THE SINGLE MARKET - COAL, OIL, BIOFUEL

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INTRODUCTION

Although the liberalisation of the electricity and gas markets has clearly been the main focus of the Commission's energy policy aims throughout the 1990s, sustained attention has also been given to the other energy sectors, although in very different ways.

In the coal industry, the Commission has pursued a single-minded policy of trying to persuade those Member States with uncompetitive businesses to reduce subsidies and close down mines. The ECSC Treaty itself prohibits subsidies but the Council has always agreed special regimes allowing the Commission to authorise state aid. The most recent of these, which will last until the expiry of the ECSC Treaty in 2002, aims to abolish coal subsidies altogether where they are not part of a viable plan to bring a coal mine to profitability or close it down. This chapter looks at the ongoing difficulties the Commission faces in its attempts to implement the regime with respect to Germany and Spain, as well as some related competition actions.

The Commission's tasks in the oil sector are very different. Historically, the oil industry has operated under free market conditions. Indeed so free was the market, that Community regulation - on crisis measures and the holding of oil stocks - was deemed necessary in response to the oil crises in the 1970s (Chapter Five). The introduction of the Single Market, though, threw a spotlight on some flaws in the operation of the industry, such as government interference in the process of granting licences for fossil fuel exploration and production. Thus, this chapter looks at the Hydrocarbons Licensing Directive. It also examines the possibility of working time regulations for offshore workers; the revision of competition block exemptions which are important to the gasoline distribution business; and the few merger notifications authorised by the Commission in recent years.

The last section of the chapter looks in detail at the Commission's involvement in monitoring and controlling the competition aspects of the biofuels market, and more briefly at its generous policy on state aid for environmental schemes, such as energy saving and renewables programmes.

CUTTING COAL SUBSIDIES - A CASE FOR COMMISSION PERSEVERANCE

Unlike other energy sectors in Europe, the coal industry remains one in decline. The ECSC Treaty, which provides the Community's legislative framework for both coal and steel, prohibits state aid. However, over the years, the Council agreed to a series of Commission Decisions which put in place framework mechanisms for approving state aid. A concerted attempt to persuade the heavily-subsidised coal industry to restructure and close expensive pits was made on the basis of the 1986-93 Decision. Under that Decision, though, the Commission failed to make a significant impact on either Germany or Spain, where subsidies were rife and production costs remained far above world prices. A more rigorous state aid regime was ushered in with a new Commission Decision (93/3632/ECSC) for the period from 1994 to the expiry of the ECSC Treaty in 2002.

The regime allows aid to be considered compatible with the proper functioning of the market if it helps to achieve at least one of three objectives:

"- *To make, in the light of coal prices on international markets, further progress towards economic viability with the aim of achieving a reduction in aid;*
- *to solve the social and regional problems created by the total or partial reduction in the activity of the production units;*
- *to help the coal industry to adjust to environmental protection standards.*"

Decision 93/3632/ECSC and its transition period

There are specific rules governing different types of subsidies of which the first two are the most important: ongoing operating aid (Article 3); aid for reduction of activities (Article 4); aid to cover exceptional costs; aid for R&D; and aid for environmental protection. A key aspect of the rules is that any Member State intending to grant operating aid in the 1994-2002 period is required to provide a modernisation, rationalisation and restructuring plan "designed to improve the economic viability of the undertakings concerned by reducing production costs". For undertakings unable to meet the economic viability requirement, aid is still allowed under Article 4 if the coal mines are subject to a plan of closure prior to 2002, or, in exceptional social/regional circumstances, at a later specified date. These plans, along with the annual planned subsidies, need to be approved by the Commission.

Decision 93/3632/ECSC sets a fairly straightforward timetable for Member States to notify aid (September the previous year, or at least three months prior to the measure entering into force), and for the Commission to decide on the aid (within three months). However, if the Commission deems the information insufficient and asks for more details, the three month period begins again from the date the new information is provided.

Coal production costs*
(Ecu/tce)

	1991	1993	1995
Germany	138	151	159
Spain	154	131	133
France	91	110	134
Portugal	103	112	-
UK	74	62	43

* including capital and depreciation costs

Source: COM/98/186

Three year transition period allowed

Since the 1993 Decision was considerably more restrictive than its predecessor, the Council allowed a three year transition period for some aspects of the new rules. For example, from 1997, the Decision said the Commission would only approve coal subsidies if they were entered in a Member States' national, regional or local public budget or channelled through strictly equivalent mechanisms. This transition period has proved significant for, although implementation of the Decision by the Commission flowed, if not smoothly, then at least adequately until the end of 1996, the Commission proved far more difficult to satisfy thereafter. Serious conflicts with both Germany and Spain meant that by early 1998, there had been no aid approvals for 1997. Moreover, UK interests had begun an aggressive policy of complaints and interventions designed to push the Commission into taking stronger action against the subsidies in both countries.

A decade of conflict between Brussels and Bonn

Historically, there has been considerable conflict between Brussels and Bonn over coal subsidies. In 1989-90, both the German coal producers and the German government took the Commission to the Court of Justice in separate cases over the way it was dealing with subsidy decisions. Also in the early 1990s, the Commission carried out a detailed competition investigation into the coal supply contracts which underpinned the German subsidy system. This resulted in an important Commission Decision in December 1992 which accepted that the contracts were covered by the Treaties' provisions on exemptions but ruled only 37.5mtce of newly-mined coal production could be allowed after 1995.

Kohlepfennig levy overturned by German court

A major turning point came in Germany, in December 1994, when the German constitutional court gave a judgement that the Kohlepfennig levy on electricity prices (used to subsidise coal production) was illegal and that the system should be phased out by the end of 1995, one year earlier than required by the European Commission. Almost immediately, the coal producers and the German government began the procedure to withdraw the two cases in the Court of Justice and formal withdrawal took place during the first half of 1995.

Following the introduction of the new state aid regime in 1994 and the withdrawal of the Court cases, there was an easing of tension between the two sides. The Commission approved a restructuring plan in December 1994 and, in each year to 1996, cleared the aid notifications from Bonn. The last one prior to the end of the transition period was approved in April 1996.

Commission authorisation for 1996 aid to Germany

In that Decision, the Commission authorised aid totalling DM13.3bn for 1995 and 1996. This included DM2.708bn and DM2.539bn to cover supply of coal and coke to the iron and steel industry in 1995 and 1996 respectively; two payments of DM0.118bn as a financial measure for Saabergwerke, one for each year; DM7.5bn to cover payments to German coal production for use in electricity generation in 1996; DM0.097bn for face workers in underground mines; and DM0.2bn for exceptional charges applying to several coal companies. In the Decision, though, the Commission warned that the 3.6% reduction in costs achieved between 1992 and 1995 was "totally inadequate" and called for "a firm approach to the reduction of capacity".

Although difficult decisions were made in Germany during 1997 (after further industry-wide protests) to cut back subsidies substantially to DM5.5bn by 2005, the Commission remained, in early 1998, dissatisfied with Bonn's approach. One key issue, for example, concerned the German insistence on using Article 3 of Decision 93/3632/ECSC for notifying aid requests. The Commission believes Germany should accept the inevitable (as the French government has done - see below) and notify the aid under Article 4 with justification based on social and regional policy.

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Complaints against German sales of anthracite into the UK

German subsidies also came under direct attack for the first time from another Member State when, in November 1996, the UK's leading anthracite producer, Celtic Energy, lodged two complaints in Brussels, with the support of the UK government. It alleged that German companies Sophia Jacoba and Preussag Anthrazit were only able to sell into the UK because of state aid - estimated at £40/t. This was distorting competition and threatening 3,000 British jobs, it said. Subsequently, the Commission wrote to Germany with its preliminary findings and published the letter in the Official Journal seeking third party comments.

In the letter, the Commission said a number of irregularities could have occurred: a disruption of the normal functioning of the market and of competition rules; the direct or indirect use of state aid which has distorted competition between Community producers and hence contravened the state aid rules laid down in Decision 3632/93/ECSC; and a failure by Germany in its obligations to ensure compliance with the decisions and recommendations of the Commission. The Commission asked Bonn to explain the legal and financial background to the sales of anthracite. It also warned that it would be entitled to revoke the aid approvals for 1996 (Ecu142m for Preussag Anthrazit and Ecu97m for Sophia Jacoba), meaning the aid would have to be repaid, and that it could also refuse the aid requests for 1997.

UK intervention calls for closure of Ibbenburen

The UK government made an intervention in the case and said it could see no alternative but the withdrawal of state aid from the anthracite producer Ibbenburen and its early closure.

In order to conclude the investigation, the Commission hired a consultant to carry out a detailed study on the anthracite market, and, in early 1998, the Commission undertook some fact-finding trips to the UK and Germany. Although Celtic Energy withdrew its complaint in 1998, after reaching a financial settlement with the German producers, further complaints were under preparation in the first half of 1998, and the Commission was still expected to make a formal Decision on the matter, probably before the summer.

Close examination of German mergers and acquisitions

Under the ECSC Treaty's Article 66, coal industry takeovers need to be vetted by the Commission. Several such transactions involving German companies were notified and approved by the Commission during the 1990s. The Commission took a long hard look, for example, at Ruhrkohle's takeover of Sophia Jacoba in 1990.

Close examination of Ruhrkohle's takeover of Raab Karcher

Some years later, in February 1996 after another in-depth investigation, the Commission authorised the takeover of the coal trader Raab Karcher Kohle by Ruhrkohle's coal trading subsidiary. The Commission analysed the effects of the Raab Karcher takeover on the sale of hard coal in three different segments of the market: electricity generation, steel, and other users such as the cement, chalk and paper industries. It concluded that Ruhrkohle's resulting high shares in the power and steel industries were predominantly based on price-regulated direct supplies and did not reflect "real market power".

In the case of hard coal sales to other industrial users, the Commission calculated Ruhrkohle's market share would be 38%. It stressed that users are geographically dispersed and generally purchase low volumes and so rely on a variety of coal merchants being active in the market. The Commission concluded that although imported coal was likely to become very important in the medium to long term, the acquisition of Raab Karcher would not prevent other traders from gaining access to international sources of supply. The Commission noted that "this view is largely based on the assessment of the competitive potential of Stinnes with the import of hard coal".

Approval for Rheinbraun's acquisition of Stinnes

Nearly a year later, the Commission authorised the acquisition of the Stinnes' coal trading activities by Rheinbraun Brennstoff, a subsidiary of the electricity utility RWE, and the Dutch coal trader SHV Energy. In relation to the markets for sale of hard coal to power plants and steel makers within the EU, the Commission said, the parties' combined share would not exceed 20%. On the markets for sale of hard coal to other industrial users, the parties' market share would not exceed 40%. Moreover, the Commission noted that the new ownership assured the independence of Stinnes Intercoal and enhanced the company's position as the leading competitor to Ruhrkohle.

During 1997, the Commission cleared two further concentrations involving Rheinbraun. The purchase of the 50% of the Italian hard coal and lignite wholesaler Agenzia Carboni, which Rheinbraun did not already own, was approved because the concentration would not allow the parties to increase prices nor to evade the ECSC competition rules. Moreover, Rheinbraun and SHV took control of Rheinbraun Thyssen Energy GmbH, Rheinbraun Thyssen Energy GmbH &

Co. KG, and the Dutch firm SSM Coal. The Commission said it had already assumed the companies were within the sphere of influence of Rheinbraun and SHV when it examined the Stinnes takeover, and therefore authorised the takeover.

UK objections to Ruhrkohle's takeover of Saabergwerke

A further and significant investigation by Brussels was under way in 1998, following notification of a restructuring in the German coal industry whereby Ruhrkohle would take over Preussag Anthrazit and Saabergwerke. Both the UK government and the main UK producer RJB Mining had responded to a standard notice in the Official Journal, under the EU merger rules, requesting third party comments. They raised a number of concerns in their submissions, some concerning state aid, and others that the proposed token price for Saabergwerke might not be its market value.

Limited state aid for lignite operations in Germany

Finally with regard to Germany, the Commission has had occasion to investigate a few cases of state aid for lignite, also under the ECSC Treaty rules. In 1992, it decided to exempt a one-off subsidy of Ecu291m by the Saxony-Anhalt regional government in Germany to Veba Kraftwerke Ruhr to build an 800 MW lignite-fired plant on the condition that, in the future, no direct or indirect state aid would be given to support the use of lignite for electricity. In 1994, Brussels also vetted the sale of the Mibrag lignite mine to a US-UK consortium and insisted on competition safeguards in the supply contract mechanisms.

Subsidy for lignite power station under investigation

In July 1997, the Commission opened a procedure against a DM49.92m grant provided to the City of Cottbus by the Brandenburg Land to cover (partly) the additional costs of constructing a new brown coal-fired power station as opposed to a gas-fired plant. The choice of lignite technology despite all the evident economic disadvantages, (both the investment cost and the operating cost were more favourable for gas than for lignite), the Commission argued, represented a long-term support for the regional lignite industry. Moreover, no formal notification of aid had been sent, the Commission said, and it reminded Germany of its 1992 commitment.

Spain faced with social and economic problems

In Spain, the Commission has faced less outright opposition and less political manoeuvring than in Germany, but, nevertheless, the nature of the social and regional problems in the coal mining regions have meant slow progress. As with the German plan, the Spanish restructuring plan was approved by the Commission in December 1994. The proposed measures were designed to continue the restructuring process, the Commission said, and to phase out the need for government aid. In particular, the plan distinguished between those production units capable of helping to achieve this objective and those where activities would have to be run down and closed.

Spanish aid authorisations given in April 1996

The aid notifications and approvals went more or less to form until 1996. In April that year, Spanish subsidies totalling Pta293bn were approved for 1994, 1995 and 1996: Pta10.362bn of additional aid in 1994 to cover operating losses; Pta141.316bn for 1995, involving Pta119.303bn to cover operating losses and Pta14.723bn for exceptional social payments to workers who had lost their jobs as a result of restructuring; Pta141.377bn in 1996, including Pta117.481bn to cover operating losses and Pta17.159bn for exceptional social payments. However, Pta1.197bn of notified aid for Hunosa in 1996 related to activities other than coal production was referred for examination under Article 92 of the EC Treaty.

Commission doubts over changes to Spain's restructuring plan

By mid-1996, though, the Commission was becoming increasingly frustrated with the Spanish government. Details of the growing conflict emerged in May 1997, when the Commission published a notice in the Official Journal threatening to take negative Decisions against several aid notifications. The notice, which catalogued the background to the dispute said that, in March 1996, the Commission had written to Spain asking for information on the state aid elements contained in a recently signed Hunosa contract. The Spanish government replied the following July, informing the Commission of its intention to modify the 1994-97 rationalisation plans (previously submitted to Brussels and approved) for Hunosa, Minas de Figaredo and Mina de la Camocha, and to provide additional state aid for 1994, 1995 and 1996. The Commission wrote back immediately requesting further information on the modified plan and the extra aid.

The Commission argued that, although it had approved rationalisation plans for the Spanish coal industry in 1994, it did not have sufficient information to make an equivalent evaluation of the modified plans. The Commission also said it wanted to see evidence of activity reduction at the mines, which was one of the conditions for approving aid. The letter concluded with a warning that "on the basis of existing information" the Commission could take a negative Decision on some or all of the aid notifications.

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By early 1998, there was no sign of a resolution to this dispute. The Spanish government, having won approval from the trade unions for a restructuring plan, notified Brussels only to be told that it was insufficient. DGXVII's Director-General Pablo Benavides told Spain that the new plan did not provide for a sufficient reduction in quantities of high cost coal production, did not provide for a reduction in state aid, nor did it ensure that aid to the two state-owned mines, Hunosa and Minas de Figaredo, would be allocated through the public budget. He rejected, moreover, a part of the plan that would have allowed four new workers to be hired for every eleven that were lost. Benavides also expressed his concern over Madrid's failure to implement fully the 1994-97 plan. Overall, and given the very high cost of some of Spain's coal production, DGXVII was looking for a 37% reduction in output by 2001 compared with the 1996 figure, Spanish reports said at the time.

Coal state aid in Portugal, France and Ireland

France and Portugal have both followed the latest ECSC Decision with less dispute. Portugal's closure plan was approved in November 1994. The last aid approval was in 1996, for subsidies totalling Esc345m in 1995 and 1996. The aid was to cover part of the compensation payable to 49 workers, at the Carbonifera do Douro company, who lost their jobs after 31 December 1994 when the company's plan to close down mining operations was put into effect.

France had to wait until mid-1995 for its plan to be approved. The Commission accepted that, for social and regional reasons, mining would have to continue at the Lorraine field until 2005 (i.e. beyond the 2002 deadline). In April 1996, it was authorised to pay coal subsidies for 1996 amounting to FFr4.4bn. The bulk of the aid (FFr3.831bn) was to cover exceptional charges; FFr0.569bn was for operating losses; and FFr0.015bn was for R&D. France notified aid for 1997 somewhat late and, in early 1998, the Commission was still looking into some aspects of it before granting clearance.

Irish peat industry cleared of state aid charges

Ireland has no coal industry as such, but it does produce peat, which is considered an ECSC product and is therefore covered by the Treaty. In 1995, the Commission launched an investigation into the the state-owned producer Bord na Mona, following several complaints and in view of a notification by the Irish authorities of a financial restructuring plan. It concentrated on allegations that the company could be receiving aid through its sale of peat to the state-owned Electricity Supply Board; on the absorption of a large portion of the company's debt by the National Treasury Management during the restructuring process; on the prices paid by the company for land purchased for peat extraction; and on alleged cross-subsidisation into other sectors of the company. However, the Commission found, in December 1996, that because there was no trade between Member States in peat for energy production, the restructuring measures did not affect competition and did not, therefore, constitute state aid according to the provisions of Article 92-1 of the Treaty.

The UK aims to maintain a competitive coal industry

As with other market liberalisation policies, the UK has always kept several steps ahead of Brussels' objectives for the coal industry. Nevertheless, during the 1990s, the Commission kept the UK situation under review. It monitored the coal supply contract arrangements between British Coal and the power generators, for example, during and after the privatisation of the electricity industry; and it allowed a transition period to 1998 in which volumes and prices could be controlled. It was involved in approving large amounts of aid to cover the historic debts of British Coal and in authorising the government plans for its privatisation. Then, in June 1994, the Commission approved the UK's coal restructuring plan under the newly adopted ECSC state aid regime.

Authorisations for UK coal aid

During 1996 and 1997, the Commission took four Decisions authorising UK coal aid: £164m for 1995-96; £378m (plus £24m packaged with a later Decision) for 1996-97; £347m for 1997-98; and £891m for 1998-2002. In each case, the aid was unconnected to current production but arose from previous liabilities. The inherited liabilities included pension contributions, exceptional social welfare benefits, concessionary fuel entitlements, compensation for industrial injuries, and recovery costs for environmental damage.

In the wake of the restructuring of the coal industry, several actions by UK mining interests were brought to the Court of First Instance, or to the British High Court and subsequently referred to the Court of Justice. The litigants claimed injustices over royalty payments to British Coal; but their cases - brought by the UK's National Association of Licensed Opencast Operators (Naloo), for example, and by Banks, a Naloo member - failed to win damages.

By 1997, the determined market-oriented approach of the UK government had resulted in a far leaner and healthier coal mine industry, with one main player, RJB Mining, and several smaller mine owners. The imminent expiry of the beneficial coal supply arrangements and the tough price competition from importers meant, though, that further mines were threatened with closure. The answer of the Labour government, when it came into power in May 1997, was not to revert to subsidies or similar (which in any case would have been very difficult to get past Brussels) but to step up a campaign against subsidies in Germany and Spain.

UK complaints to Brussels against Spanish and German subsidies

One aspect of this policy involved support for the Celtic Energy case and intervention in the Ruhrkohle takeover notification (as above), but the government also initiated two complaints against Spain. The first of these was made in July 1997 and concerned limits on the sulphur content applied by Spain to UK coal at higher levels than those applied to subsidised Spanish coal. The second, made during September, concerned price discrimination by Spanish power stations regarding coal imported from elsewhere in the EC. Furthermore, the UK had planned to make direct complaints to Brussels about German subsidies for power station coal, but, in the first half of 1998, chose instead to provide behind-the-scenes backing for a formal complaint lodged by RJB mining.

Enhancing the oil market operation - upstream and downstream

Although the EU's wide-ranging and important procurement legislation does embrace the oil and gas industry, a more specific Directive was deemed necessary to ensure non-discrimination in the upstream oil and gas exploration and production industry, especially with regard to the allocation of licences. The Commission put forward a proposal in mid-1992 for a Directive on hydrocarbon licensing, and this was formally adopted in May 1994 under the codecision procedure. Although both Denmark and Norway (which at the time was due to become a Member State) had serious difficulties with the Directive, their concerns were met with a special clause providing a specific derogation for Denmark, and a complex paragraph (designed largely for Norway) delineating the role of the state as licensor and as an active participant in the business,

The Hydrocarbon Licensing Directive

The aim of the Directive, which came into force in July 1995, is to ensure non-discriminatory access within the internal market to upstream activities under conditions which encourage greater competition. It is based on the principle that Member States have sovereignty and sovereign rights over their resources and the right to determine which resources are exploited. But, whenever an area is made available for the prospection, exploration or production of hydrocarbons, Member States must ensure there is no discrimination between entities. They may, though, refuse access to a company controlled by third countries on grounds of national security.

Since the adoption of the Directive, there has been a steady stream of Notices from Member States in the Official Journal (as required by the Directive) making public the areas available for licences, or advertising the conditions for a licence round, or simply advising that a bid has been received and that other bidders have a set period to put in a competitive bid.

Ireland taken to Court over non-transposition

Several Member States failed to transpose the legislation into national law in time and the Commission launched infringement proceedings against Belgium, Italy and Ireland. By the end of 1997, however, only Ireland had failed to follow the legislation and in early 1998, the Commission brought a case to the Court of Justice. Nevertheless, the Irish government was expected to comply with the Directive during 1998. Also during 1998, the Commission was due to adopt a report on the implementation of the Hydrocarbons Licensing Directive.

Very few competition notifications concerning upstream oil and gas activities emerge into the public domain. In December 1996, the Commission belatedly approved an agreement between the parties involved in the development of the Britannia gas condensate field, the largest undeveloped gas field in the UK at the time. The verbal agreement was in force between February 1992 and the end of 1994, and concerned the decision by members of the consortium to appoint a single sales negotiator from within their number on behalf of them all.

Upstream industry concerns over application of working time rules

Although not strictly a Single Market measure, there is one other area of European policy of direct concern to the upstream oil and gas sector which involves harmonisation: the rules on working time. The EU's Working Time Directive dates from November 1993 and is based on Article 118a of the Treaty, which requires Member States to "pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers". It sets down specific rules for workers to be given minimum daily rest periods and breaks, for a maximum working week, and for minimum annual holidays.

However, although the Commission had included all economic sectors in its original proposal, the Council excluded the offshore oil and gas industry, along with several others sectors (particularly transport) from the provisions of the Directive. It did, though, suggest at the time that separate measures might be adopted later to extend worker protection into those areas. It was not until mid-1997, though, that the Commission finally brought forward ideas on how to do this, in a white paper which examined the justification for exemptions and the problems involved with the extension of the Directive to each sector in turn.

Importance of shift patterns in offshore sector

Within the North Sea offshore sector, for example, the Commission noted that virtually all work is based around a 12 hour working shift, although some personnel may work according to the requirements of the job rather than to fixed hours. The duration of the period offshore is typically two weeks, although this can vary according to the country and the employer. The paper took account of a 1995 report by the consultant Coshape which had concluded that existing shift patterns were the most appropriate way of organising working time offshore, and that scope for change was limited.

The white paper reported on the opinion of the trades unions, which want action on working time to be taken at Community level, and on that of the employers' lobbies, who see no justification for EU legislation in the sector. It concluded by suggesting that any proposal "needs to allow shift systems based on two shifts x 12 hours x 14 days to continue, and to give adequate recognition to the international and seasonal nature of the industry's working patterns by allowing an annualised calculation of working hours".

Four ways of extending working time rules into the excluded sectors

The Commission's white paper also evaluated a number of ways of extending the working time rules into each excluded sector. These included: a non-binding approach; a purely sectoral approach; a purely horizontal approach; and a differentiated approach involving some horizontal and some sector specific actions. The Commission said the latter would be the most appropriate, i.e. the extension of the Working Time Directive to all workers who are not mobile or involved in "other work at sea", in other words, offshore workers.

The remaining workers, the Commission said, although exempted from the 48 hour week, should nevertheless become subject to the provisions of the Directive on four weeks paid annual leave and health assessments for night workers, as well as on guarantees of adequate rest and limits on annual working hours. The Commission anticipated "introducing or modifying specific legislation for each sector or activity concerning the working time and rest periods of mobile workers and those engaged in other work at sea". These proposals were expected during 1998.

Upstream industry continues to argue for exemption

Following adoption of the white paper, the oil exploration and production industry, as represented by the Exploration & Production Forum, which had lobbied (and continues to lobby) strenuously for exclusion from the Directive, said it was "disappointed" at the Commission's recommendations. It reiterated its message that the "excellent health and safety record of the industry" made EU intervention unnecessary.

Revision of the block exemptions under discussion

As with the upstream oil and gas sector, the Commission finds little need for intervention in the downstream refining and oil production distribution markets. In a 1996 report on the refining industry, the Commission noted the following: "*The internal market in the oil sector is relatively well developed and transparent compared to other energy sectors. Many of the developments in the refining sector stem from the fact that the internal European market is part of a wider market with global competition.*"

There is one issue, though, which is of great concern to the oil products market: the future of two block exemptions - Regulation 1983/83 on exclusive distribution agreements and Regulation 1984/83 on exclusive purchasing agreements - both of which are widely used in the service station business. The former permits suppliers to allot to resellers a defined territory on which the reseller has to concentrate his sales efforts and, at the same time, the supplier undertakes not to supply any other reseller on the territory. Under exclusive purchasing supply agreements, the reseller agrees to purchase the contract goods only from one supplier but he has no territorial restriction for reselling.

These arrangements are considered acceptable under Article 85-3 of the Treaty. This allows certain restrictive practices where the benefits (such as improving the production or distribution of goods and benefiting the consumer) outweigh the disadvantages. There are also advantages for the Commission, because they reduce its administrative burden, and for industry, because they provide conditions of legal certainty.

In January 1997, the Commission issued a report on the future of block exemptions, including the two Regulations used by the oil industry, in which it acknowledged the importance of producer-distributor relationships. Agreements between producers, who want to break into a market, and local distributors can help the opening up of markets and increase competitivity, it said. However, it also noted that such arrangements can also be used to partition the market and exclude new entrants who would intensify competition and provide downward pressure on prices.

Reasons for reviewing the block exemptions

The Commission gave four reasons for reviewing the application of block exemptions: expiry of the Regulations on vertical restraints at the end of 1997; the completion of the Single Market legislation; the changes in distribution methods; and the relevance of EU policy in the international arena where it is a promoter of free and open competition. In fact, in relation to the first point, and pending a Council decision, Regulation 1983/83 and Regulation 1984/83 were both extended to the end of 1999 by the adoption of a Regulation in mid-1997.

Four options proposed for future of block exemptions

In the Communication, the Commission presented four options for the future and asked for comments from all interested parties. The four options were:
- to maintain the current system along with special arrangements for the petrol (and beer) industries;
- to maintain the existing approach but make the block exemptions (and the special rules for petrol) more flexible and less regulatory, and allow them to cover more situations;
- to focus the block exemptions so as to exclude companies with market shares above a certain threshold (40% was suggested);
- to reduce the scope of Article 85-1 and introduce a negative clearance presumption for companies with a market share below a proposed figure (20% was suggested). This latter approach would apply to beer and petrol supply sectors “only in so far as the cumulative impact of parallel networks has no significant foreclosure effect”. Above the 20% threshold, there would be two variants, related to Options Two and Three.

Oil industry calls for wider ranging regime

The oil industry, as represented by Europia, responded in May 1997, stating its strong preference for the second option. It said: “*A wider block exemption would allow parties greater flexibility in formulating their agreements, in particular addressing forecourt shop issues, while promoting adequate legal certainty.*” It also asked an independent consultant to compile statistics on inter-brand competition and conditions of entry into the EU retail motor fuels market, and the results were submitted to the Commission in July 1997. Europia’s summary of the results was as follows: “*The EU’s retail motor fuels sector is characterised by high inter-brand competition between a wide range of operators - many of whose activities were embryonic or non-existent in the early/mid-1980s. This situation developed and was sustained within the framework of legal certainties, which was afforded by the Commission’s block exemption, applicable throughout the EU, for exclusive purchasing agreements between motor fuel suppliers and their retailers.*”

Oil market liberalisation in Greece, Spain and Portugal

More specifically, the Commission does occasionally intervene in the downstream sector to control state aid cases or to vet a joint venture or dominant position under the merger regulations. In a unique case dating from 1983, the Court of Justice ruled against the Commission and in favour of Ireland over state protection of its one refiner on security of supply grounds. Greece, following its accession to the Community in 1979, also failed to liberalise its markets, and the Commission struggled for a decade over the issue. The Court of Justice ruled substantially in Brussels’ favour in 1990, although against it on some lesser points. The Commission then took a few years more to ensure Greece was not flouting the Treaty rules.

Following the accession of Spain and Portugal in 1985, it was also necessary for the Commission to oversee the incorporation of their downstream oil industries into the non-discriminatory Community market. On several occasions in Spain, the Commission was obliged to intervene to prevent abuse of the block exemption Regulations (as above). The last case was closed in September 1994 when the Spanish refiners agreed to adjust the terms of the relevant contracts.

Discrepancies over aid payments to German refinery

Since then, only one significant competition case has emerged regarding the downstream oil sector. It concerns the new refinery being built at Leuna in East Germany by Mider, a subsidiary of Elf Aquitaine. Substantial aid was involved when the Elf Aquitaine-led consortium purchased the old refinery and a distribution chain from the Treuhandanstalt privatisation agency, which the Commission approved in 1993. Further aid was approved towards the end of 1994, to cover part of the DM200m required for extra safety and environmental protection measures.

In 1997, the Commission reopened the case because of information from a study carried out for the BvS, the successor to the Treuhandanstalt, with a view to determining the market price of shares in Mider, because Elf has an option to sell 33% of the shares in the new refinery back to BvS once the refinery goes into production. The study concluded that Elf's estimate of the cost of building the Leuna refinery, namely DM3.3bn, was a great deal too high and should have been nearer DM2.4bn. Since the aid levels are calculated relative to the overall costs, the Commission said it would need to determine whether some of the aid, given in 1993-94, should be returned. It would also have to consider the terms on which BvS should buy back the 33% stake if Elf were to exercise its option, the Commission said, or the terms of any other compensation BvS might offer Elf.

Decision against tax rebate challenged by Mider in Court

Later the same year, the Commission said it would investigate a general scheme to provide tax breaks on capital investment in Eastern Germany, which should have ended in 1996, but which was used during 1997 to assist the Leuna project. When the Commission took a Decision against the aid towards the end of 1997 demanding it be repaid, Mider took the case to the Court of First Instance (in January 1998) and asked for the Decision to be annulled. It claimed that the extended period was necessary because of circumstances beyond its control, such as the discovery of bombs on the construction site. Four legal arguments were put forward. Firstly, it said the Commission failed to verify whether the derogation available in Article 92-2c of the Treaty was applied, despite the request by Germany that it should be. Secondly, Mider argued, the Commission failed to recognise that the extension of the investment period did not constitute an additional aid over and above the investment grants. Thirdly, Mider claimed the Commission infringed the general EC law of proportionality; and, finally, it erroneously classified the investment grant as a new additional aid rather than as approved existing aid.

Ownership changes in refinery and distribution sector

In recent years, the Commission has approved a number of ownership switches in the retail market. In December 1994, the Commission approved the purchase by the Royal Dutch/Shell group of the 50% share in Monteshell which was owned by Edison. The deal effectively ended the automotive fuel and lubricants joint venture, dating from 1987, between Shell Italia and Edison, and left Shell Italia in sole control of Monteshell. A few weeks later, the Commission authorised the creation of a new joint venture by Norsk Hydro and Texaco for the distribution of refined oil products in Norway and Denmark.

Green light for Saudi moves in Greece

In mid-1995, the Commission approved the purchase, by the Saudi Arabian Oil Company from the Vardinoyannis family, of a 50% stake in two Greek oil companies - Motor Oil Corinth Refineries and Maritime Oil Company - and the setting up of a joint venture. The Commission said the concentration would mainly affect the Greek markets for refining and retailing of oil products and, since the Saudi firm had no existing presence in those markets, there would be no increase in market share.

BP-Mobil joint venture cleared

In August 1996, the Commission cleared a major joint venture in which BP and Mobil combined their fuels and lubricants businesses throughout Western and Eastern Europe (including western Russia, Turkey and Cyprus). The Commission calculated that for the fuels business, which would be operated by BP, the joint venture would take an overall market share of about 10% in Europe and be the third largest retailer after Exxon and Shell. The lubricants business, to be run by Mobil, would have about 18% of the market. The Commission said, in justification of its decision, that all the markets covered by the joint operation would face strong competition from other large transnational oil companies. Furthermore, the venture would often compete in national markets against a strong national player, and against a growing number of supermarket chains.

There was one proviso, however, concerning the implications of Mobil's continuing shareholding in Aral and "in particular the issue of possible conflicts of interest which could arise as a result of Mobil's shareholding and its entry into the joint venture which will compete with Aral in some markets". The Commission argued that, while Mobil's shareholding in Aral does not give rise to a likelihood of coordination of competitive behaviour between BP and Mobil, "the supply arrangements and information flows from Aral to Mobil following the entry of Mobil into the joint venture may raise issues under Article 85 of the EC Treaty". The Commission's clearance of the joint venture, therefore, did not cover the supply arrangements between the joint venture and the two parent companies, nor the information flows between Aral and Mobil.

Commission approval for developments in UK and France

In late 1997, the Commission approved an operation by which Shell UK acquired three petrol distribution terminals, a 50% interest in a lubricants blending plant and 215 petrol stations held by Gulf Oil, part of the Chevron group. The Commission examined the product markets on which both parties would be active - exploration/production, oil/gas, chemicals and coal - but found that the overlaps were not such as to give rise to competition concerns, even on the narrowest definitions.

Two further recent interventions by Brussels are worth recording, both in France. In May 1996, the Commission closed an infringement proceeding, opened two years earlier, by authorising a special levy on oil products paid to the Institut Francaise Petrole for R&D purposes. In autumn 1997, a resubmitted scheme for 1998-2002 was also cleared by Brussels. The Ecu181m annual budget is not state aid, the Commission said, and would be used for R&D, the results of which would be widely transferred to non-French companies.

Elements of crude oil venture referred back to France

In December 1997, the Commission decided to refer part of its investigation into the proposed takeover of Compagnie Industriel Maritime by Elf subsidiary Sogelfa and Compagnie National de Navigation back to the French authorities. France expressed concern that the venture could create or reinforce a dominant position in the markets for crude oil storage at Le Havre and for storage of petroleum products in the Paris region, Val de Loire and Le Havre. The Commission did, though, approve those elements of the takeover which related to the storage at Le Havre of crude oils traded on the spot market and petroleum products intended for export.

A CATALOGUE OF INFRINGEMENTS CONCERNING BIOFUELS

With a growing interest in renewable forms of energy and increasing difficulties in the agricultural sector, the 1990s has seen the use of biofuels develop from little more than a few research projects to a significant European market. In the last few years, the Commission has made attempts to encourage the use of biofuels (Chapter Four B), but the application of competition rules to the sector has been rather uneven - with infringement proceedings stemming from the agricultural, competition and industry services - and has been challenged in the Court of Justice.

Aid for German biofuel plant restricted slightly

In January 1994, for example, the German authorities notified Brussels of aid for a rapeseed oil methylester pilot plant operated by the German company Raiffeisen Hauptgenossenschaft Nord, at Kiel. The Commission initiated an Article 93-2 procedure, in October 1994, because the aid was due to cover 36.6% of the eligible costs of the Ecu10m plant on top of Community aid covering a further 30% of the costs. The Commission noted that, if the project was considered as R&D, then an aid intensity of only 25% would be legitimate. If the project was considered under the environmental umbrella, then the aid maximum could be 30%. The procedure was closed a year later in October 1995 after Germany agreed to reduce the state aid from the level of DM6.4m, as originally notified, to DM4.5m. This left a total aid component as high as 55%. The Commission justified its authorisation on the basis that it had, in the past, accepted this level of aid for a commercially-operating rape oil methylester plant with cofinancing from the Community’s funds, and that it would have been inconsistent to apply stricter rules in this case.

Discriminatory measures in Italy and Belgium

A case in Italy, dating from 1993, revolved around two aid schemes. The first involved an exemption from excise duty for a quota of biodiesel (250,000t in 1994) made from the esterification of vegetable oils, and the second a grant of L150,000/hectare for farmers taking part in the programme. The Commission had some trouble extracting information about the schemes from the Italian authorities and made public its investigation with a notice in the Official Journal in December 1994.

Italian aid measures deemed illegal

In coming to its March 1997 Decision, the Commission argued that both aid measures conflicted with EU rules, for the agricultural common market in fat-based materials, and for set-aside. Moreover, the per-hectare aid measure conflicted with rules laid down in Regulation 2078/92, which stipulate that no environmental aid can be given for using set-aside land for non-food production. It concluded, therefore, that neither measure could benefit from the derogations contained within the Treaty. Italy was given two months to dismantle the system of tax exemptions.

At the time of the Decision, the Commission emphasised that it was not opposed to the principle of encouraging the production of biofuels but that it objected to the discriminatory nature of the tax exemption concerned and the undue restrictions, from a technical point of view, on the raw materials that could be used to produce the exempt biodiesel.

A case in Belgium, concerning regional aid to rapeseed agriculture for biofuel use, was given some publicity by the Commission when it announced, in March 1995, the opening of an infringement procedure. The aid was provided to make up the difference between the price rapeseed oil fetched as a food and the (lower) price it fetched for biofuel manufacture. The Commission said the aid violated various aspects of Community law, not least the rules for use of set-aside land, and could affect competition and intra-EU trade in biofuels.

Concerted French attempts to back biofuel development

However, by far the most important cases concern France and the various schemes devised by its authorities for supporting the use of biofuel production from agriculture. The French government, for example, tried to legitimise its tax incentives for biofuels by making an application for exemptions through the excise tax Directives (Chapter Three). In a short Communication adopted in mid-1995, the Commission advised the Council that the French had failed to provide full justification for their request and that, in any case, the tax measures suggested were currently the subject of Article 93 proceedings (as below).

In August 1995, the Commission opened an infringement procedure against France, concerning agreements between the state and a number of companies and oilseed organisations (Onidol and Sido). These agreements, to support the establishment of an experimental production and marketing programme for ester fuel derived from winter rape grown on set-aside land, were communicated to the Commission in 1993 only as a result of a Commission investigation.

The Commission found a whole series of problems: the aid provided by the French government for winter rapeseed or sunflower seed constituted an infringement of the common market in fats and oils, did not comply with the set-aside rules, and was not justifiable under Regulation 1765/92 on the common organisation of markets including that of oilseed plants. Moreover, despite repeated requests, the Commission said, it had received insufficient information on which to judge the proposed measures to be legal.

Commission investigations into French aid

Also in mid-1995, the Commission went public over an infringement proceeding started the previous December (though the actual investigation had been under way since at least 1991, and a partial tax exemption dated from three years before that). The Commission's detailed objections, published in a notice in the Official Journal, concerned direct aid for biofuels of agricultural origin, and indirect aid to certain basic products.

Commission attacked in Court over failure to act

By July 1996, there was no sign of the Commission cracking down on the French subsidy plan, and Pantochim, a Belgian subsidiary of the Italian company Sisas, which manufactures methyl ester at Feluy, lodged an action at the Court of First Instance against the Commission's failure to act.

In its plea to the Court, Sisas said it had contacted both the main French oil companies, with a view to supplying biofuel direct, and three French vegetable oil producers with regard to processing contracts at Feluy. But, because the French authorities had refused to designate the Feluy plant as a "pilot unit", necessary to obtain tax relief, it had been unable to win any orders. Moreover, Sisas said Pantochim was the only non-French producer within the Community capable of supplying biodiesel in France at a competitive price (assuming it was granted the tax exemption). As a result of the Commission's failure to utilise the Article 93-2 procedure to oblige France to revise conditions for the special tax relief, Sisas said Pantochim had lost FFr50m.

Action against Commission in Court of First Instance

A few months later, in December 1996, the Commission did take a Decision against the French scheme. It excluded certain raw materials without technical justification, the Commission said, and, at the same time, limited eligibility to agricultural raw materials - rapeseed, sunflower seed, cereals, Jerusalem artichokes, beet and potatoes - grown exclusively on set-aside land. These stipulations, the Commission explained, breached Community rules on the common agriculture markets and on set-aside. The Commission also found an infringement of Article 95, because the scheme discriminated against alternative fuels imported from other Member States and made from different raw materials by taxing them more heavily. The tax exemption for French producers had direct effects as regards the fuels and indirect effects as regards the agricultural raw materials from which they were made, the Commission added.

Commission Decision against French biofuel aid

In February 1998, the Court of First Instance ruled in the Pantochim case. It judged as irrelevant the fact that the action taken by the Commission was not the same as that asked for by Pantochim. By making its December 1996 Decision, the Commission had undeniably defined its position as required by the Treaty and was not guilty of failing to act, the Court decided, and therefore a ruling in the case was unnecessary. On the question of damages, meanwhile, it said that the Commission had, at no point, acted illegally during its investigation of the tax scheme, and could not be considered responsible for Pantochim's alleged losses. Pantochim, however, began proceedings in France for recovery of its losses.

Chapter Three C

Commission authorisation for French scheme challenged

In a somewhat unusual move, the Commission press release announcing the 18 December negative Decision also appeared to give guidance for future proposals. It said: "*If France had set up a scheme involving exemption for all kinds of alternative fuels, there would not have been an infringement of the Community's agricultural rules of Article 95 of the Treaty.*" The same press release stated that France had submitted, towards the end of 1996, a new scheme for fiscal exoneration of biofuels which the Commission hoped "to be able to approve soon".

Indeed, just a few months later, in April, the Commission announced it had authorised a French scheme allowing chosen manufacturers to market a limited quota of biofuels without being subject to the domestic oil products tax. The approved scheme was aimed at introducing a limited quantity of such products into the domestic heating and vehicle fuels markets. Each contract, to be awarded following a call for tender published in the Official Journal, would be for a period of either three or nine years, depending on how much investment the businesses had made recently in biofuels production. Decisions on the length of the contract would have to be decided according to very specific criteria which France would communicate to the Commission.

BP challenge to the Commission's biofuels policy

This was not the end of the story, though. The UK ethanol producer, BP Chemicals, lodged an action in the Court of First Instance in June 1997 calling for the Commission's April 1997 Decision to be annulled on three principle grounds. Firstly, BP Chemicals claimed the Commission had exceeded its margin of discretion in three respects: it did not set any financial limit on the volumes of biofuel production or the life of the 1997 scheme; it failed to assess the impact of the scheme on the ethanol market; and, it said, the environmental benefits of the scheme would be minimal at best and could be secured by far less expensive and discriminatory measures.

Secondly, BP claimed that a derogation for the scheme would require a unanimous Council decision. The idea that the 1997 scheme could benefit from a derogation for pilot plants was a volte face, it said, because the December 1996 Decision had declared that approach illegal and, in the new scheme, nothing had changed. Thirdly, BP Chemicals said, the 1997 scheme was "biased entirely in favour of the incumbent French producers and their suppliers, who have already benefited substantially by the measures declared illegal and incompatible in December 1996 (but still in force today)". France was levying discriminatory taxation on imported production and the 1997 scheme accordingly should not be given an exemption under Article 92-3, it argued.

APPLICATION OF COMPETITION RULES TO ENERGY SAVING SCHEMES

Apart from safeguarding competition policy within the major energy industries, the Commission also monitors a significant number of cases where state aid is provided to support energy saving schemes, to bolster the use of renewables, CHP or district heating, and to underpin R&D into more efficient uses of energy. These cases are rarely controversial and are almost always signed off with a so-called comfort letter by DGIV. In order to set a clear and transparent framework for the use of state aid, the Commission operates guidelines for different kinds of aid, such as that for R&D (latest guidelines issued in 1996), for SMEs (1996), for environmental aid (1994) and for restructuring of firms in difficulty (1994).

New system of block exemptions for small state aid cases

However, in 1997, the Commission put forward a draft Regulation asking the Council for authorisation to adopt horizontal block exemptions in the following areas: SMEs, R&D, environmental protection, and employment and training. The Council approved the Regulation in May 1998. In essence, the block exemptions, when prepared by the Commission, will exempt aid, below a specified threshold, from the notification requirements of Article 93-3. Member States will also be required to set up monitoring and reporting mechanisms to relay information to Brussels. In presenting the proposal, the Commission claimed considerable experience in the use of state aid in the specified areas and argued that, in general, Member States did already respect the existing guidelines. By removing the notification requirements for standard cases, DGIV would be given more time to focus on the important issues which threaten the functioning of the Single Market. In its Opinion, the Parliament suggested the addition of a "local public services" category, but this idea was not taken up.

Germany appears to provide state aid more than any other Member State to support a wide range of energy schemes. In 1996, the Commission authorised aid for solar technologies, for limiting CO_2 emissions in the energy industry, for wind turbines, for promoting investment in district heating, and for several general energy savings and renewables programmes in different Lander. An Ecu5m/yr energy conservation and renewables programme for Baden-Wurttemberg, for example, was approved by DGIV in January 1997. Also in 1997, it authorised an Ecu7.5-15m/yr programme, running until 2002, to support the processing and use of biomass.

Approval for aid measures related to energy taxation

Denmark, like Germany, regularly seeks approval for support schemes: an Ecu4m/yr programme of investment aid for sustainable energy sources in 1996, a larger programme of aid for energy efficiency (reducing from Ecu119m in 1997 to Ecu23.5m in 2000) and another for supporting CHP, both in 1997. The Commission also approved, somewhat enthusiastically (given the failure of its own CO_2/energy tax proposal), a number of state aid elements connected with CO_2/energy taxation measures, one for the Netherlands in November 1995; others for Denmark and Sweden, in May and December 1996 respectively, and in February 1997 (tax relief for steel firms in both countries).

There have been far fewer such schemes related to energy notified in most of the other Member States, and, during 1996 and 1997, none in about half of them. In Austria, aid for the construction of heating distribution plants fuelled by renewables was approved in 1996. Finland put forward several schemes for wind energy and for electricity connections to certain island regions in 1996 and, in 1997, an Ecu3m/yr scheme to compensate power plants for using renewable energies. New or amended rural electrification and gas schemes in Spain were notified in 1996 and approved, as was an Ecu45m scheme for support of renewables in Portugal.

Assessment

No room for highly subsidised coal industry in Single Market

Even when coal was much more important than it is today for strategic and security of supply reasons, the original European Coal and Steel Community was founded on the basis of market principles. Article 4 of the Treaty says “subsidies or aids granted by States, or special charges imposed by States, in any form whatsoever” are recognised as “incompatible with the common market for coal and steel and shall accordingly be abolished and prohibited with the Community”. Strong stuff for 1951! Over the years, the Council and the Commission have circumvented this stricture by the use of Article 95, a general provision which allows Commission Decisions in support of other objectives. Historically these have been based on the restructuring and modernisation of the industry to meet the challenges of cheap coal imports and substitute fuels such as oil and gas. But today, with the Single Market in place, there is no room for highly subsidised coal mining businesses. Most Member States have recognised this. Portugal and Belgium have already closed their industries; France has a clear closure programme; and the UK has only kept open those mines which have a chance of profitability.

Germany and Spain, though, have yet to face up to reality. In Germany, the miners continue to tap such a deep vein of public sympathy that, despite the wealth of the nation, the government has found it painfully difficult to enforce the necessary cutbacks. The figures in the table below demonstrate, firstly, that the problem in Germany is on a completely different scale to that in Spain, and secondly, that there has been no real progress in subsidy cut cutbacks year-on-year. The figures for 1996 (as above) looked no better, and the Commission was so dissatisfied with the level of notifications for 1997, that it had not approved them by March 1998. The key point for the Commission is that Germany should be notifying most of its aid under Article 4 in combination with pit closure plans, and not under Article 3 which was designed to allow operating aid for potentially commercial pits. With German elections during the latter part of 1998, the issue is

Coal aid authorised 1992-95 (Ecu m)

	1992	1993	1994	1995
Germany - aid linked to current production[1]	4,497.7	4,462.6	4,845.8[3]	4,784.2
- aid not linked to current production[2]	246.7	256.3	181.4	106.7
Spain - aid linked to current production[1]	463.3	373.3	730.8	731.9
- aid not linked to current production[2]	108.9	0	145.3	135.0
France - aid linked to current production[1]	186.9	190.2	298.0	56.9
- aid not linked to current production[2]	774.6	818.1	614.8	612.3
Portugal - aid linked to current production[1]	5.8	6.4	1.8	0
- aid not linked to current production[2]	0	1.0	3.6	0.9
UK - aid linked to current production[1]	0	0	20.1	0
- aid not linked to current production[2]	13.1	12.4	870.0	1,622.8

[1] aid granted under Articles 3, 4, 5 and 6 of Decision 2064/86/ECSC and Articles 3 and 4 of Decision 3632/93/ECSC
[2] inherited liabilities under Decision 2064/86/ECSC and aid granted under Articles 5, 6 and 7 of Decision 3632/93/ECSC
[3] not including the activation of Ecu2,779m to cover certain debts for coal supply to power stations under German law

Source: COM/98/186

likely to be a highly sensitive one, and the Commission may find it difficult to take the necessary tough decisions (such as refusing the aid notifications unless resubmitted under Article 4).

The situation in Spain is of a different order, although the Commission is just as anxious to nudge the government into Article 4 notifications. The Spanish government has tried to meet the Commission's requirements, but, as in Germany, the trade unions have taken their grievances into the streets and the government has backed down from its initial (Brussels-approved) restructuring plans.

The UK, meanwhile, having privatised British Coal and finally shaken off much of its historic debt, is now looking to Brussels to help give the few remaining commercially viable mines a chance. It supported the complaint to Brussels by Celtic Energy over anthracite subsidies, and further complaints by RJB Mining over steam coal aid. It lodged its own formal complaints against Spanish discriminatory measures, and objected to a proposed German company restructuring. However, for these complaints to really bite, the UK government will have to keep its own sheet clean, so to speak. This may be difficult with pressure building domestically to avoid further closures.

UK could export several million tonnes of coal

The UK points to the fact that production costs at British mines are one-third those in some German mines and it argues that, with a level playing field on subsidies, it could export several million tonnes of UK coal. A typically bullish response came from the economics minister Gunter Rexrodt in early 1998 when he said British protests were "simply absurd" and that the UK government could not expect German taxpayers to save British jobs at the expense of German jobs!

Traditionally, the EU has only troubled the liberal oil market to make allowances for public security of supply obligations, but the Single Market brought the need for more rigorous regulation of the way the market operated. This led to the Utilities and Hydrocarbon Licensing Directives, both of which affected businesses within the oil and gas exploration industries, although without much benefit, according to the industry itself.

Now that the basic regulations requiring non-discrimination and equal access are in place, it is useful to look more carefully at the way the market operates - at safety and environmental issues, for example. This involves examining, and harmonising where necessary at EU level, national rules that have a significant impact on the costs of a product or service. In the electricity sector, the whole question of access for renewables is under examination (Chapter Three A). In the upstream oil and gas sector, the safety requirements for offshore workers are a major issue. The Commission's main objective in absorbing the offshore workers into the working time rules is health and safety, but it is clearly preferable for the industry to have Single Market-wide laws rather than ad hoc laws in different countries. Oil platform decommissioning is another similar issue in that the Commission believes the Member States should agree on a single position (although in this case such a position would be taken to a higher international level of negotiations - Chapter Four).

The Commission's policy on biofuels remains a little sketchy. In recent years, it has acted against national discriminatory measures for developing biofuels, whether they be agricultural subsidies, production aid, or excessive RTD support. Moreover, when challenged in the Court of Justice, its individual actions have been upheld. A case brought by a chemical ethanol manufacturer against the French support mechanism, however, could unravel the Commission's tenuous policy framework.

A sketchy policy on biofuels - more transparency needed

There is an amended Commission proposal dating from 1994, which proved unacceptable to the Council, for allowing excise tax derogations for biofuels. The more recent proposal on energy excise tax harmonisation would also allow preferential treatment for biofuels. Apart from those proposals, however, the only substantive discussion of biofuels policy can be found in DGXVII's white paper on renewables (Chapter Four B). It confirmed that a market share of 2% for liquid biofuels should be considered a pilot phase, but it also said this level may well be reached in the short or medium term in Austria, Germany, France and Italy. The Commission needs urgently to address the competition aspects of the burgeoning biofuels market (possibly in the wider context of biomass) in relation to industrial, energy and agricultural policy, and provide the market with a coherent and transparent policy framework.