition considered by anti-monopoly bodies increased by 14 percent as compared to 1995. Decisions that require discontinuing unfair competition become important precedents, orienting economic entities towards strict observance of anti-monopoly laws. What is more important, is that annually 30 percent of cases of unfair competition were dismissed without instituting proceedings as economic entities discontinued their unfair anti-competitive actions. This testifies to the effectiveness of anti-monopoly laws.

### ***The case of PepsiCo***

Joint Venture OOO American Medical Center in Moscow (hereinafter, AMC) filed a claim of unfair competition by PepsiCo., Inc. USA, (hereinafter, PepsiCo).

In 1992 PepsiCo decided to enter the Russian market of medical services. In late May 1993 Vice President of one of PepsiCo divisions sent his employee, R. Kenig, to Moscow to carry out market research. R. Kenig arrived in Moscow on May 25, 1993 and visited a number of health care institutions, including the AMC. The AMC has been rendering high quality medical services to Russian and foreign clients in Moscow since 1991. While visiting the Center R. Kenig managed to obtain the register of the Center's clients without the consent of the AMC. The register is a confidential document, and the absence of the Center's consent is confirmed by letters addressed by the AMC to PepsiCo. R. Kenig sent the register to his division, and a copy of the register to the representative office of a PepsiCo subsidiary in Moscow.

PepsiCo created a medical center called Columbia Presbyterian Moscow (hereinafter, CPM). The Center was registered on September 5, 1994 by Moscow Registration Chamber. PepsiCo regarded the AMC as its only competitor on the market of medical services. PepsiCo, through a number of its subsidiaries, jointly with Columbia Presbyterian Ltd., USA and the American-Russian Investment Fund obtained the controlling rights to 85 percent of votes corresponding to the parcel shares in the charter capital of the CPM.

The register of AMC clients was used by PepsiCo to enter the market of medical services. This is confirmed by the correspondence between PepsiCo and the J. Hopkins Hospital, and a US consultancy company, as well as by a number of invitations to the CPM presentation sent out to companies registered with the AMC.

The CPM was also had a copy of the AMC register, and included 79 AMC corporate clients (45.7 percent of the total number) into the list of its target clients. As of July 27 1995, the CPM was providing services to 83 corporate clients, and 13 of them (about 15.7 percent) were from the AMC register.

Thus, PepsiCo entered the Moscow market of medical services and the AMC lost a number of its clients.

The Commission of the SAC of Russia qualified the actions of PepsiCo as unfair competition in the form of obtaining confidential information without the consent of the owner.

### ***The case of Microsoft***

Microsoft filed a claim of unfair competition by AOZT VIZA (Moscow). The Commission of the SAC considered the claim and the submitted evidence and established the following:

Microsoft develops and produces computer software and has the copyright of MICROSOFT WINDOWS 95 and MICROSOFT OFFICE FOR WINDOWS 95. The said corporation sells computer

software on the territory of the Russian Federation through a network of dealers on the basis of agreements.

AOZT VIZA sells computer software, including CDs. According to an expert conclusion, two CDs purchased in AOZT VIZA contain two programs called MICROSOFT WINDOWS 95 and MICROSOFT OFFICE FOR WINDOWS 95, that are copies of programs, copyright to which belong to Microsoft.

According to international agreements and the laws of the Russian Federation on copyright to computer software, the copyright holder has the exclusive right to distribute or to permit distribution of such software. Transfer of rights to third parties shall be effected on the basis of written agreements. A party violating the laws on exclusive rights is infringing the copyright. Microsoft did not conclude agreements with AOZT VIZA on using computer software belonging to Microsoft, and AOZT VIZA failed to prove its rights to use the above software. Thus, AOZT VIZA that sells copies of computer programs belonging to Microsoft without concluding an agreement with the corporation, infringes the copyright.

Microsoft also possesses exclusive rights of trade marks WINDOWS and MICROSOFT registered in the Russian Federation (certificate issued by Rospatent No. 119186 of 7.27.94 and certificate issued by State Committee for Inventions of the USSR No. 81067 of 4.13.87). According to the above expert's conclusion these trade marks were found on CDs purchased at VIZA. Microsoft did not conclude agreements with VIZA on using its trade marks. AOZT VIZA failed to prove its rights to use the said trade marks. Thus, AOZT VIZA infringes the rights of the owner of the above trade marks.

The Commission qualified the actions of AOZT VIZA (sale of CDs with copies of computer software MICROSOFT WINDOWS 95 and MICROSOFT OFFICE FOR WINDOWS 95, and use of trade marks WINDOWS and MICROSOFT) without concluding agreements with the Microsoft Corporation as unfair competition in the form of sale of goods and illegal use of intellectual property and means of individualisation of a legal entity and products. Based on the decision by the Commission, the SAC of Russia issued an order instructing AOZT VIZA to cease the violation of Article 10 of the Law On Competition.

*Appendix*

Monitoring implementation of anti-monopoly laws and laws on advertisement by SAC of Russia  
and its territorial bodies  
1994-1996

		Number of cases considered		
		1994	1995	1996
1	Total number of claims relating to violations of anti-monopoly legislation	12 152	9 144	7 610
2	including cases of violation of anti-monopoly legislation	3 720	2 933	3 077
3	Total number of claims concerning violations of legislation on advertisement	968	1 905	4 000





## **THE SLOVAK REPUBLIC\***

(1996)

### **Summary**

Unlike the previous year, during which some of the identified anticompetitive practices were considered and judged according to the old Competition Protection Act No. 63/1991 Coll., the year 1996 has been the first year of full practical application of the Act No. 188/1994 Coll. on Protection of Economic Competition.

During 1996, no amendments to existing competition legislation were approved in the Slovak Republic, since it takes a certain period of time until a need to amend the legal norm is recognised and clearly phrased. At the same time, potential changes in attitudes towards competition principles within European Union will probably affect relevant national regulations and facilitate necessary amendments, with special respect to the preparation of Slovak Republic's accession to the European Union.

In 1996, the Antimonopoly Office has dealt with 128 cases, including the justification reviews in cases of interventions of central state administrative bodies and municipalities. Totally, 70 first and second-degree decisions have been issued, nine appeals against the decisions have been submitted, and two charges requesting review of legality of issued decisions have been received by the Supreme Court of the Slovak Republic.

### **1. Changes in Competition Policy and in the Act on Protection of economic Competition**

#### ***Current Act on Protection of Economic Competition***

During the respective period of time, i.e. in 1996, no changes in or amendments to, the Act No. 188/1994 Coll. on Protection of Economic Competition (hereinafter referred to as "the Act"), have been approved.

In 1996, the Association Committee, as a body established in accordance with the Europe Agreement, has approved the decision dealing with implementing rules for application of competition provisions regulated in the Article 64, paragraph 1 (i), (ii) of the Europe Agreement. The implementing rules specify the set of criteria according to which the agreements restricting competition as well as abuse of dominance negatively influencing trade between the European Union and the Slovak Republic shall be dealt with on the territory of the European Union and the Slovak Republic. The implementing rules determine the proceedings to be adhered to by the concerned institutions, i.e. by the EU Commission - DG IV and Antimonopoly Office of the Slovak Republic (hereinafter referred to as "the Authority"). The rules shall be applied when dealing with anticompetitive practices, positive or negative conflict of competencies, problems of mutual co-operation, *de minimis* cases, and also when trying to find mutually acceptable solutions to specific anticompetitive problems and cases through bodies established in consistence with the Europe Agreement. The rules shall come into force on 1st January 1997.

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\* The original language of this document is English.

The Act contains a general prohibition of both vertical and horizontal agreements restricting competition. Such agreements are prohibited and, at the same time, legally void, provided they do not meet the exemption criteria. The Act also contains a general prohibition of abuse of a dominant position on the market, while not allowing for any exemption from the respective rule. Concentrations (mergers) resulting in major changes of market structure and affecting competitive environment are also monitored by the Authority. The Act specifies quantitative criteria to be met in mandatory notification procedures. The Authority shall prohibit a concentration creating or strengthening a dominant position on the market unless the participants prove that the harm resulted from the restriction on competition will be outweighed by overall economic advantages of the concentration.

The Antimonopoly Office of the Slovak Republic (the Authority) is a central state administrative body with a wide variety of powers focused on promotion and protection of economic competition. The Authority is entitled to decide on agreements restricting competition, abuse of dominance, concentrations, and is also empowered to further supervise practical implementation of all decisions issued in the respective cases. The Authority may revoke its decision if circumstances decisive for the decision's issuance have changed substantially or if the decision was based on false and/or incomplete data submitted by concerned entrepreneurs or if the decisions were induced by a deceit. The Authority has the right to publicise the decisions and notifications of the concentrations. Finally, the Authority is entitled to fine entrepreneurs for breaching duties stipulated by the Act. The fines may be imposed repeatedly.

Amongst other activities of the Authority, we should mention the preparation of general surveys focused on competitive environment in various industrial branches of the Slovak economy, as well as enforcement of measures protecting and promoting the development of competitive environment. The Authority may request remedial (corrective) measures from central state administrative bodies and municipalities, if it possesses clear evidence showing that those bodies have, through their steps, measures taken, or obvious support shown, seriously violated principles of fair competition. In privatisation process, the Authority issues written opinions evaluating privatisation drafts (proposals) from purposeful deconcentration point of view. If the Authority does not agree with the privatisation project prepared and submitted by the establishing ministry, the case may be handed over to the Slovak government for final decision.

#### ***Other Relevant Legal Norms and Latest Legal Trends***

The Act No. 18/1996 Coll. on Prices defines rules for price negotiations, price-related regulation, and relevant control. On the basis of the provisions of this Act, financial monitoring bodies are responsible for imposing fines on those who use excessive prices in business dealings. The Act also determines the powers of the Authority in issuing measures against undesirable price developments. More specifically, official bodies, when considering price regulation steps resulting from insufficiently developed competitive environment, have to request from the Authority an objective analysis of current competitive environment in the respective sector of the economy. When dealing with excessive prices enforced by an entrepreneur having a dominant position on the market, the Authority has the right to propose that financial monitoring bodies take appropriate interim measures focused on adequacy analysis of the respective prices.

By the Act No. 303/1995 Coll. on Budgetary Rules, the Authority has been entrusted with the exaction of fines. Based on the provisions of Budgetary Rules Act, the Authority is obligated to exact the fines imposed on the entrepreneurs for breaching duties stipulated by the Act on Protection of Economic Competition.

The Act No. 164/1996 Coll. on Railways, Cable Railways, and Trolley Ways creates a space for free competition on the respective markets, i.e. makes it possible for those, who have been granted a license, to provide customers with a wide variety of transportation services. The license is granted by Railways Administration Office. The Act divides railways into several categories (national, regional, and

local railways), while assuming that, in the first stage, the national railways will remain state-owned and regional (local) railway networks will gradually be privatised. The Act sets the same conditions for each and every potential bidder, regardless of ownership status.

Pursuant to the Act No. 168/1996 Coll. on Road Transportation, all those having a trade license for transportation can start up business. However, a special transportation license is necessary for regular passenger transportation. The license is, according to its nature, granted either by the respective municipality or by state administrative body.

The Act No. 119/1996 Coll. on Public Procurement regulates procurement procedures in public construction projects realised for municipalities or state institutions by partially or totally private companies. Here we mean public construction projects like highways, telecommunication facilities built within the Global Telecom Network (GTN), railways, central heating systems, electricity generation and transmission facilities, gas and water distribution systems, etc. Procurement procedures are implemented by using concessions which allow successful applicants to realise the agreed projects within the set period of time, maintain the construction sites appropriately, and receive the agreed amount of revenues as a compensation for the work done.

The Act No. 121/1994 Coll. abolishes mandatory membership of entrepreneurs in trade (business) chambers and professional associations.

The Act No. 317/1996 Coll. amending the State Enterprise Act provides that two state companies can merge or fuse only if a merger (concentration) review has been done in accordance with the Act on Protection of Economic Competition.

The Act No. 289/1995 Coll. on Valued Added Tax introduced six per cent VAT on water, mineral water and sparkling waters with sugar additives, except for pure fruit or vegetable extracts (juices). Other beverages remained in 23 per cent VAT category which put them in a highly disadvantageous position, since the six per cent VAT beverages were considered as substitutes. The amendment passed in 1996 removed the discrepancy.

### ***Government Drafts Introducing New Legal Norms***

The Authority is entitled to issue comments on government drafts and prepare its own legal proposals related to the respective powers. In 1996, the Authority issued comments to 190 government or parliamentary drafts and expressed its opinion of additional 140 strategic documents dealing with government economic policy, out of which 40 were connected to international agreements.

In the negotiation process focused on free trade agreements, the Authority proposed that competition rules be included in the wording of those agreements. In addition, the Authority prepared procedures to be followed in case of restrictive business practices which might negatively influence trade between respective countries.

The Slovak Republic is obligated to harmonise its national competition law with the legal norms valid in the European Union. This obligation results from the Association Agreement closed between EU member countries and the Slovak Republic. The government of the Slovak Republic considers harmonisation of national competition law as a top priority. In practise, it means that the Slovak government will consider alternative, according to which the Slovak Republic would join the system of block exemptions next year (especially in case of the so-called black clauses). Other harmonisation-related activities would deal with procedural issues, like protection of third parties and further introduction of fair competition principles into major economic sectors (energy, telecommunications, water and sewage systems, securities market, banking, insurance, etc.).

## 2. Practical Application of the Act on Protection of Economic Competition

### *Proceedings in Cases of Anticompetitive Practices -- Agreements Restricting Competition and Abuse of Dominant Position*

The Act No. 188/1994 Coll. on Protection of Economic Competition gives the Authority a right to investigate and prosecute competition-related violations (anticompetitive practices used by entrepreneurs), issue decisions, demand corrective measures, and impose sanctions.

In 1996, the Authority has investigated 87 anticompetitive practices, out of which 25.3 per cent (i.e. 22 cases) were focused on agreements which might have restricted competition. 65 cases (74.7 per cent) dealt with abuse of dominance - those cases were finally decided by competent commercial courts:

- 28 cases have been completed by issuing a decision, six cases are still being processed;
- 53 cases were dealt with outside the administrative proceedings' framework. In those cases, it had become obvious before the proceedings started that practices described in the petitions (like unfair business practices) were not subject to the Competition Protection Act. Since the Authority did not have legal powers to complete the cases, official administrative proceedings could not be launched.

In the first degree (procedural round), one of four executive divisions of the Authority and two regional offices (Banská Bystrica for Central Slovakia, Košice for Eastern Slovakia) are authorised to start proceedings. Parties to the proceedings or those whose interests have been affected by the decision can submit an appeal against the decision. The appeal shall be reviewed and decided upon by the Chairman of the Antimonopoly Office in separate administrative proceedings. The Chairman shall issue a final decision based on recommendations from independent commission. There is no appeal against the final decision.

A party of the proceedings may, however, bring an action before the Supreme Court requesting a judicial review of the decision. The deadline for bringing an action is 30 days from the date on which the decision was delivered to the respective party to the proceedings.

In 1996, two cases requesting a review of the decision issued by the Authority were brought before the Supreme Court of the Slovak Republic. In the first case, the Supreme Court cancelled the original decision of the Authority and the second case has not yet been completed. Since 1991, six cases were dealt with at the Supreme Court of the Slovak Republic.

### *Agreements Restricting Competition*

The Act on Protection of Economic Competition provides that agreements and concerted practices between entrepreneurs as well as decisions of their associations whose object or effect is or may be the restriction on competition are prohibited, if this Act does not state otherwise. There are prohibited agreements restricting competition that involve in particular : - direct or indirect price fixing; commitment to limit or control production, sales, research & development, or investments; - division of the market or of sources of supply; - commitment by the parties to the agreement that different trade conditions relating to the same contractual subject matter will be applied to individual entrepreneurs which will disadvantage some of them in competition; - conditions which connect conclusion of contracts to the acceptance of supplementary obligations which are not related to the subject of those contracts either by their nature or according to commercial usage.

***(a) Case Summary - Agreements Restricting Competition***

In 1996, eight cases were processed within administrative proceedings, seven were completed by issuance of the decision and one is still being processed:

- 14 cases were solved outside administrative proceedings;
- Price-fixing agreements proved to be the most frequent type of restrictive agreements.

The Supreme Court of the Slovak Republic has not reviewed any case related to the agreements restricting economic competition.

***(b) Brief Description of Major Cases - Agreements Restricting Competition******The Association of Slovak Cement and Lime Producers (negative clearance)***

The Association of Slovak Cement and Lime Producers submitted a request to the Authority whether or not concerted practices and agreements used in Association's activities meet the conditions defined in Article 5 paragraph 1 (conditions which, if met, mean that the ban shall not apply to the respective agreement) of the Act, i.e. if Article 3 of the Act does not apply to them.

All Slovak cement producers are organised in the Association (which adds up to seven companies), so are major lime producers. The Association turned to the Authority especially in conjunction with the obligation of the Association to release and exchange relevant information with its foreign partners (organisations). This obligation results from the membership of the Association in CEMBUREAU (The European Cement Association) and EULA (The European Lime Association).

The Authority has closely reviewed major documents (association agreement and statistical rules), based on which the statistical, technical, and economic data were sent to the international organisations.

The association agreement specifies following main activities : - protection of interests of all members in environmental and technical issues; - co-ordination in coping with technical, technological and transportation problems, -- R&D support -- technical norms and technological projects. Amongst additional activities, we should mention expert analyses of alternative energy resources, reduction of energy consumption, preparation and completion of overall statistical, economic and technical information for the international associations.

Having reviewed all the documents, the Authority came to the conclusion that association agreements along with precisely defined statistical rules do not represent an agreement restricting competition.

In the area of information sharing, which was analysed separately, the Authority has issued following binding conditions whose meeting would mean that information-sharing activity does not violate provisions of the Article 3 of the Act :

- data collection and processing, as well as release of information should be done exactly as defined by relevant statistical rules, with the same frequency and the time-lag between collection and publication;
- any kind of additional individual information sharing (with features of business secrecy) between members of the Association is prohibited;

- confidential information can only be published in total (aggregated) figures representing the whole Association;
- following information sent to the Association is considered confidential :
  - (a) performance data less than one year old;
  - (b) data officially unavailable for public;
  - data characterising one member separately or data describing performance of less than three members in an aggregated manner;
  - (c) data which, if shared between members, would lead to a co-ordination of market actions of the members (competitors);
  - (d) data on prices of cement and lime less than one year old.
- The Association must not publish any kind of confidential information within one year from the collection date;
- The Association must not release any information comparing economic performance of two or more of its members;
- Published data must not contain any information pointing at business transactions affecting competitive relations between concerned members.

#### *Abuse of Dominant Position*

Pursuant to the Competition Protection Act, a dominant position on the market is held by one entrepreneur or by several entrepreneurs, who are not subjected to substantial competition or, as a result of their economic power, they can behave independently from other entrepreneurs and consumer and can therefore restrict competition. The Act does not prohibit gaining or strengthening of such defined dominant position, it only prohibits abuse of dominance.

An abuse of dominance on the market is in particular : - direct or indirect enforcement of disproportionate conditions in contracts; - restrictions on production, sale, research & development of goods and services to the detriment of consumers; - application of different conditions for equal or comparable transactions to individual entrepreneurs on the market, especially if it constitutes a competitive disadvantage; - making the conclusion of the contract conditional upon another party's acceptance concerning additional conditions, while those conditions are clearly unrelated to the contractual subject matter both in substance and in customary commercial practice.

#### ***(c) Case Summary - Abuse of Dominant Position***

In 1996, 26 cases of described nature have been dealt with, out of which 21 were completed by issuance of the respective decisions. The rest has not yet been finished. 39 cases were processed outside the official administrative proceedings.

Inappropriate (disproportionate) conditions enforced through business contracts were the most frequent reason for starting an investigation activities.

As was already mentioned in paragraph 21, two cases were submitted to the Supreme Court of the Slovak Republic.

***(d) Brief Description of Major Cases - Abuse of Dominant Position****Marianum Bratislava, Municipal Company  
Funeral and Cremation Services*

Parties to the proceedings : BIOPOL, Ltd.; Maestus - funeral services Bratislava; PIETA Ltd. - funeral services Bratislava; Ladislav Strí Funeral Services, Bratislava; STYX Ltd. Bratislava and Marianum Bratislava, Municipal Company (hereinafter referred to as "Marianum") - the company against which the petition was filed.

Petitioners claimed that Marianum representatives (Marianum - a company that took care of municipal cemeteries, managed the only cremation facility in Bratislava city, and provided complex funeral services) forced them to close subcontracts on certain services exclusively with Marianum. The nature of those services and valid concessions held by all petitioners allowed them to provide respective services by themselves with no assistance necessary from the Marianum company. However, when they wanted to provide the services, Marianum employees did not let them enter the cremation facility, funeral homes, and even cemetery premises. In addition, according to petitioners, Marianum forced them to sign contracts which would give that firm an exclusive right to provide funeral oration services, flowers, manual assistance during ceremonies, all this in spite of the fact that all those firms (petitioners) possessed relevant concessions and employed skilled personnel.

Although it was hard to separate particular services from each other, three distinct relevant market were defined as a result of investigation done by the Authority, namely cremation services, cemetery maintenance and administration services, and core funeral services. The Authority used internationally recognised methodology of funeral services' classification, as published by International Association of Funeral Service Providers, and also classification approved by the Slovak Association of Funeral, Cremation, and Cemetery Services.

When determining market shares on relevant markets of cremation and cemetery services, the Authority assumed that most of funeral services are usually provided in funeral homes, administration and renting of which fall directly into revenues gained from cremation and cemetery services. Because of the traditions of Slovak funeral services, it is almost a rule that there is only one funeral home located directly at the cremation or burial facility, in other words, there is one funeral home per one cemetery or crematorium. It follows that an owner (administrator) of the crematorium or cemetery becomes, at the same time, the owner (administrator) of the respective funeral home, while funeral home itself represents a facility which is absolutely necessary for any kind of funeral-related service.

The Authority then reviewed opportunities for the potential new entrants. An access to this market was, to a significant degree, restricted, because of its territorial structure and related transportation efficiency. In additions, the plan of new cemeteries and urn storage facilities represents natural limits which each and every potential entrant has to take into consideration.

It was found during the investigation that Marianum company was operating the only cremation facility in the city of Bratislava, i.e. was acting as a monopoly provider of cremation services in the whole region (the other cremation facility in Banská Bystrica is 220 kilometers from Bratislava). Moreover, Marianum Municipal Company administered 21 out of 22 municipal cemeteries on the Bratislava's territory, which put the company into highly dominant position on the relevant local market of burial services.

When determining relevant geographic market of funeral services, it was clear that most people insisted on chosen (wished) burial place, while not being willing to switch to an alternative one. Besides, additional transportation of the deceased persons to another facility would have made the funerals much

more expensive. That is why the territory of Bratislava City was determined as a relevant local geographic market.

The Antimonopoly Office of the Slovak Republic, as a body competent for the case pursuant to the Article 12 of the Act No. 188/1994 Coll. on Protection of Economic Competition, has issued, in consistence with the Article 11, paragraph 1(f) of the Act No. 188/1994 Coll. and Article 46 of the Act No. 71/1967 Coll. of Laws, following decision related to the abuse of dominance exerted by Marianum company on four funeral companies operating in Bratislava City:

- (1) Pursuant to the Article 7, paragraph 4 of the Act No. 188/1994 Coll., any abuse of dominance enforced by the Marianum company shall be prohibited. The Marianum company must not connect cemetery and cremation services with funeral services in any kind of contracts to be closed between the company and the other four funeral service providers.
- (2) Pursuant to the Article 14, paragraph 1, a fine of Sk 1 000 000 (one million Slovak Crowns) shall be imposed on the Marianum company for violation of the respective provisions of the Act, as described in paragraph 1 above.

Marianum Municipal Company then submitted an appeal against the above mentioned decision. The Chairman of the Authority reconfirmed the original verdict and decided in additional administrative proceedings that, pursuant to the Article 11, paragraph 1(f) of the Act No. 188/1994 Coll., the Marianum Company shall refrain from any further abuse of dominance on the defined relevant market, namely the abuse through which it forced four funeral service providers (BIOPOL, Ltd.; PIETA Ltd. - funeral services Bratislava; Ladislav Strí Funeral Services, Bratislava; STYX Ltd. Bratislava) to order all related subcontracts in its branches. The amount of the fine to be paid, was, however, reduced from Sk 1 000 000 Sk 500 000.

In reaction to the Chairman's ruling, the Marianum Company brought an action before the Supreme Court of the Slovak Republic which has not yet completed the case.

#### *Slovak Telecommunications Kosice*

Parties to the proceedings : Qeta Ltd., Poprad and Slovak Telecommunications, Regional Headquarters Kosice against which the petition was filed.

In its petition, Qeta Ltd. claimed that Slovak Telecommunications Kosice had abused its dominant position by disconnecting the telephone lines of the Qeta Ltd. and private line of its head manager (legal representative - partner), Mr. Ambros Simko. Slovak Telecommunication Kosice (hereinafter referred to as "STK") argued that they had done so because Young Ltd., another company managed and represented by Mr. Simko, failed to pay overdue telephone bills. Although STK were aware of the fact that Young, Ltd. was an independent and separate company operating on its own account (i.e. company that had formally nothing to do with Qeta, Ltd.), they had disconnected the Qeta's lines because both Qeta, Ltd. and Young, Ltd. had the same head manager and, in case of Young, Ltd. , also the same exclusive partner (Mr. Ambros Simko).

Voice communication services as the basic telecom activity can be provided either through stable (fixed) telecom network or through public radio-telephone network (mobile or cellular telephones). The Authority therefore focused primarily on product market, while trying to determine the degree of substitution between fixed and mobile voice telecom networks. Having specified major characteristics of both stable and mobile telecom networks, the Authority came to a conclusion that those two ways of voice communication were not mutually interchangeable in conditions present in the Slovak Republic.



Such opinion was backed up by the fact, that state-owned Slovak Telecommunications (ST) had been (by Telecom Act) granted an exclusive rights for services provided through fixed telephone infrastructure.

Since the Slovak Telecommunications had been granted exclusive rights in the sector, geographic market could be identified through organisational structure of ST. An applicant, when applying for a line, could choose only geographically relevant branch of ST, i.e. any other operator from neighbouring region was out of question. In case of East Slovakia branch of Slovak Telecommunications, a geographic market was identical with the territory of Eastern Slovakia.

From time point of view, the market such defined was not subjected to any significant change, at least in the short run. This would be the case up until the mobile voice communication network reached a territorial coverage comparable to stable cable phone network in the Slovak Republic.

Once the relevant market had been defined, the Authority proceeded further to determine the role of STK on the market. As it was mentioned before, Slovak Telecommunications had an exclusive rights to provide voice communication services through fixed phone network, which in practice meant, that as defined in the Article 7, paragraphs 1 and 2 of the Act, Slovak Telecommunications Kosice had a dominant position on the relevant market.

During the proceedings, the Authority took into consideration not only Competition Protection Act, but also Act No. 110/1964 Coll. of Laws on Telecommunications and the Decree of Federal Telecom Ministry on Telephone Code. Pursuant to the Article 7, paragraph 5 (b) of the Competition Protection Act, the Authority decided that Slovak Telecommunications, regional headquarters Kosice acted to the detriment of consumers since they tried to get the overdue bills repaid through disconnection of the lines belonged to other private company. Pursuant to the Article 11, paragraph 1(f) of the Act No. 188/1994 Coll., the Slovak Telecommunications Kosice should refrain from any further abuse of dominance on the defined relevant market, and remedy the respective breach inconsistent with the provisions of Article 7. In keeping with Article 14, paragraph 1 of the Act, the Authority imposed a Sk 1 000 000 fine on Slovak Telecommunications Kosice.

STK submitted an appeal against the decision. The Chairman of the Authority, in co-operation with the established independent expert commission, fully reconfirmed original decision.

### **Mergers (Concentrations)**

According to relevant provisions of the Competition Protection Act, a concentration is a process of economic combining through merger or amalgamation of two or more previously independent enterprises, or transfer of an enterprise to another entrepreneur or acquisition of control by one or more entrepreneurs over an enterprise or part thereof. The Act specifies conditions meeting of which means that a concentration is subject to control procedures conducted by the Authority. The Authority may either fully approve the concentration or approve with certain additional time and subject matter conditions to be met or prohibit the transaction. The Authority shall prohibit the concentration if it creates or strengthens a dominant position on the market unless the participants prove that the harm resulting from the restriction on competition will be outweighed by overall economic advantages of the concentration.

#### ***(a) Case Summary - Concentrations***

In 1996, 40 concentration cases have been processed, of which 13 concentrations were fully approved. There were no decisions or rulings with additional conditions to be met by parties to the respective concentrations. 14 cases dealt with the classification of concentrations while another 13 have not yet been completed.

Of 13 approved concentrations, eleven were of horizontal and one of vertical nature. The remaining case represented conglomerate merger.

Four concentrations had international dimensions (Heineken International Beheer B.V., Amsterdam, Netherlands and Goldener Pheasant, Ltd. Hurbanovo, Slovak Republic; OSRAM Ltd., Nové Zámky - Tesla Ltd. Nové Zámky, Feron a.j.s.c. Prague, Czech Republic - Feron a. ilina, Slovak Republic, VS a.j.s.c. Košice, Slovak Republic - FLLI Goffi S.p.A. Villanuova, Italy.)

The Supreme Court of the Slovak Republic has not dealt with any charges (requests for judicial reviews) submitted against original verdicts issued by the Authority.

***(b) Brief Description of Major Cases - Concentrations***

*Concentration of Slovak Furniture Manufacturers*

MIER Topolčany, the biggest Slovak furniture manufacturer, submitted a notification of concentration to the Authority. Although the biggest on the market, MIER exported majority of its production, while only 36 per cent of the output was distributed to serve domestic customers. The second participant of the concentration was TATRA Holding, a.j.s.c. Pravenec which owned controlling stakes in following companies :

- TATRA Furniture Production Pravenec - manufacturing of chairs,
- TATRA Furniture Production Prievidza - furniture,
- TATRA Furniture Production Kamenec p.Vtáènikom - upholstered furniture,
- TATRA Furniture Production Martin - chairs.

Pursuant to Article 9, paragraph 1 of the Competition Protection Act, this concentration was subject to Authority's controlling procedures.

The ties between aforementioned companies were highly structured - the same managers were sitting on the several Boards of Directors or Supervisory Boards of respective firms, which gave them an opportunity to exert their influence and control over those companies.

The Authority conducted a detailed monitoring focused on competitive environment in furniture production sector. The antitrust officials took part in annual furniture fairs and exhibitions, monitored all imports through reports from Customs Authorities, and investigated all concerned companies individually. Those analyses were then updated by information submitted by the parties to the concentration. Finally, the positions of all companies concerned were defined on the furniture production market which was further divided into several sub-sectors (kitchen furniture, pieces for living rooms and bedrooms, office furniture, upholstered high-profile furniture sets, various types of chairs, etc.).

The combined share of all merging companies on the Slovak furniture market (as a whole, with no sub-sectoral divisions) was 19.1 per cent before the merger. The described concentration did not bring about any significant change in competitive structure of the market. Results after the concentration are as follows: kitchen furniture - market share remained the same 49 per cent, while in bedroom sets it slightly went up from 22.1 per cent to 22.6 per cent.

The most significant result of the concentration could be seen in living room furniture sets - an increase from 5.5 per cent to 17.5 per cent, office furniture equipment which boosted by two per cent to 14.1 per cent, and upholstered pieces in which the share reached 12.6 per cent.

However, there are numerous other Slovak firms serving relevant market segments. According to business statistics, there were more than 90 companies with more than 25 employees per facility, out of which ten major producers exported most of their production.

Having done all the mentioned analyses, the Authority came to a conclusion that the respective concentration had not created nor strengthened dominant position of the concerned companies, since the companies even after the concentration had to face substantial competition. The concentration has therefore been approved, which was supported by following additional arguments:

- zero tariff imports from the Czech Republic realised within the Tariff Union between Czech and Slovak Republics;
- technological flexibility of production equipment which means that production facilities can, if necessary, switch from one production line to another;
- low import barriers like import surcharge or mandatory tariffs;
- existing amount of imports from foreign countries;
- highly structured and competitive market of furniture with hundreds of small firms operating all over the Slovakia.

#### *Vertical Mergers*

##### *OSRAM Ltd., Nové Zámky - Tesla Ltd. Nové Zámky*

Proceedings were triggered off after the notification submitted by the OSRAM Ltd., Nové Zámky (hereafter only "OSRAM"), a subsidiary of Germany-based company OSRAM GmbH. According to the notification, OSRAM intended to buy 100 per cent stake in TESLA Ltd., Nové Zámky (hereinafter only "TESLA").

OSRAM was registered on 11 August 1995, at the Bratislava - vidiek Court of Justice as a legal entity with Sk 100 000 equity. The scope of business was retail and wholesale activities (household appliances, lighting equipment, glass products, etc.)

OSRAM GmbH had twelve per cent share on the relevant market of the Slovak Republic in 1994.

TESLA was registered on 12 December 1990 with Sk 126 200 000 equity. The core business activities were development, production, and repairs of lighting equipment and electric light generators. According to the intentions announced in notification, TESLA would continue with those activities after the concentration.

TESLA reported 11.8 per cent share on the above mentioned relevant market.

There were several other major international companies serving the Slovak market in 1994, amongst which we should mention General Electric (19 per cent market share), Philips (13 per cent), Narva (five per cent), Czech-based TESLA Holešovice (39.2 per cent).

Based on submitted documents and data, the Authority decided that the transaction (it was in fact, an agreement on buying 100 per cent shares of TESLA) should, according to Article 8 of the Competition Protection Act, be classified as a concentration. Through the agreement, OSRAM acquired a control over another entrepreneurial legal entity which meant that conditions stipulated by paragraphs 1 and 2 of Article 8 of the Act were met. Further, from documents, consultations, and analyses done, it turned out that

the concentration should be subject to controlling and reviewing procedures, as described in Article 9, paragraph 1 of the Act.

The Authority declared that features of the concentration had following obvious economic advantages :

- production line would remain the same, as to classic lightbulbs for general lighting purposes, cars and administrative premises, and new items would be added, especially updated light generators;
- production equipment would be fully modernised within four years period, while being consistent with the global OSRAM technology frameworks, the number of production lines would be almost doubled (from existing 18 to 32 in the year 2000);
- an output would also be doubled;
- new job opportunities would be created through investment projects valued at Sk 12 000 000 in which numerous regional subcontractors would participate;
- social aspect - 200 primary job opportunities right at the facility would be created within four years period, 100 of which during the first year of expansion program;
- such an expansion of production in the Slovak Republic would consequently lower the need for imports and bring Slovakia closer to self-sufficiency in the respective products while exports of OSRAM to other countries would be made easier through business contacts that OSRAM Germany had established over the past years;
- overall synergy effect resulting in good value-for-money relation.

#### *Conclusion*

In spite of the fact that the concentration strengthened dominant position of TESLA on the domestic relevant market, the Authority approved the transaction, since it came to a conclusion that a harm resulting from the restriction on competition would be outweighed by overall economic advantages of the concentration. In addition, no barriers to entry were found in conjunction with the defined relevant market.

#### *Fines*

Pursuant to the Competition Protection Act, the Authority is entitled to fine entrepreneurs for breaching duties stipulated by this Act according to its importance up to ten per cent of their turnover recorder in the previous accounting period. If it is impossible to calculate a turnover, the fine may reach Sk 10m (US\$ 333 000). If it has been proved that the entrepreneur made profit through breaching a duty, the fine shall be at least equal to this profit.

In 1996, fines of Sk 3 130 000 (US\$ 100 000) were imposed for breaching duties stipulated by the Competition Protection Act. Fines were related to five completed cases.

#### *Exaction of Fines*

Exaction procedures are regulated in the Act No. 511/1992 Coll. on Tax and Fees Administration and on Changes in Hierarchy of Financial Controlling Bodies, as amended by later legal norms. The Act specifies procedural rules and decision making process in case of fines exaction. For reasons enumerated specifically in this Act, the Authority can decide on delays in payments of respective sanctions as well as on payment schedule and ways of fine exaction enforcement. The most frequent method of exaction is direct withdrawal from the bank account of respective debtor.

The Authority issued 20 decisions in 1996 dealing with exaction of fines, out of which seven were payment orders for interest rates from overdue penalties, five execution orders, six payment warnings and two decisions on payment postponement.

### **3. The Role of the Antimonopoly Office of the Slovak Republic in Formulation and Practical Implementation of other relevant Policies**

The Antimonopoly Office of the Slovak Republic, as a central state administrative bodies with exclusive powers in the area of antitrust, enforces basic principles of competition in order to develop balanced competitive environment which will in turn contribute to steady economic growth of the Slovak Republic.

Within the framework of industrial policy, the Authority strives for full enforcement of fair competition principles and proportional development of all sectors of the Slovak economy with no sector being given a preference over the others. Liberalisation of external economic relations results in increasing pressure on Slovak companies in terms of quality, depth and width of production lines, R&D issues, and thoughtful restructuring.

Efficient and precise bankruptcy and settlement legislation is one of the main prerequisites of overall restructuring of bank and insurance sectors. The Authority therefore supported government Bankruptcy and Settlements drafts so that credit portfolio problem could be solved quickly and effectively.

Insolvency is another economic factor slowing the whole transition process down. It is a strong barrier to further development of entrepreneurial activities, investment projects, and industrial output. It is important for economic environment to remove both entry and exit barriers. If enforced properly, fair competition principles result in output satisfying needs of consumers at competitive prices.

Privatisation process is, to a significant extent, connected with restructuring efforts, which in turn involves liquidation of inefficient state-owned enterprises. That is why the Authority's main goal in privatisation is to develop working competitive environment through property transfers. Thus, privatised companies are viewed and analysed from purposeful deconcentration point of view. The Authority reviewed 178 privatisation projects, each strictly individually, while taking into consideration latest trends in economic globalisation and liberalisation of international trade relations. The privatisation cases which may have involved antitrust aspects are reviewed and monitored within the legislative space given by the Competition Protection Act. Here, a list of all privatisation decisions issued by the National Property Fund proved to be of great help.

Within the framework of macro-economic policy, there are certain legal priorities to focus on, especially antidumping legislation. To balance interests of antitrust and trade policies, we need a transparent and comprehensive antidumping law, since dumping prices may cause serious problems in the area of competition. That is why it is necessary for the Authority to actively participate in the preparation of antidumping drafts, so that each and every dumping case can also be analysed from antitrust (competition protection) point of view.

Competition policy has traditionally had a very close ties to trade policy. The Authority in this area monitors all trade-related measures and steps taken by the government of the Slovak Republic. It goes without saying that the larger the extent of foreign trade relations, the higher is a competitive pressure on domestic entrepreneurs, the more visible are the impacts on prices, research and development, and consumer satisfaction.

Taking the structure of Slovak market into consideration along with the trade liberalisation trends, there is a certain dilemma to be resolved. On one hand, it is undeniable that domestic companies

and entrepreneurs need strong foreign competitors; this was taken into account when lowering import surcharge from ten to 7.5 per cent and further to zero in 1996. On the other hand, lower efficiency and weaker competitiveness of domestic firms require certain protection.

The Authority closely monitors preparation process focused on protection of the domestic market which was launched in 1996. It is vital that this process be consistent with the relevant regulations of the World Trade Organisation. In its official decision and views, the Authority several times stressed that excessive protectionism represented an artificial intervention destructing trade and economic relations and hampering the overall socio-economic adaptation to the world standards.

Decisions issued by municipalities and state administrative bodies can influence competition environment significantly. Pursuant to Article 18 of the Competition Protection Act, those bodies and government institutions must not, through their own actions, restrict competition; if they have already done so, the Authority shall be obligated to require that the state of affairs caused by such actions be remedied.

As an example, we can mention the case in which the Slovak Ministry of Transportation, Postal Services and Telecommunication introduced the wording of a contract to be closed between cable TV operator and users of cable connections. The original wording made it possible for the operator to add extra conditions to the contract after the actual contract had been closed, which lead in several cases to abuse of dominance. Having approved such a contract, the Ministry of Transportation, Postal Services and Telecommunication in fact legally justified the steps that SKT (at that moment, the only cable TV-operator in Slovakia) had taken towards its clients (citizens-users of cable TV signal). Pursuant to the aforementioned Article 18, the Authority did issue a request saying that relevant provisions had to be excluded from the contracts' wording.

The Authority has been participating in the process of regulation reforms. The goal is to develop regulatory framework which will actively support competitive relations, while minimising a possibility of clash between state interests and priorities of regulatory bodies.

The Authority's officials have taken part in activities of permanent working commissions dealing with appropriate price and tariffs regulations, especially in the area of natural monopolies. A current legal status in this area does not measure up to the latest trends in natural monopolies' regulation. The objective of working price commissions is to prepare gradual regulation steps for each activity, entrepreneurial sector, budgetary relations, and for public purposes. Here we mean prices of energy and heating gas, heating oils, petrol, water and sewage fees, telecom and postal rates, and other regulated activities.

Thus, the Authority closely follows the process of tariff and price regulation reform and present relevant views phrased on the basis of fair competition principles.

#### **4. Summary of references to New Reports and Studies on Competition Policy**

##### ***Information Exchange and International Co-operation***

In 1996, the Authority helped to prepare several major documents submitted to international institutions. Some of those papers contained parts focused on competition policy.

In November 1995, the European Union gave to the Slovak Republic a Slovak translation of the White Paper. Based on this, the Slovak government decided to prepare the so-called Mirror Version of the White Paper containing all relevant information about Slovakia. Its third chapter dedicated to competition policy has all been prepared by the Authority's employees. It dealt with the agreements restricting competition, abuse of market dominance, state aid, monopolies of a commercial character, mergers (concentrations) control, and public enterprises with special or exclusive rights. The Mirror Version was officially given to the EU representatives in the summer of 1996.

In April 1996, the Slovak minister of foreign affairs received from the head of EU's permanent mission in Slovakia the European Commission Questionnaire whose final version would be used in the overall evaluation of the Slovak Republic and then further in the EU accession procedures. The Authority's experts prepared the sixth part of the Questionnaire - Competition. This document has also been given to the EU representatives.

We have also prepared the 1995 Report on Competitive Environment in the Slovak Republic which was included in the agenda of government summer session in 1996. The government has reviewed and accepted the Report.

Experts of the Authority have written several studies amongst which we should mention The Analysis of Macro-economic Impacts of Concentrations Consummated in Monopoly Market Structures, The Possibilities of Practical Application of German Monopoly Commission's Methodology in Competitive Environment Analyses of the Slovak Economy, and others.

Employees of the Antimonopoly Office have also published numerous educational articles in both daily and expert press (Principles of Application of Competition Protection Act, Concentration Proceedings in Practice, Entrepreneurial Actions and Collusion, etc.). All decisions and rulings issued of the Authority were made available for the public, too.

To further explain measures and steps taken in the area of competition protection, the Authority has held press conferences and employees gave interviews to expert journalists.

The Antimonopoly Office has further developed co-operation with academicians from Bratislava University of Economics, Law School of Bratislava Comenius University, and specialised high schools in Bratislava.

The Antimonopoly Office issues its annual report in both Slovak and English language. The report describes activities and proceedings completed in the respective period.

**INDEX**

**A**

**ABUSE OF DOMINANT POSITION**

- abuse of dominant position
  - EUROPEAN COMMISSION, 414, 415
  - FINLAND, 97
  - GERMANY, 129
  - HUNGARY, 145, 148
  - ITALY, 172, 173, 174
  - NORWAY, 270
  - POLAND, 279
  - PORTUGAL, 288, 289, 290
  - SPAIN, 303
  - SWEDEN, 314
  - SWITZERLAND, 332
  - UNITED KINGDOM, 371, 375
- dominant position
  - PORTUGAL, 294
- excessive pricing
  - GERMANY, 129
- loyalty rebates
  - FINLAND, 96
  - NORWAY, 269, 270
- monopolization
  - JAPAN, 192
- predatory pricing
  - DENMARK, 87
  - SWEDEN, 318, 320
- price discrimination
  - EUROPEAN COMMISSION, 417
  - FINLAND, 96
  - NORWAY, 270
  - POLAND, 280
  - SWEDEN, 314, 315, 316
- refusal to deal
  - ITALY, 173
  - POLAND, 280
  - SWEDEN, 316, 317
- sports
  - DENMARK, 87
  - EUROPEAN COMMISSION, 416

**AGRICULTURE**

- agriculture
  - ITALY, 167
  - NORWAY, 269
- fertilisers
  - GERMANY, 136
- meat production
  - DENMARK, 87
  - SWITZERLAND, 332
- milk production
  - DENMARK, 86

**C**

**COMMUNICATIONS**

- telecommunications
  - POLAND, 284

**COMMUNICATIONS SERVICES**

- cable television
  - HUNGARY, 149
  - POLAND, 280
  - SPAIN, 304
- communications services
  - EUROPEAN COMMISSION, 418, 419
  - GERMANY, 130
  - POLAND, 279, 280
- motion pictures
  - GERMANY, 130
  - UNITED KINGDOM, 374
- post and parcel delivery
  - EUROPEAN COMMISSION, 411
  - FINLAND, 99
  - GERMANY, 126
  - NEW ZEALAND, 264
  - SWEDEN, 314
- telecommunications, 334
  - DENMARK, 89, 91
  - EUROPEAN COMMISSION, 410, 415, 417
  - GERMANY, 125, 133
  - IRELAND, 162
  - ITALY, 175, 176, 177, 178
  - NEW ZEALAND, 259, 264
  - NORWAY, 270, 272
  - POLAND, 278, 279, 280
  - SPAIN, 303, 308
  - SWEDEN, 315
  - SWITZERLAND, 332
- telecommunications/ ITALY, 176
- television
  - EUROPEAN COMMISSION, 418, 419

**CONSTRUCTION**

- construction
  - DENMARK, 89
  - GERMANY, 137
  - SPAIN, 308

**E**

**ELECTRICITY AND GAS**

- electricity
  - DENMARK, 87
  - EUROPEAN COMMISSION, 411
  - FINLAND, 98
  - GERMANY, 126, 131, 134
  - IRELAND, 158
  - NEW ZEALAND, 259, 260, 264
  - NORWAY, 267, 270
- electricity and gas
  - EUROPEAN COMMISSION, 420
- gas
  - GERMANY, 126, 131, 134
  - NEW ZEALAND, 259
  - SPAIN, 308
- water supply, 309
  - HUNGARY, 149
  - POLAND, 284

**ELECTRICITY AND GAS**

- gas



ITALY, 171

**ENFORCEMENT**

information collection  
NEW ZEALAND, 261

authorisations  
AUSTRALIA, 26, 30, 31  
NEW ZEALAND, 260

confidentiality protection  
EUROPEAN COMMISSION, 409

enforcement  
GERMANY, 127  
IRELAND, 156  
JAPAN, 190  
NEW ZEALAND, 259, 260  
POLAND, 279  
SWITZERLAND, 332  
SWITZERLAND, 332

enforcement guidelines  
EUROPEAN COMMISSION, 408, 409  
JAPAN, 189  
NEW ZEALAND, 260  
SWEDEN, 311

enforcement statistics  
AUSTRALIA, 30  
DENMARK, 84  
DENMARK, 84  
EUROPEAN COMMISSION, 413  
FINLAND, 94  
GERMANY, 127, 132  
IRELAND, 157, 162  
ITALY, 165  
JAPAN, 190  
NEW ZEALAND, 260, 261  
POLAND, 279, 281  
PORTUGAL, 288  
SPAIN, 299, 304  
SWEDEN, 312, 318  
SWITZERLAND, 333

information collection  
NEW ZEALAND, 259  
POLAND, 284

information sharing  
NEW ZEALAND, 260

international co-operation  
EUROPEAN COMMISSION, 412, 413

orders  
JAPAN, 190

organisational changes  
JAPAN, 186, 189  
NORWAY, 274  
POLAND, 281

penalties  
EUROPEAN COMMISSION, 408  
NEW ZEALAND, 259, 260  
POLAND, 280, 284

**EXEMPTIONS**

exemptions  
EUROPEAN COMMISSION, 409, 410  
EUROPEAN COMMISSION, 408  
GERMANY, 127  
HUNGARY, 146  
ITALY, 167, 179  
JAPAN, 187, 196

NEW ZEALAND, 259  
NORWAY, 271  
SWEDEN, 314, 317

## F

### FINANCIAL SERVICES

banks  
AUSTRALIA, 26  
EUROPEAN COMMISSION, 417  
HUNGARY, 148  
ITALY, 178  
JAPAN, 194  
POLAND, 281, 282

financial services  
AUSTRALIA, 31  
DENMARK, 84, 90  
EUROPEAN COMMISSION, 417  
POLAND, 283, 285  
SWEDEN, 314  
UNITED KINGDOM, 375

insurance  
GERMANY, 133  
ITALY, 179

### FORESTRY

forestry  
SWEDEN, 313

## H

### HORIZONTAL AGREEMENTS

bid rigging  
GERMANY, 125  
ITALY, 172, 183, 184  
JAPAN, 192, 193

bid rirring  
JAPAN, 193

cartels  
FINLAND, 98  
GERMANY, 127, 131  
HUNGARY, 147  
ITALY, 171  
SWEDEN, 317  
UNITED KINGDOM, 368

competitive tendering  
DENMARK, 89

horizontal agreements  
AUSTRALIA, 26  
DENMARK, 85  
GERMANY, 127, 131, 134, 135, 136, 137  
GERMANY, 136  
HUNGARY, 147  
IRELAND, 160, 161  
ITALY, 167, 168, 169, 179  
PORTUGAL, 288, 289  
SPAIN, 302  
SWITZERLAND, 332  
UNITED KINGDOM, 369, 375

horizontal customer allocation  
GERMANY, 131

horizontal price fixing  
GERMANY, 131

IRELAND, 160  
ITALY, 180, 183  
NORWAY, 268  
SPAIN, 302  
SWEDEN, 313  
UNITED KINGDOM, 369, 370

quota allocations  
POLAND, 285

tacit collusion  
PORTUGAL, 289

tacit collusion  
PORTUGAL, 289

#### **HOTELS**

hotels  
GERMANY, 130  
HUNGARY, 150

### **J**

#### **JUDICIAL REVIEW**

judicial review  
DENMARK, 84  
HUNGARY, 150  
JAPAN, 193  
review procedures  
HUNGARY, 150

### **L**

#### **LEGISLATION**

control legislation  
EUROPEAN COMMISSION, 411  
legislative developments  
DENMARK, 84  
EUROPEAN COMMISSION, 408  
FINLAND, 93  
GERMANY, 124  
HUNGARY, 146  
IRELAND, 155  
JAPAN, 186, 187, 188, 189  
NEW ZEALAND, 259  
NORWAY, 267  
POLAND, 277, 278, 282, 283, 284, 285  
PORTUGAL, 287  
SPAIN, 298, 308, 309  
SWEDEN, 311, 312  
SWITZERLAND, 325, 326, 327, 329, 330  
UNITED KINGDOM, 367

### **M**

#### **MANUFACTURING AND DISTRIBUTION OF**

electrical machinery and apparatus  
PORTUGAL, 293

food and beverage  
NEW ZEALAND, 262

#### **MANUFACTURING OR DISTRIBUTION OF**

books  
ITALY, 180

brewery  
HUNGARY, 147

cement and concrete

DENMARK, 87

ITALY, 171

chemicals

GERMANY, 136

communication equipment and apparatus, 130

decisions of associations  
GERMANY, 129, 130  
PORTUGAL, 289

distribution  
NEW ZEALAND, 262  
PORTUGAL, 293

electrical machinery and apparatus  
POLAND, 282

food  
SPAIN, 302

food and beverage  
EUROPEAN COMMISSION, 418  
FINLAND, 96

IRELAND, 156  
ITALY, 167, 168  
NEW ZEALAND, 262  
SPAIN, 302

food and beverages  
JAPAN, 192, 193  
UNITED KINGDOM, 370, 375

food and beverages  
GERMANY, 135

footwear  
PORTUGAL, 293

machinery  
EUROPEAN COMMISSION, 413

machinery and equipment  
EUROPEAN COMMISSION, 414  
GERMANY, 135

magazines  
GERMANY, 136

manufacturing  
NEW ZEALAND, 262  
PORTUGAL, 294  
SPAIN, 306  
UNITED KINGDOM, 369, 375

manufacturing or distribution of  
PORTUGAL, 293

medical instrument  
EUROPEAN COMMISSION, 414

medical instruments  
JAPAN, 193  
PORTUGAL, 292

metal product  
POLAND, 281

metal products  
GERMANY, 136

motor vehicles  
EUROPEAN COMMISSION, 410  
SWEDEN, 314

musical instruments  
JAPAN, 192

newspapers  
GERMANY, 136  
SWITZERLAND, 333  
UNITED KINGDOM, 369, 381, 382

optical instruments  
PORTUGAL, 290

paper  
 JAPAN, 193, 195

paper products  
 EUROPEAN COMMISSION, 420  
 GERMANY, 135

petroleum products  
 FINLAND, 96  
 IRELAND, 160

pharmaceuticals  
 EUROPEAN COMMISSION, 414, 419, 420  
 FINLAND, 99  
 GERMANY, 135  
 JAPAN, 192  
 PORTUGAL, 292  
 SPAIN, 300  
 SWEDEN, 317, 323  
 UNITED KINGDOM, 371

pharmaceuticals  
 GERMANY, 125

radio  
 NEW ZEALAND, 263  
 NEW ZELAND, 262

recorded media  
 FINLAND, 97  
 PORTUGAL, 293  
 UNITED KINGDOM, 370

recycling  
 DENMARK, 90  
 GERMANY, 129

tobacco  
 EUROPEAN COMMISSION, 418  
 PORTUGAL, 294

toys  
 PORTUGAL, 293

TV  
 DENMARK, 89  
 FINLAND, 99  
 SWEDEN, 316

watches  
 SWEDEN, 313

**MARKET DEFINITION**

access  
 POLAND, 284

geographic market definition  
 SWEDEN, 316

**MERGER**

merger  
 GERMANY, 135

**MERGERS**

joint venture  
 EUROPEAN COMMISSION, 419

joint ventures  
 EUROPEAN COMMISSION, 415, 420  
 POLAND, 283

merger  
 SPAIN, 306

mergers  
 DENMARK, 84  
 EUROPEAN COMMISSION, 411, 418, 419, 420  
 FINLAND, 99  
 GERMANY, 132, 133, 135, 136, 137  
 HUNGARY, 145, 149, 150  
 IRELAND, 158

ITALY, 178, 181  
 JAPAN, 188, 194, 195  
 NEW ZEALAND, 261, 262, 263  
 NEW ZEALAND, 262  
 NORWAY, 269  
 POLAND, 281, 282  
 PORTUGAL, 291, 293, 294  
 SWEDEN, 312, 318, 319  
 SWITZERLAND, 333  
 UNITED KINGDOM, 376, 381, 382

notification procedures  
 HUNGARY, 145  
 JAPAN, 188, 194

orders  
 JAPAN, 192, 193

public interest test  
 UNITED KINGDOM, 381

remedies  
 ITALY, 168, 178, 181  
 NEW ZEALAND, 259

strategic alliances  
 GERMANY, 133  
 SPAIN, 304

**MINING AND QUARRYING**

mining and quarrying  
 EUROPEAN COMMISSION, 420  
 POLAND, 285

**O**

**OTHER SERVICES**

other services  
 ITALY, 170, 174, 181, 182, 183, 184

**P**

**PROFESSIONAL SERVICES**

dentists  
 NORWAY, 267

lawyers  
 DENMARK, 85  
 UNITED KINGDOM, 369

professional services  
 DENMARK, 85  
 HUNGARY, 147  
 ITALY, 182  
 POLAND, 281  
 POLAND, 282  
 SPAIN, 308

**R**

**REGULATION**

competitin advocacy  
 ITALY, 176

competition advocacy  
 DENMARK, 89, 90  
 ITALY, 169, 170, 171, 173, 175, 182, 183, 184  
 NEW ZEALAND, 259

competitive advocacy  
 DENMARK, 90

deregulation

DENMARK, 91  
 FINLAND, 99  
 GERMANY, 126  
 GERMANY, 124  
 IRELAND, 162  
 ITALY, 175, 176  
 JAPAN, 190, 195, 196  
 NORWAY, 272  
 PORTUGAL, 296  
 SWEDEN, 320, 323

deregulation  
 GERMANY, 126

infrastructure  
 EUROPEAN COMMISSION, 417

price monitoring  
 NORWAY, 271

price regulation  
 GERMANY, 131  
 NORWAY, 271

public utility regulation  
 DENMARK, 87  
 EUROPEAN COMMISSION, 417  
 ITALY, 174  
 NEW ZEALAND, 263, 264

regulation  
 EUROPEAN COMMISSION, 417, 418  
 NORWAY, 271  
 SWITZERLAND, 334, 335, 336

regulatory reform  
 POLAND, 283

## T

### TRANSPORTATION SERVICES

air transport  
 EUROPEAN COMMISSION, 416  
 GERMANY, 129, 131  
 ITALY, 173, 174  
 PORTUGAL, 293  
 SWEDEN, 319

airports  
 EUROPEAN COMMISSION, 417

bus transport  
 SWEDEN, 323

bus transport  
 ITALY, 172

maritime transport  
 EUROPEAN COMMISSION, 410  
 PORTUGAL, 289

ports  
 ITALY, 172, 173

railroads  
 POLAND, 283  
 SPAIN, 309  
 SWEDEN, 318

taxis  
 SWEDEN, 311, 316, 317

transportation services  
 PORTUGAL, 294

travel agencies  
 GERMANY, 130

## U

### UNFAIR PRACTICES

advertising  
 ITALY, 183

advertising practices  
 JAPAN, 186, 193

unfair practices  
 DENMARK, 86, 87  
 JAPAN, 192

## V

### VERTICAL AGREEMENTS

boycott  
 DENMARK, 86  
 UNITED KINGDOM, 369

exclusive dealing  
 AUSTRALIA, 30  
 DENMARK, 86, 87  
 GERMANY, 130  
 IRELAND, 158  
 ITALY, 167, 181

exclusive distribution  
 EUROPEAN COMMISSION, 410, 413  
 ITALY, 177  
 JAPAN, 192  
 PORTUGAL, 290  
 SPAIN, 300

exclusive territories  
 EUROPEAN COMMISSION, 413  
 FINLAND, 99

exclusive dealing  
 ITALY, 171

franchising  
 PORTUGAL, 290

price recommendation  
 GERMANY, 129  
 PORTUGAL, 290

resale price maintenance  
 EUROPEAN COMMISSION, 413  
 GERMANY, 129, 130  
 HUNGARY, 147  
 ITALY, 179  
 JAPAN, 188  
 NORWAY, 268  
 SWEDEN, 313  
 SWEDEN, 314  
 UNITED KINGDOM, 370, 371

resale price recommendation  
 PORTUGAL, 290

selective distribution  
 EUROPEAN COMMISSION, 410  
 UNITED KINGDOM, 375

tied selling  
 SWEDEN, 316  
 UNITED KINGDOM, 374

vertical agreements  
 DENMARK, 89  
 EUROPEAN COMMISSION, 409, 413, 414  
 GERMANY, 134, 135, 136  
 HUNGARY, 147

ITALY, 174  
PORTUGAL, 288, 290  
SPAIN, 302  
UNITED KINGDOM, 374, 375

retail services  
DENMARK, 90  
**WHOLESALE AND RETAIL TRADE**  
retail services  
EUROPEAN COMMISSION, 415  
JAPAN, 192

**W**

**WHOLESALE AND RETAIL SERVICES**