Guide To EC Merger Regulation

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GUIDE TO EC MERGER REGULATION

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INTRODUCTION AND OVERVIEW

Since its inception in 1990, the merger review system introduced by the European Merger Control Regulation ("ECMR" or "Merger Regulation") has rapidly matured and continuously grown in complexity. The Merger Regulation was substantially amended on March 1, 1998 and May 1, 2004. The Commission has now adopted more than 3,000 reasoned decisions and a substantial number of interpretative notices and guidelines.

In light of this ever-growing complexity, the aim of this Guide -- which is now in its fourth edition -- is to provide the non-expert with a clear and concise overview of the principal features of the Merger Regulation and their application in practice. By combining the texts of the pertinent legal instruments with a clearly structured explanatory text, the Guide seeks to provide quick answers to the most frequently asked questions about the European merger review system. The Guide does not aim to be an exhaustive reference work, nor can it substitute for expert legal advice on the complex questions of EC merger review in individual cases.

The organization of the Guide follows the basic steps of merger analysis:

- Does the Merger Regulation apply to the transaction? (Part 1)

  The transaction must (i) be a "concentration" within the meaning of Article 3 of the Regulation, and (ii) have a "Community dimension" -- that is, it must meet the turnover thresholds of Article 1(2)-(3) of the Regulation. Alternatively, the Commission may obtain jurisdiction at the parties' request if the concentration is reviewable in at least three Member States and the Member States concerned do not object, or if one or more Member States refer a case to the Commission.

- What is the procedure for notifying the transaction under the Regulation? (Part 2)

  Mandatory waiting periods prohibit consummation of the transaction before the Commission concludes its review. The review may last anywhere from five weeks to many months and may impose substantial information-gathering burdens on the parties.

- Does the transaction raise substantive concerns? (Part 3)

  In determining whether a merger is "compatible with the common market," the Commission defines the relevant product and geographic markets and assesses whether the merger substantially impedes effective competition in those markets.

- What is the relationship between the Merger Regulation and other regulatory regimes? (Part 4)

A transaction that falls under the Merger Regulation generally will not be subject to other Member State or Community procedural regimes. In investigating international mergers, however, the Commission cooperates with other agencies around the world, most notably with agencies in other Member States and the United States.

In addition, this Guide gives a brief overview of national merger control systems in the EU and EEA Member States, to provide a starting point for determining national notification requirements for transactions not covered by the Merger Regulation.

PART ONE: TRANSACTIONS CAUGHT

The Merger Regulation gives the Commission jurisdiction over any "concentration" that has a "Community dimension".

Whether or not a transaction is a concentration depends on the structure of the transaction. A transaction has a Community dimension if the sales of the parties to the transaction (and their respective corporate groups) exceed certain thresholds.

Even if a concentration does not have a Community dimension, the Commission may obtain jurisdiction under the Merger Regulation if the parties to the concentration successfully apply for a referral under Article 4(5) ECMR, or one or more Member State authorities refer the concentration to the Commission under Article 22 ECMR.

1 Concentration

According to the Merger Regulation, a "concentration" arises where a *change of control on a lasting basis* results from:

- **Merger** between previously independent undertakings or parts of undertakings (Article 3(1)(a) ECMR).
- **Acquisition of control** of the whole or parts of one or more undertakings whether by purchase of securities or assets, by contract or by any other means (Article 3(1)(b) ECMR).
- **Creation of a full-function joint venture** (Article 3(4) ECMR).

Certain kinds of transactions are excluded either by the Merger Regulation itself or by Commission practice. The Commission Notice on the concept of concentration ("Concentration Notice") provides interpretative guidance.[1]

1.1 Mergers

The term "merger" as used in Article 3(1)(a) ECMR includes:

- Legal mergers, whereby two or more previously independent undertakings or parts of undertakings are merged in such a way that at least one undertaking ceases to exist (*see* Concentration Notice, para. 6).
- *De facto* amalgamations, in which the parties retain their separate legal personalities, but are combined into a single economic unit, *e.g.*, by

[1] O.J. 1998 No. C 66/5. Attached as Annex 6. It is expected that the Concentration Notice will be revised in the near future.

contractually establishing a common economic management (*see* Concentration Notice, para. 7).

1.2 Acquisition of Sole Control

The Merger Regulation treats as a concentration any acquisition of sole control over all or part of an undertaking by one or more undertakings (or by one or more persons already controlling at least one undertaking). For example, the Merger Regulation also applies to a shift from joint to sole control (*e.g.,* when a joint venture partner is being bought out). "Control" can be constituted by rights, contracts or any other means which confer the *possibility of exercising decisive influence* on an undertaking (Article 3(2) ECMR):

- **Acquisition by purchase of securities.** An acquisition of a majority of the voting rights of an undertaking will normally confer sole control. A minority shareholding is sufficient to confer sole control if the minority shareholder has the legal right to determine the strategic commercial behavior of the target company (such as the power to appoint more than half of the members of the relevant boards), or is *de facto* highly likely to achieve a majority at the shareholders' meeting, *e.g.*, if the remaining shares are widely dispersed (*see* Concentration Notice, para. 14). An option to purchase shares, even a majority of shares, will normally not confer sole control until it is exercised (*see* Concentration Notice, para. 15).

- **Acquisition by purchase of assets.** When the transaction involves the transfer of individual assets only, the question may arise whether the purchaser has obtained control over "part of an undertaking". The Commission's position is that assets constitute "part of an undertaking" whenever turnover (net sales) can be clearly attributed to them, for example when the purchaser acquires brands or licenses (*see* Concentration Notice, para. 11).

- **Acquisition by contract or other means.** The Commission's practice provides little guidance on this point. The Commission suggests that a "situation of economic dependence" might in some circumstances support a finding of control, *e.g.*, when a supplier or a customer provides long-term supply agreements or financing that is coupled with structural links with the undertaking (*see* Concentration Notice, para. 9).

1.3 Creation of a Full-Function Joint Venture

The 1998 amendments to the Merger Regulation brought the creation of all "full-function" joint ventures within the concept of a concentration.[2] A full-function joint venture is any joint venture that:

[2] The procedural regime of the Merger Regulation thus applies to all full-function joint ventures regardless of whether or not they are deemed to involve a risk of coordination between the

- involves the acquisition of joint control by two or more entities; *and*
- performs on a lasting basis all the functions of an autonomous economic entity (Article 3(4) ECMR).

Joint control. When two or more parents cannot, individually, control the strategic business decisions of the controlled undertaking (the joint venture) but can, on a legal or *de facto* basis, block each other from doing so, those parents enjoy joint control of the joint venture. Joint control can arise in two circumstances:

- **Each of at least two parents has absolute, unilateral veto power over important business decisions.** This will normally be the case in 50:50 joint ventures when voting rights and representation in the joint venture's decision-making bodies are equally distributed.[3] In joint ventures with non-identical participation, joint control between the leading and the minority owners nevertheless arises if the statutes of the joint venture or the relevant agreement between the parents provide the minority shareholder(s) with veto rights over key matters, particularly the appointment of management and the determination of the annual budget and business plan. Depending on the economic context, veto rights as to certain investment decisions or such matters as the choice of key technologies may also be sufficient for joint control. In order to acquire joint control, it may be sufficient that only some, or even one of such veto rights exists. On the other hand, normal minority shareholders' rights that are primarily designed to protect investors' financial interests and that are related to the essence of the joint venture, such as changes in the statutes, or an increase or decrease in the capital or liquidation, will not confer joint control (*see* Concentration Notice, paras. 20-29).

- **Two or more parties to the joint venture can jointly veto important business decisions.** Even in the absence of specific veto rights, two or more minority shareholders in a joint venture may have joint control if, together, they hold a majority of voting rights and will act together in exercising those rights. This joint control may arise from a legally binding arrangement (*e.g.*, a pooling agreement or the creation of a holding company to which voting rights are transferred). In rare cases, a strong common and lasting interest between the minority shareholders indicating that they would *de facto* not act against each other in exercising their respective rights may create joint control (*see* Concentration Notice, paras. 30-35).

parents. The distinction between concentrative/cooperative joint ventures that was determinative for the Commission's jurisdiction until the 1998 reform of the Merger Regulation no longer has any practical relevance.

[3] Even if one of the parties has the power to cast a tie-breaking vote in case of deadlock, joint control may still exist if such a vote is difficult to exercise in practice, *e.g.,* because the tie-breaking power becomes operative only after lengthy arbitration and reconciliation procedures (*see* Concentration Notice, para. 37).

Full-function joint venture. To fall under the Merger Regulation, the joint venture must operate in a market and perform the functions normally carried out by other undertakings operating in the same market. As set out in the Commission Notice on the concept of full-function joint ventures ("Full-Function Notice"),[4] the Commission will evaluate the following elements:

- **Management and resources.** The joint venture must have its own management and access to sufficient resources (including finance, staff and assets) to conduct on a lasting basis the business activities specified in the joint venture agreement (*see* Full-Function Notice, para. 12).

- **Functions performed.** The joint venture will not be deemed full-function if it takes over only one specific function within the parent companies' business activities, *e.g.*, if the joint venture is limited to research and development, production, or sales. However, the fact that the parents act as agents of the joint venture in distributing its products will not by itself cause the joint venture to lose its full-function status (*see* Full-Function Notice, para. 13).

- **Dependence on parents for input or output.** When the joint venture relies heavily on its parent companies for purchases or for sales, particularly when those transactions are not at arm's length, the joint venture is presumed not to be full-function. There are two exceptions, however: (i) when reliance on parents for sales or purchases is limited to a start-up period, normally not exceeding three years; or (ii) when the joint venture is active in a trading market and performs the normal functions of a trading company in such a market (*see* Full-Function Notice, para. 14).

- **Duration.** The joint venture must operate on a lasting basis. Normally, this is evidenced by the parents' commitment of the necessary resources to the joint venture, even if the agreements provide for dissolution under certain standard contingencies, *e.g.*, commercial failure or fundamental disagreement between the parents. The joint venture will not be deemed to be established on a lasting basis if the joint venture agreement is for a short, finite term (generally less than five years), and there is no possibility for an extension. That the joint venture is a small, start-up operation and subject to the parents' future financial decisions will not, however, undermine a finding that the joint venture is full-function (*see* Full-Function Notice, para. 15).

1.4 Exceptions

Based on the general proposition that the Merger Regulation should cover only permanent structural changes with a market impact, the Regulation itself and the Commission's practice exclude several types of transaction from the Regulation:

[4] O.J. 1998 No. C 66/1. Attached as Annex 7. It is expected that the Full-Function Notice will be revised in the near future.

- **Acquisitions by financial institutions of securities for resale**, provided that the financial institution holds the securities only temporarily for resale in the ordinary course of business and does not vote them for the purpose of influencing the undertaking's competitive behavior, unless it exercises those rights only with a view to preparing for the disposal of those securities or of all or part of that undertaking (Article 3(5)(a) ECMR).

- **Acquisitions by liquidators** or any other officer in connection with insolvency or similar proceedings (Article 3(5)(b) ECMR).

- **Acquisitions by certain financial holding companies** of a controlling share of an undertaking if the holding company exercises its voting rights only to maintain the full value of those investments and refrains from influencing the acquired undertaking's competitive conduct (Article 3(5)(c) ECMR).

- **Purely intra-group transactions**, such as the merger of two wholly-owned subsidiaries, since there is no change in ultimate control (*see* Concentration Notice, para. 6).

- **Increase in the shareholding without influence on the quality of control**, where a party increases its shareholding in an undertaking, when it already held sole control over that undertaking or, where it previously exercised joint control over that company, the increased shareholding does not confer sole control.

2 Community Dimension

The Commission has jurisdiction only over concentrations that have a "Community dimension".[5] The Community dimension test, which is based on turnover (net sales), attempts to identify those transactions that have an appreciable economic impact on the Community. Whether physical assets are located in the Community is irrelevant to determining the applicability of the Merger Regulation.

The turnover-based thresholds in the Merger Regulation sometimes result in a very far-reaching jurisdiction, imposing what may be perceived as an unnecessary administrative burden on companies and the Commission. The Regulation will sometimes apply to transactions having only a marginal impact in the Community (particularly small joint ventures of large parent entities), while transactions with far more substantial impact fall outside the Regulation if the turnover thresholds are not met. To date, the Commission has always claimed jurisdiction over transactions that satisfy the turnover thresholds, even when they primarily affect markets outside the Community.[6] Nevertheless, the Commission has reduced the amount of information required in the notification for several situations which typically raise fewer competitive concerns.[7]

2.1 Turnover Thresholds

General thresholds. A concentration is deemed to have a Community dimension when it meets the following turnover thresholds (Article 1(2) ECMR):

- The combined aggregate *worldwide* turnover of *all* the undertakings concerned exceeds € 5 billion; *and*
- the *Community-wide* turnover of *each of at least two* undertakings concerned exceeds € 250 million;

[5] For a discussion of Commission jurisdiction as a result of referrals under Articles 4(5) and 22 ECMR see Sections 2.5 and 2.6 below.

[6] In March 1999, the Court of First Instance upheld the Commission's decision prohibiting the proposed merger between Impala Platinum Holdings Ltd., controlled by the South African group Gencor, and the platinum division of the British group Lonrho plc., Case T-102/96 *Gencor v. Commission,* [1999] ECR II-753. The Court held that the Community merger rules apply to transactions carried out outside the Community but liable to impede competition significantly within the Community.

[7] *See* Short Form for the notification of a concentration pursuant to Regulation (EC) No. 139/2004, Annex II to Commission Regulation (EC) No. 802/2004 ("Implementing Regulation"), attached as Annex 4. In addition to international joint ventures which could previously be notified on a short form, the new Implementing Regulation also allows short form notifications for cases where there is no overlap between the notifying undertakings' activities, where their market share is below certain levels, or where the acquisition only entails a change from joint to sole control.

unless

- *each* of the undertakings concerned achieves more than two-thirds of its aggregate *Community-wide* turnover *within one and the same Member State*.

Alternative thresholds for smaller, multi-jurisdictional transactions. Under an alternative set of turnover thresholds introduced in 1998, the Merger Regulation also applies to concentrations that meet the following thresholds (Article 1(3) ECMR):

- The combined aggregate *worldwide* turnover of *all* undertakings concerned exceeds € 2.5 billion; *and*

- the aggregate *Community-wide* turnover of *each of at least two* of the undertakings concerned exceeds € 100 million; *and*

- in *at least the same three* Member States:

  -- The combined aggregate turnover of *all* the undertakings concerned exceeds € 100 million; *and*

  -- the turnover of *each of at least two* of the undertakings concerned exceeds € 25 million;

  unless

- *each* of the undertakings concerned achieves more than two-thirds of its aggregate *Community-wide* turnover *within one and the same Member State*.

2.2 Calculation of Turnover

Calculating turnover for determining "Community dimension" requires several steps: (i) determining the "undertakings concerned"; (ii) identifying the affiliated companies that must be included when calculating the turnover; and (iii) allocating the turnover geographically.

2.2.1 Identification of Undertakings Concerned

The starting point for the turnover calculation is identifying the "undertakings concerned," *i.e.*, those parties that are direct participants in a merger or acquisition of control. The extensive Commission Notice on the concept of undertakings concerned ("Undertakings Concerned Notice") provides interpretive guidance.[8] The most important principles in determining the undertakings concerned are:

- **Merger.** In a merger, the undertakings concerned are the merging entities.

[8] O.J. 1998 No. C 66/14. Attached as Annex 8.

- **Acquisition of sole control.** In the acquisition of sole control of a company, the undertakings concerned will be the acquiring company and the acquired company. If the acquisition concerns only part of a company, the undertakings concerned will be the acquirer and the acquired part(s) of the target company only.[9] The seller that relinquishes control of the relevant undertaking (or parts thereof) is *not* an undertaking concerned, nor is its turnover included as an affiliated company (*see* Undertakings Concerned Notice, para. 8).

- **Acquisition of joint control.** When two or more undertakings acquire joint control of another undertaking, each parent is an undertaking concerned. The target company will also be a separate undertaking concerned, *unless*: (i) it is a newly created company (in which case it has no attributable turnover); or (ii) it was formerly under sole control of one of the parents now obtaining joint control. When the parties acquiring joint control have agreed to divide up the acquired undertaking immediately following the transaction, the Merger Regulation treats the acquisition as two or more separate transactions, in which the respective acquirers and acquired parts of the target for each transaction are the undertakings concerned (*see* Undertakings Concerned Notice, paras. 21-25).

- **Acquisition of control by a joint venture.** When a full-function joint venture acquires a controlling interest in another entity, the acquiring joint venture is the only undertaking concerned on the buyer's side. When, however, the joint venture is merely an acquisition vehicle, the Commission will "pierce the corporate veil" and treat the joint venture's parents -- rather than the joint venture -- as the undertakings concerned (*see* Undertakings Concerned Notice, paras. 26-29).

- **Other situations.** The Commission has developed complex rules for many situations that do not fit neatly into one of the above categories, such as changes in the shareholder structure of joint ventures, demergers and break-ups, share and asset exchanges, management buy-outs and acquisitions by state-owned companies (*see* Undertakings Concerned Notice, paras. 33-56).

2.2.2 Identification of Affiliated Group Companies

When an undertaking concerned belongs to a group of companies, the Merger Regulation provides that the turnover of the group as a whole must be taken into account in order to capture the total volume of resources that the operation is combining (Article 5(4) ECMR). To identify those group companies, the Regulation stipulates criteria that in some cases may be different from those used in consolidated group accounts. However, in most cases in which the turnover

[9] When the parties to the transaction agree to a staggered sale of different parts of the same undertaking within a two-year period, the Regulation treats the sales as one transaction (*see* Article 5(2) ECMR, subpara. (2); Undertakings Concerned Notice, para. 15).

thresholds are easily met, it is sufficient in practice to rely on companies' annual reports or similar accounting records. Together with the Turnover Calculation Notice,[10] the Regulation sets out the following general principles for attributing the turnover of group companies to the undertakings concerned:

- **Subsidiaries of the undertaking concerned (direct and indirect).** The test here differs somewhat from the "control" test used in defining the term "concentration" (*see* Section 1.2 above). Subsidiaries are to be included if the undertaking concerned: can (as a legal matter or *de facto*) exercise the majority of voting rights; *or* owns more than half of the capital or assets; *or* has (as a legal matter or *de facto*) the power to appoint more than half of the managers; *or* has the legal right to manage the subsidiary's affairs (Article 5(4)(b) ECMR).

- **All parent companies of the undertaking concerned up to the ultimate parent.** These are included following the same control test as for the subsidiaries of the undertaking concerned (Article 5(4)(c) ECMR).

- **Companies that have joint control of the undertaking concerned and their respective parent companies.** The Commission includes in the calculation of turnover the companies that jointly control the undertaking concerned, even if the joint venture is full-function (Article 5(4)(c) ECMR; *see* Turnover Calculation Notice, para. 38, subpara. 3).

- **Other (direct and indirect) subsidiaries of parent companies.** These are the "sister companies" of the undertaking concerned and their parents and subsidiaries. Again, this test is the same as that for the subsidiaries of the undertaking concerned (Article 5(4)(d) ECMR).

- **Companies in which two or more group companies jointly hold majority rights.** If two or more group companies, together, own majority voting rights in the same company, the jointly held company will also be included in the calculation of turnover (Article 5(4)(e) ECMR).

- **Pre-existing joint ventures controlled by two or more undertakings concerned.** The Merger Regulation sets out two special rules for such pre-existing joint ventures: (i) to prevent "double counting", sales between the joint venture and the undertakings concerned and their respective group companies are excluded for purposes of turnover calculation; and (ii) the external turnover of the joint venture is apportioned equally among the undertakings concerned (Article 5(5) ECMR).

[10] Commission Notice on the calculation of turnover under Council Regulation (EEC) No. 4064/89 on the control of concentrations between undertakings (O.J. 1998 No. C 66/25), attached as Annex 9.

- **Joint ventures between group companies and third parties.** By analogy to Article 5(5) of the Regulation, the Commission has determined that the turnover of companies controlled jointly by a group company and a third party generally should also be included, but that such turnover should be shared equally between the controlling companies (*see* Turnover Calculation Notice, para. 40).

2.2.3 General Turnover Calculation Rules

Once the undertakings concerned and their respective group companies have been identified, turnover for these entities is determined based on the following principles:

- **Net sales revenues.** Turnover is derived from the sale of products and the provision of services after excluding sales rebates, VAT, and other turnover taxes, *e.g.*, excise taxes levied on products such as gasoline and cigarettes.

- **Ordinary activities.** Only transactions falling within the undertaking's "ordinary activities" are to be taken into account. Examples of extraordinary income that is excluded include State aid (unless directly related to the sale of products or the provision of services) and proceeds from the sale of production assets.

- **Deduction of "internal" turnover.** Internal transfer transactions between undertakings concerned or within their respective corporate groups are excluded from the turnover calculation (Article 5(4) ECMR).

- **Relevant financial year.** The Commission will normally rely on the turnover figures for the undertaking's most recently completed financial year for which final audited accounts have been prepared in the ordinary course of business.

- **Acquisitions and divestitures completed since the last financial year.** The turnover figures for the most recent financial year need to be adjusted to reflect acquisitions and divestitures that occurred since the end of the last fiscal year and before the conclusion of a binding agreement or the announcement of a public bid (*see* Turnover Calculation Notice, para. 27).

- **Conversion into Euros.** The annual turnover derived from the audited financials is to be converted into Euros based on the average annual exchange rate for the twelve month period corresponding to the entity's last financial year (*see* Turnover Calculation Notice, para. 49).

2.3 Geographic Allocation of Turnover

The thresholds relating to turnover in the Community and in a given Member State require a geographic allocation of turnover. The Commission interprets the relevant provision in the Merger Regulation (Article 5(1) subpara. (2) ECMR) to mean that the allocation of turnover is determined *by the location of the customer at the time of the transaction*, rather than the place the goods or services are ultimately delivered or used. This means, for example, that all sales to a multinational corporation with

centralized purchasing for its geographically dispersed manufacturing facilities will be allocated to the country where the purchasing office is located (*see* Turnover Calculation Notice, paras. 45-47). The country of incorporation or registration of the customer company is irrelevant to apportioning turnover.[11]

2.4 Special Turnover Rules for Financial Institutions

Credit institutions and other financial institutions. For credit institutions and other financial institutions, the turnover thresholds are replaced by considering the income falling within Council Directive No. 86/635/EEC (*i.e.*, interest income and similar income, income from securities, commissions receivable, net profit on financial operations, and other operating income). This income is geographically allocated to the branch or division of the financial institution that receives it (Article 5(3)(a) ECMR). Financial (but not operational) leasing companies and financial holding companies are also financial institutions falling within this rule (*see* Turnover Calculation Notice, para. 55).

Insurance companies. For insurance companies, turnover is replaced by "gross premiums written," which includes: (i) reinsurance premiums charged by the undertaking concerned; and (ii) premium income that is derived in the relevant financial year from contracts concluded in previous years. Income from the insurer's institutional investment portfolio is not included, except when the insurer has a controlling interest in an undertaking. When the insurer holds a controlling interest, the undertaking's turnover is attributed to the insurer according to the general rules (*see* Turnover Calculation Notice, paras. 56-57).

2.5 Member State Referrals to the Commission

Article 22 of the Merger Regulation allows the Commission to review a concentration that lacks a Community dimension on request by one or more Member States. Originally, this referral possibility was introduced for Member States that lacked their own national merger control system. Four "single Member State" cases have been referred to the Commission in this way.[12] Because all Member States except Luxembourg now have merger control regimes in place, the focus has in practice shifted to joint referrals from several Member States.[13] The 2004 amendments to the

[11] *See Boeing/Hughes,* Case No. COMP/M.1879, Commission decision of October 29, 2000. In this case, the Commission included, for purposes of calculating EEA turnover, sales to a customer purchasing from and with its principal place of business in the United Kingdom, notwithstanding the customer's formal registration as a Bermudan company.

[12] *See British Airways/Dan Air,* Case No. IV/M.278, Commission decision of February 17, 1993; *RTL/Veronica/Endemol,* Case No. IV/M.533, Commission decision of May 22, 1995; *Kesko/Tuko,* Case No. IV/M.784, Commission decision of July 26, 1996; *Blokker/Toys "R" Us*, Case No. IV/M.890, Commission decision of February 21, 1997.

[13] *See GE/Agfa NDT,* Case No. COMP/M.3136, Commission decision of December 5, 2003; *GEES/Unison*, Case No. COMP/M.2738, Commission decision of April 17, 2002; *Promatech/Sulzer*, Case No. COMP/M.2698, Commission decision of July 24, 2002.

Merger Regulation have clarified the procedural rules for such referrals. In addition, the Commission has published a related Notice ("Case Referral Notice").[14]

Procedure. Under Article 22(1) ECMR, the Commission may review a transaction if a Member State requests a referral within fifteen working days from the date on which the concentration (i) was notified or, (ii) if no notification is necessary, was otherwise "made known" to the requesting Member State(s). Article 22(2) requires the Commission to inform the other Member States' competition authorities and the undertakings concerned of the request. Within a further fifteen working days of such information, any other Member State may join the initial request. Upon expiration of this time limit, the Commission has another ten working days to decide whether it will review the concentration. It may only do so if it considers that the concentration will affect trade between Member States and threatens to significantly affect competition within the territory of the requesting Member State(s). However, if the Commission fails to take a decision within these ten working days, it is automatically deemed competent to review the transaction according to the request(s).

Suspension of national time limits. All time limits under the national merger regimes are suspended until the Commission has decided who will review the transaction (Article 22(2) subpara. (3) ECMR). If a Member State has informed the Commission and the undertakings concerned that it will not join the referral request, the suspension of that Member State's time limit ends.

Optional request for new notification. Once the Commission decides to review the transaction, it may require the parties to file a notification according to the provisions of the Merger Regulation.

Commission's scope of review. The Commission's powers for cases referred by Member States have been extended under the new Merger Regulation. While not all provisions of the Merger Regulation are applicable to cases referred on request by Member States, the Commission's powers are no longer limited to measures strictly necessary to maintain or restore effective competition in the requesting Member State(s). Instead, the Commission may now use its full decision powers under the Merger Regulation.

2.6 Company Requests for Pre-Notification Referral to the Commission

Article 4(5) of the Merger Regulation now also enables the notifying parties to apply for a referral of the transaction to the Commission even if it does not have a Community dimension. Such an application requires that the transaction in question is a "concentration" as defined by the Merger Regulation, and is capable of being notified under the national competition laws of at least three Member States. If no competent Member State disagrees, the Commission obtains sole jurisdiction over the case and

[14] Commission Case Referral Notice, attached as Annex 16.

the parties need not make any national filings. The Commission's new Case Referral Notice[15] provides guidance on this procedure.

Procedure. To request a referral under Article 4(5) ECMR, the notifying parties must submit a "reasoned submission" using the new Form RS.[16] Form RS requires much of the same information as Form CO, and for each of the 25 Member States a reasoned statement as to whether the transaction is capable of being notified there.[17] Upon receipt of Form RS, the Commission transmits it to all Member States without delay, and all competent Member States then have fifteen working days to object to a referral to the Commission. If no Member State objects, the Commission gains sole jurisdiction over the transaction and the notifying parties must submit a notification on Form CO to start the procedure.

Scope of application. According to the Case Referral Notice, the most appropriate cases for Article 4(5) ECMR referrals will be transactions where the geographic markets at stake are larger than national.[18] This is in line with statements by Commission officials indicating that the referral system will -- at least for an initial period -- most likely be used for such cases. However, the Commission points out that it will probably also be in a better position to review cases where the transaction affects several national or smaller markets across the Community.[19]

Advantages. If no Member State objects, the Article 4(5) ECMR referral procedure allows companies to avoid burdensome multiple notifications in Member States, and will thereby often reduce legal costs and management time. Moreover, the Commission's merger review procedure is well established and subject to strict (albeit now somewhat diluted) statutory time limits, which may be more attractive than the prospect of having the closing of a transaction held up by one or more national jurisdictions with less merger control experience.

Disadvantages. Despite these advantages, companies should carefully consider on a case-by-case basis whether an Article 4(5) ECMR application is preferable to multiple national notifications, as the use of the Article 4(5) procedure[20] has a number of potential downsides as well:

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15 Attached as Annex 16.

16 Attached as Annex 5.

17 The Commission stresses that it is vital for the parties to identify all Member States that are competent to review the transaction, and to include in their Form RS all information necessary for the Member States to establish whether they are "competent", Case Referral Notice, para. 75.

18 Case Referral Notice, para. 28.

19 Case Referral Notice, para. 29.

20 Parties should also consider whether national filings may not be preferable in light of the Commission's new "significant impediment of effective competition" ("SIEC") test and its enforcement practice.

- **Delay.** Because of the fifteen working day Member State consultation period and the preparatory work required for completing Form RS, the Article 4(5) procedure in conjunction with the regular procedure under the Merger Regulation will often be lengthier than national filings. If the parties' Article 4(5) application is rejected because a Member State objects, the parties simply lose fifteen working days as well as the time spent completing Form RS.

- **Burdensome data requirements.** The amount of information that Form RS requires (in combination with the need to subsequently complete a Form CO) may well exceed that needed even for multiple national filings. Form RS requires explanations on market definition, information on the parties' and their competitors' market shares in all potentially affected Member States (even if the relevant geographic market is clearly wider), and a detailed analysis of filing requirements in all 25 Member States. Moreover, it would appear more difficult to obtain waivers of certain information requirements at the Form RS stage than is the case for Form CO because of the need to consult multiple agencies.

- **Confidentiality concerns.** The Commission stresses that both it and all national competition authorities are bound by professional secrecy obligations[21] and that it does not intend to publish the filing of a Form RS.[22] Nevertheless, at least some companies are likely to determine that they do not want highly sensitive information to be distributed to 25 Member State authorities before their deal is public; whereas waiting to file Form RS until after the announcement further increases the delays already inherent in the Article 4(5) procedure.

[21] Case Referral Notice, para. 57.

[22] Case Referral Notice, para. 61.

PART TWO: MERGER CONTROL PROCEDURE

3 Procedure before the Commission

The Merger Regulation lays down the rules for notification of proposed transactions, establishes the timetable for the process, provides for Commission investigative powers and sets out the rights of the parties. Other procedural aspects of the process are codified in Regulation (EC) No. 802/2004 (the "Implementing Regulation")[23] issued by the Commission on the basis of Article 23 of the Merger Regulation. The Implementing Regulation deals with the information to be provided in notifications, the calculation of time limits and the procedures for hearings and objections. A Commission Notice sets out a simplified procedure for concentrations that typically do not raise competition concerns.[24] Last, the Commission's Directorate General for Competition ("DG Competition") has issued Best Practice Guidelines on the conduct of EC merger control proceedings.[25]

The distinctive procedural features of the EC merger control process include the following:

- A significant amount of informal pre-notification consultation of the parties with DG Competition.
- Notification using a standardized form ("Form CO") that requires the provision of extensive information on the competitive situation in the markets concerned.
- Defined time limits for the Commission's initial investigation and a possible in-depth investigation (respectively, 25 working days, extended to 35 under certain circumstances; 90 additional working days for the in-depth investigation, with the possibility of separate extensions of 15 and up to 20 additional working days).
- A prohibition on closing the transaction during the Commission's investigation.

3.1 Pre-Notification Consultation

Informal pre-notification consultations between DG Competition and the notifying parties have become an essential part of the notification procedure. The Commission strongly encourages parties to contact DG Competition at the earliest possible stage because this helps DG Competition to manage its workload and

[23] O.J. 2004 No. L 133/1, attached as Annex 2.

[24] Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No. 139/2004, attached as Annex 15.

[25] DG Competition Best Practices on the conduct of EC merger control proceedings ("Best Practice Guidelines"), attached as Annex 18.

effectively gives it more time to deal with difficult cases. The pre-notification consultations will usually involve the submission of a memorandum on the transaction and a meeting with DG Competition staff.[26] For the parties, such consultations are useful for determining the scope of the notification, potentially negotiating waivers to the information required in Form CO and reducing the risk that the notification could be rejected as incomplete.[27] However, DG Competition will normally be reluctant at this early stage to discuss the merits of the competitive assessment of a transaction.

3.2 Notification of the Transaction

When to notify. A transaction that falls within the scope of the Merger Regulation may not be closed prior to notification and clearance by the Commission. Concentrations with a Community dimension can be notified after the conclusion of a legally binding agreement, the announcement of a public bid or the acquisition of control. Since May 1, 2004, notification is also possible where the undertakings concerned demonstrate a "good faith intention" to conclude an agreement or have announced an intention to make a public bid that would result in a concentration with a Community dimension (Article 4(1) ECMR).

Content of notification. Notifications must be made either on Form CO[28] or on the Short Form[29] if the conditions for a short-form filing are met (*see* Section 3.5 below). The forms list the information and material that the parties to the transaction must provide. Form CO is long and complex. The amount and type of information required is similar to the information called for by interrogatories in a second request under the US Hart-Scott-Rodino Act. Completing Form CO requires strategic choices that will shape the framework for subsequent submissions to the Commission, for example the identification of markets affected by the transaction. Companies can be fined for supplying incorrect or misleading information (Article 14(1)(a) ECMR). Parties are well advised to begin gathering the information for Form CO and drafting their notification as soon as possible. DG Competition will normally ask the parties to submit a draft Form CO for comments before the formal filing is made. The final Form CO must be submitted to the Commission in one original and 35 copies, including all annexes.

Who must notify? The undertaking acquiring control is generally responsible for completing and filing Form CO (Article 4(2) ECMR). In practice, it is often the ultimate parent of the undertaking concerned that submits the notification. For true mergers

[26] Best Practice Guidelines, para 11.

[27] Best Practice Guidelines, para. 22.

[28] Form CO is contained in Annex I of Commission Regulation (EC) No. 802/2004 and is attached as Annex 3 of this Guide.

[29] The Short Form is contained in Annex II of Commission Regulation (EC) No. 802/2004 and is attached as Annex 4 of this Guide.

(*i.e.*, transactions in which two or more previously independent parties merge into a new legal entity), all parties to the transaction must jointly file Form CO. Similarly, for acquisitions of joint control, all parties obtaining joint control must file. In the case of joint notification, parties may protect their respective business secrets by including them as separate annexes.

3.3 Automatic Suspension of the Transaction

Suspensory effect. The Merger Regulation bars the parties to a concentration from putting the concentration into effect until (i) it has been declared compatible with the common market or (ii) the Commission has failed to take a decision within the prescribed time limits.[30] A concentration put into effect[31] in contravention of the automatic suspension period is provisionally -- or, in case of an eventual prohibition, permanently -- invalid and may subject the parties to fines of up to 10% of their aggregate turnover (Article 14(2)(b) ECMR; *see* Section 3.5 below).

Derogations. For public bids, the Merger Regulation provides for an automatic derogation from the suspension to complete the bid, provided that the acquirer does not exercise any voting rights prior to Commission clearance (Article 7(2) ECMR). In addition, the Commission can grant discretionary derogations, taking into account, *inter alia*, (i) the effects of the suspension on the parties to the transaction or a third party and (ii) the threat to competition posed by the concentration (Article 7(3) ECMR previously Article 7(4) old ECMR). Although the Commission's practice is to grant derogations from suspension only in exceptional circumstances, derogations have been granted for a variety of reasons such as the dissolution of a joint venture,[32] the divestiture of assets required by commitments,[33] the creation of a new entrant in the market,[34] the difficult financial situation of the target,[35] or the necessity to make an

[30] Article 7(1) ECMR.

[31] The Commission has taken the view that the "putting into effect" of a transaction is not limited to the legal transfer of shares or assets, but includes all actions that *de facto* anticipate completion of the transaction, such as the joint marketing of products, *see Bertelsmann/Kirch/Premiere*, Commission Press Release IP/97/1062, December 1, 1997.

[32] In *Philips/Lucent Technologies (Deconcentration)*, Case No. COMP/M.1358 (Commission decision of November 27, 1998), the parties re-acquired the businesses that they had originally contributed to the joint venture. The Commission granted a derogation from the obligation to suspend the operation given the "exceptional nature of the case" and to enable the parties to disengage from the joint venture without delay.

[33] In the December 22, 1999, decisions in *BP/JV Dissolution*, Case No. COMP/M.1820 and *Mobil/JV Dissolution*, Case No. COMP/M.1822, the Commission granted a derogation from suspension because the dissolution of the BP/Mobil joint venture was a commitment the Commission had imposed in clearing *Exxon/Mobil*, Case No. COMP/M.1383, Commission decision of September 29, 1999. The Commission determined that the speedy transfer of control of the joint venture was the most effective way to give effect to the commitments.

[34] In *BBL/BT/ISP Belgium*, Case No. COMP/M.1667 (Commission decision of September 23, 1999), the Commission granted a derogation from suspension to a new entrant that planned to challenge the Internet service provider Skynet, controlled by the incumbent telephone operator (Belgacom). According to the Commission, any delay in implementing the joint venture would

unconditional offer for the target.[36] The Commission has adopted 74 decisions granting derogation from suspension, most of them during a Phase I investigation. In 2003, the Commission adopted eight such decisions (4% of the notified cases in that year).

3.4 Initial (Phase I) Investigation

Time limit for initial decision. The Commission has 25 working days to make an initial determination on the merits as to compatibility of the notified transaction with the common market. This period is extended to 35 working days if the parties offer commitments within 20 working days after notification or a Member State requests a referral of the transaction.[37] The Phase I investigation period begins to run the day after the Commission receives a complete notification. If the Commission finds that the notification is materially incomplete, it becomes effective and time periods begin to run only after the parties have cured the defect. The 25 working day period may be suspended if the parties fail to meet a deadline to submit requested information.

Transmission to Member States and publication in the *Official Journal*. Within three days of receiving the notification, the Commission must transmit a copy to the competent authorities of the Member States. If the Commission determines after a preliminary examination that the Merger Regulation may apply to the notified concentration, it must publish in the *Official Journal* the fact of the notification, the names of the parties, and a description of the transaction and the economic sectors involved (Article 4(3) ECMR). Publication usually takes place within eight days of receipt of the notification. Interested third parties are invited to submit comments within ten days of publication. In addition, the Commission now publishes the names of the parties and the date of the notification on its website within one or two days of notification.[38]

Investigation by the Commission and Article 11 requests for information. Depending on the issues raised, the Commission may and routinely does issue

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have resulted in the former monopoly operator's subsidiary achieving a very strong market position, thereby significantly damaging the parties. Similar considerations led to derogations from suspension in *ENEL/FT/DT*, Case No. IV/JV.2 (Commission decision of 26 May 1998) and in *OMNITEL*, Case No. IV/M.538 (Commission decision of 22 December 1994).

35 In *WPP/Cordiant*, Case No. COMP/M.3209 (Commission decision of 18 June 2003), the Commission granted a derogation from suspension based on the "situation of financial distress of the target company". In *ING/Barings*, Case No. IV/M.573 (Commission decision of 6 March 1995), the Commission took into account that the target was placed in (forced) administration and that the rapid completion of the transaction was necessary to prevent serious damage to the target and third parties.

36 This aspect was taken into account in *E.ON/TXU Europe Group*, Case No. COMP/M.3007 (Commission decision of October 18, 2002) and in *Cinven Limited/Angel Street Holdings*, Case No. COMP/M.2777 (Commission decision of March 15, 2002).

37 *See* Section 9.2 below.

38 http://europa.eu.int/comm/competition/whatsnew.html

formal or informal requests for information to the notifying parties and third parties, such as competitors, suppliers and customers. It will also consider the views of Member States and interested third parties that have taken the initiative to submit comments. The Commission's powers to examine books and records, demand on-the-spot oral explanations, and enter any premises (Articles 11, 13 ECMR) have to date not played a significant role in merger cases. These powers have been expanded by the reform of the Merger Regulation and now include the right to interview company officials during inspections. However, it seems unlikely that the Commission will need to make extensive use of these powers in merger control proceedings.

In its recent practice, the Commission has occasionally resorted to issuing extensive requests for information, sometimes to gain more time for its investigation. If the parties are unable to supply all the information requested within the deadline, the Commission can issue a formal request for information under Article 11(3) of the Merger Regulation. This will stop the clock and suspend the investigation period until the parties fully comply with the request.[39]

The Commission can impose fines of up to 1% of the aggregate turnover if a company provides incorrect or misleading information in response to a request for information. The Commission can also impose periodic penalties of up to 5% of the average daily aggregate turnover for each working day in delay in responding to a formal Article 11(3) decision requesting information (*see* Section 3.5 below).

Decisions concluding Phase I. At the end of the Phase I investigation, the Commission[40] will decide that the notified transaction either:

- falls outside the scope of the Regulation (Article 6(1)(a) ECMR) (2.3% of all Phase I decisions as of year-end 2003); or

- does not raise serious doubts as to its compatibility with the common market, as notified or following modifications (commitments) proposed by the parties (Article 6(1)(b) ECMR) (91.0% of all Phase I decisions -- 88.4% without commitments and 4.6% with commitments); or

[39] *See, e.g., Pfizer/Pharmacia*, Case No. COMP/M.2922, Commission decision of 27 February 2003, where an Article 11 decision had been addressed to the notifying party on 18 November 2002 and the full information was not submitted until 6 February 2003. Similarly, in *Lagadere/Natexis/VUP*, Case No. COMP/M. 2978, Commission decision of 7 January 2004, the investigation was suspended for two months and subsequently for another month as the notifying parties did not submit information requested in Article 11 decisions within the deadlines set by the Commission.

[40] The Commissioner responsible for competition makes all decisions concluding Phase I under delegated authority and without a vote by the full College of Commissioners.

- raises serious doubts as to its compatibility with the common market and therefore requires an in-depth Phase II investigation (Article 6(1)(c) ECMR) (5.7% of all Phase I decisions).[41]

The Commission will publish a notice announcing its decision in the *Official Journal* and issue a press release on its website. An Article 6(1)(c) decision explaining the "serious doubts" that led to initiation of a Phase II investigation is sent to the notifying parties but not published.

3.5 In-Depth (Phase II) Investigation

Criteria for opening Phase II. As the above-mentioned statistics illustrate, the Commission attempts to resolve the majority of cases in Phase I. It remains to be seen whether the extension of the deadline for the Phase I decision to 25 working days (from 20) will help avoid Phase II proceedings in cases that raise difficult issues but are unlikely to lead to an outright prohibition. Under the old Merger Regulation, the Commission sometimes issued detailed Article 11 requests for information or declared a notification incomplete (sometimes with the complicity of the parties) to resolve cases in Phase I.

Time limits for Phase II. From the date it decides to open Phase II proceedings, the Commission has another 90 working days to take its final decision, with an extension to 105 working days if the parties offer commitments after the 54th day of Phase II.[42] Except in the rare instance when it decides to clear the merger without issuing a Statement of Objections, the Commission generally uses the entire period. The notifying parties have the possibility of requesting an extension of up to 20 working days. They may make only one extension request and can do so only within the first 15 working days after initiation of Phase II. The Commission may extend the time limit up to 20 working days if the parties agree, without restriction as to the number of separate extensions or when they must be agreed. However, all such extensions -- whether requested unilaterally by the notifying parties or agreed with the Commission -- cannot exceed 20 working days in total. (The separate extension of 15 working days to consider remedies comes on top of these extensions.)

Statement of Objections. When the Commission plans to issue a decision that will adversely affect the parties to a transaction (*e.g.*, finding a transaction incompatible with the common market, approving the transaction subject to conditions, imposing a fine or extending a suspension), it must afford the parties an opportunity to be heard (Article 18(1) ECMR). In the case of a possible prohibition or approval subject to

[41] The remaining 24 decisions (1.0% of total Phase I decisions) were referred in full to Member States pursuant to Article 9(3) of the Merger Regulation.

[42] Note that pursuant to Article 19 of the Implementing Regulation commitments shall be submitted to the Commission no later than 65 working days after the initiation of Phase II proceedings. However, this deadline is extended if the Parties either requested or agreed to an extension of the deadline for the final decision.

conditions, the Implementing Regulation requires that the Commission send the parties a written Statement of Objections ("SO") so that they have an opportunity to respond to the Commission's concerns.[43] The Commission will normally issue the SO to the parties between the eighth and tenth week of a Phase II investigation. The parties have a specified and very limited time period, typically two weeks, to respond. The Commission can base its final decision only on objections on which the parties have been able to comment (Article 18(3) ECMR).

In a handful of Phase II cases, the Commission has cleared the transaction subject to undertakings submitted by the parties without issuing an SO, thereby considerably shortening the duration of the Phase II investigation.[44]

Access to file. Following receipt of the SO the notifying parties, and in limited cases third parties, can request access to the Commission's file to inspect documents that the Commission did not provide with the SO (*e.g.*, comments of competitors or customers). Parties are not given access to business secrets in the file or internal documents of the Commission and Member State authorities. The Commission has also claimed that its correspondence with US antitrust agencies constitutes internal documents. The procedure for obtaining access to the file is supervised by the Hearing Officer, a senior Commission official who is not part of the Commission's case team investigating the concentration. In addition, the Commission has said that it will provide the notifying parties with an opportunity to review "key documents" obtained by the Commission during the investigation as soon as Phase II proceedings have been initiated (*i.e.*, prior to issuing an SO and formal access to the file).[45] However, experience has shown that, particularly in contentious cases, parties gain access to the bulk of incriminating documents in the Commission's file only after the Commission has issued an SO.

Oral hearing. On request by the notifying parties, the Commission must hold a formal, non-public oral hearing at which the parties can present their views. Interested third parties also have the right to present their views. The Commission has no discretion to hold a hearing at the request of third parties even if the notifying parties have not requested a hearing. Representatives of the Member States are invited to attend the oral hearing and can ask questions. As a general rule, the oral hearing will take place a few working days after the deadline for responding to the SO.

State of play meetings, peer review and the role of the Chief Economist. In response to criticism of the Commission's procedure in the past, the Commission

[43] An SO is also required before the Commission can impose fines or periodic penalty payments (Article 13(4) Implementing Regulation).

[44] *See, e.g., BT/AT&T*, Case No. IV/JV.15, Commission decision of March 30, 1999; *Allied Signal/Honeywell*, Case No. COMP/M.1601, Commission decision of December 1, 1999; *MMS/DASA/ASTRIUM*, Case No. COMP/M.1636, Commission decision of March 21, 2000; *Pirelli/BICC*, Case No. COMP/M.1882, Commission decision of July 19, 2000.

[45] Best Practice Guidelines, attached as Annex 18, para. 45.

has introduced internal reforms intended to provide more transparency and to redress other perceived shortcomings. In order to improve the communication between the parties and the case team, the Commission now endeavors to hold "State of Play" meetings between DG Competition and the notifying parties at key junctures of the Phase II (and potentially also the Phase I) proceedings.[46] In all Phase II investigations, a **"**peer review**"** panel composed of experienced DG Comp officials is appointed to scrutinize the case team's conclusions with a "fresh pair of eyes" at key points in the inquiry. In addition, the Commission has created the position of Chief Economist to provide independent economic advice to Commission decision makers, as well as guidance throughout the investigative process. The Chief Economist has about 10 PhD level economists on staff. They are assigned to participate in the case teams as required and, in particular, to bring sophisticated economic analysis to bear in the process. The introduction of peer review in the Phase II procedure and the involvement of the Chief Economist and his staff in merger control proceedings (which may begin as early as Phase I in appropriate cases) are internal measures that are intended to improve the quality of the Commission's decision-making. The parties do not have any separate right to be heard by the peer review panel or the Chief Economist's office.

Consultation of Advisory Committee. As a final step before making any decision adverse to the parties to a transaction, the Commission must consult with and take "utmost account of" the opinion of the Advisory Committee of Member State representatives (Article 19(3)-(7) ECMR). As a practical matter, the Advisory Committee generally follows the Commission's recommendation.

Content of decision. At the end of Phase II, the Commission[47] may decide under Article 8 of the Merger Regulation:

- To declare the concentration compatible with the common market without modifications (about 23.1% of all Phase II decisions as of year-end 2003);
- to prohibit the concentration as incompatible with the common market (about 17.3%); or
- to declare the concentration compatible with the common market following modifications (commitments) (about 59.6%).

3.6 Simplified Procedure for Unproblematic Mergers

In order to reduce the administrative burden on both the notifying parties and on itself, the Commission has introduced special procedures for mergers that clearly do not raise substantive issues. If certain conditions are met, parties can use the "Short

[46] Best Practice Guidelines, para. 30.

[47] Formal decisions taken under Article 8 of the Merger Regulation require a vote by the full College of Commissioners.

Form"[48] that calls for considerably less information than Form CO. Moreover, the Commission has adopted a Notice ("Simplified Procedure Notice")[49] providing that under the same conditions, the Commission normally will not adopt a fully reasoned decision at the end of Phase I, but will only take a short-form decision.

Concentrations to which the simplified procedure can apply. The simplified procedure is generally available for the following types of transactions:

- Joint ventures having no, or negligible, activities within the European Economic Area ("EEA")[50] (*i.e.*, turnover of joint venture and/or contributed activities of less than € 100 million in the EEA and total value of assets transferred to joint venture of less than € 100 million).

- Concentrations where none of the parties are active in the same product and geographic markets as another party, or in a product market that is upstream or downstream from a product market in which any other party is active.

- Mergers, joint ventures, or other acquisitions of sole or joint control in which -- although two or more of the parties are engaged in business activities in the same product and geographic market or individual parties are active in vertically related markets -- the parties' combined market share is less than 15% for horizontal relationships and none of the parties has more than a 25% share in a market that is vertically related to a market in which another party is active.

- The acquisition of sole control of an undertaking over which the acquirer already has joint control, except in cases where the party ceding joint control exercised a disciplining effect on the activities of the joint venture as a result of its potentially diverging incentives.[51]

Procedure. Notifying parties are encouraged to request the waiver of full-form notification during pre-notification contacts. The Commission will publish the fact of notification in the *Official Journal* and on its website. This publication will include (i) the names of the parties to the concentration; (ii) a description of the concentration and the economic sectors involved; and (iii) a statement that the concentration may qualify for a simplified procedure. The notice will give interested parties the opportunity to submit comments, particularly information about circumstances that might require closer investigation. The Commission will initiate an investigation in a

[48] Attached as Annex 4.

[49] Commission Notice establishing a simplified procedure for certain concentrations that are not expected to raise competition concerns under the Merger Regulation, attached as Annex 15.

[50] The EEA comprises the European Union, plus Norway, Iceland and Liechtenstein. *See* Section 10.1, below.

[51] Simplified Procedure Notice, para. 9.

simplified procedure only if a Member State or interested third party submits information justifying an investigation. When it does not identify circumstances that merit an investigation, it will generally clear the transaction based on the information in the Form CO alone. At any time during Phase I the Commission retains the discretion to switch to the normal Phase I merger procedure and, *e.g.*, launch a customer or competitor survey.

Short-form decision. If the Commission is satisfied that the concentration qualifies for clearance under the simplified procedure, it will issue a short-form decision within 25 working days of the notification date. The short-form decision will also cover restrictions that are directly related and necessary to the implementation of the concentration. If the parties wish an express assessment of ancillary restrictions because the restraints contemplated involve novel or unresolved questions, the simplified procedure is not available. The Commission will publish the short-form decision on its website and a non-opposition notice in the *Official Journal*.

3.7 Fines

Available fines. The Commission can impose fines of up to 10% of the aggregate turnover of the notifying parties that put into effect a concentration without authorization. It can impose fines of up to 1% of aggregate turnover where an undertaking provides incorrect or misleading information in a notification or a response to a request for information (Article 14 ECMR). The Commission can also impose periodic penalties of up to 5% of the average daily aggregate turnover for each working day that a party goes beyond a deadline set in a formal request to supply complete and correct information under Article 11(3) of the Regulation.

Commission practice. The Commission has emphasized its determination to obtain complete and accurate information from the notifying parties, as well as third parties, and to ensure that every concentration with a Community dimension is notified. Since 1999, the Commission has used its powers under the Merger Regulation to fine companies that (i) failed to notify and put into effect a concentration without authorization;[52] (ii) filed an incomplete notification;[53] or (iii) supplied incorrect or

[52] *See, e.g.,* Commission Press Release IP/99/100, February 10, 1999 (A.P. Møller fined € 219,000 for failing to notify and putting into effect three concentrations).

[53] In *Sanofi/Synthélabo*, the filing of an incomplete and therefore incorrect notification led to fines of € 50,000 for each of the parties. The Commission learned, after clearing the concentration and receiving several third-party complaints, that the parties had not described their respective activities in morphine products in their notification. After the Commission revoked its clearance decision the parties immediately undertook to divest the Synthélabo morphine products business. The Commission adopted a second clearance decision, subject to a commitment to this divestiture (Commission Press Release IP/99/591, July 28, 1999). Under the new Merger Regulation, fines are no longer capped at € 50,000 but may amount to 1% of aggregate turnover.

misleading information.[54] In July 2000, the Commission also fined a *third party* € 950,000 for failing to provide information to the Commission. That fine was by far the largest the Commission has ever imposed for a procedural violation in a merger control proceeding. It was also both the first fine imposed on a third party and the first periodic penalty ever imposed under the Merger Regulation.[55] Under the new Merger Regulation periodic penalty payments may amount to up to 5% of the average aggregate daily turnover of the undertaking concerned for every working day of delay in providing information.

[54] *See, e.g., BP/Erdölchemie*, Commission decision of June 19, 2002 (Deutsche BP fined € 35,000 for supplying incorrect and misleading information).

[55] *See,* Commission Press Release IP/00/764, July 12, 2000 (Mitsubishi fined € 50,000 for supplying incomplete information about its recovery boilers business in the *Ahlström/Kvaerner* proceedings and further fined € 15,000 per day in periodic penalty payments from the day the formal request for information was issued until closure of the merger investigation).

4 Judicial Review

An application for annulment of Commission decisions in merger cases can be filed with the Court of First Instance by:

- The parties to the transaction to whom the decision is addressed.
- Other parties that are directly and individually affected by the decision.

A further appeal against the judgment of the Court of First Instance, limited to points of law, can then be made to the European Court of Justice.

The past years have witnessed a significant strengthening of the system of judicial review, largely due to the pro-active approach of the Court of First Instance. In 2002 and early 2003, the Court of First Instance annulled five Commission merger decisions, and gave guidance on important issues such as the adequacy of particular types of remedies and the limits to the Commission's application of substantive theories of competitive harm (*e.g.*, collective dominance, conglomerate issues).

4.1 Standing to Appeal

Under Article 230(4) of the EC Treaty ("EC"), natural or legal persons may institute proceedings against decisions that are addressed to them or that are of "direct and individual concern" to them.

Appeal by a party to the transaction: increasing significance. Appeals by parties to a prohibited transaction played a limited role[56] until 2002, when the Court of First Instance annulled three Commission prohibition decisions on application by the parties: *Airtours/First Choice*; *Schneider Electric/Legrand*; and *Tetra Laval/Sidel.*[57] The appeals in *Schneider* and *Tetra Laval* were brought with the aim of completing initially prohibited transactions, even though only the *Tetra Laval* appeal was successful in this respect. Even after the introduction of the expedited procedure (*see* Section 5.3 below), it seems likely that most appeals will continue to be brought to eliminate an unfavorable precedent for the parties to the transaction, and possibly to obtain damages[58]. It is not clear whether a party to a merger has standing to appeal against a conditional clearance decision with the ultimate aim of securing unconditional clearance.

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[56] *See, e.g.*, Case T-22/97, *Kesko Oy v. Commission*, [1999] ECR II-3775; Case T-102/96 *Gencor v. Commission*, [1999] ECR II-753; and Case T-221/95, *RTL/Veronica/Endemol*, [1999] ECR II-1299. In all three cases, the Court upheld the Commission's prohibition decisions.

[57] Case T-342/99, *Airtours v. Commission*, [2002] ECR II-2585; Case T-310/01 *Schneider Electric v. Commission*, [2002] ECR II-4071; Case T-5/02, *Tetra Laval v. Commission,* [2002] ECR II-4519 (this case is subject to an appeal to the European Court of Justice).

[58] *See* Case T-351/03, *Schneider Electric v. Commission*, O.J. 2004 No. C7/37.

Appeal by third parties. The Community Courts have been fairly generous in granting standing to third parties appealing Commission decisions in the merger field:

- **Competitors.** Competitors have been held to have standing when they have intervened in the procedure, or when the Commission decision has taken their individual situation into account.[59] The recent judgments of the Court of First Instance in *BaByliss v. Commission*, *Philips v. Commission* and *ARD v. Commission* suggest that competitors (including potential competitors and competitors active in neighboring or upstream/downstream markets) will have standing in all but exceptional cases.[60] Competitors have also been granted standing to challenge a Commission decision referring a concentration to a Member State competition authority.[61]

- **Labor unions and work councils.** Recognized workers' representatives have been granted standing, but only with respect to the claim that the Commission infringed their procedural rights under Article 18(4) ECMR.[62]

- **Minority shareholders of target company.** In one case, the Court of First Instance rejected standing for small shareholders who had alleged that, contrary to the Commission's findings, another undertaking had gained control over the company.[63]

- **Third parties affected by conditions imposed.** The remedies that the Commission imposes in the context of a conditional clearance, such as severing contractual links or divesting shareholdings, may directly affect third parties. On that basis, the Court of First Instance granted interim relief to the complainants in the *Kali + Salz* case.[64]

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59 *See* Case T-2/93, *Air France v. Commission*, [1994] II-ECR 323, paras. 44-45; Case T-3/93, *Air France v. Commission*, [1994] II-ECR 121, para. 82.

60 Case T-114/02, *BaByliss v. Commission*, [2003] ECR II-1279; Case T-119/02, *Royal Philips Electronics v. Commission*, [2003] ECR II-1433; Case T-158/00, *Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland (ARD) v. Commission*, judgment of September 30, 2003, not yet reported in the European Court Reports ("ECR").

61 Case T-119/02, *Royal Philips Electronics v. Commission*, [2003] ECR II-1433*;* Joined Cases T-346/02 and T-347/02 *Cableuropa and Aunacable v. Commission,* judgment of September 30, 2003, not yet reported in the ECR.

62 *See* Case T-96/92, *Comité d'Entreprise de la Société Générale des Grandes Sources and others v. Commission*, [1995] ECR II-1213; Case T-12/93, *Comité Central d'Entreprise de la Société Anonyme Vittel and others v. Commission*, [1995] ECR II-1247.

63 *See* Case T-83/92, *Zunis Holding and others v. Commission*, [1993] ECR II-1169. On appeal the European Court of Justice dismissed the application on other grounds and did not address this issue, Case C-480/93 P, *Zunis Holding and others v. Commission*, [1996] ECR I-1.

64 Case T-88/94 R, *Société Commerciale des Potasses et de L'Azote and Entreprise Minière et Chemique v. Commission*, [1994] ECR II-401.

- **Rejected purchasers in divestiture cases.** In *Petrolessence v. Commission,* the Court of First Instance granted standing to a potential purchaser of some of the assets to be divested by the parties to the transaction, to bring an action against a Commission decision rejecting him as a suitable buyer.[65]

- **Member States.** Member States have standing to appeal any Commission decision directly to the European Court of Justice.[66] They do not need to show that the decision is of direct and individual concern to them.

4.2 Normal Court Procedure

The application for annulment against a Commission merger decision must be filed within two months and ten days from the later of (i) the date of notification of the merger decision to the party in question; or (ii) the date of publication.

Article 230 EC sets out four principal grounds for review of Commission merger decisions: (i) lack of competence; (ii) infringement of an essential procedural requirement; (iii) infringement of the EC Treaty or of any rule of law relating to its application; or (iv) misuse of powers. These grounds -- and in particular, that relating to infringement of the EC Treaty or of secondary legislation -- are sufficiently broad to cover the vast majority of arguments that an applicant may want to raise in the context of judicial review of a merger decision.

It typically takes two years to obtain a judgment, which has made recourse to EC courts unattractive to applicants in merger proceedings. The expedited procedure has -- at least partially -- resolved that problem.

4.3 Expedited ("Fast Track") Procedure

Effective February 2001, the Court of First Instance introduced an expedited procedure for urgent cases, including appeals of merger decisions, when interim measures are inappropriate or unsuitable.[67] The Court's decision whether to order the expedited procedure depends on: (i) the urgency of the matter; (ii) the complexity of the case;

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[65] Case T-342/00, *Petrolessence SA and Société de Gestion de Restauration Routière SA (SG2R) v. Commission*, [2003] ECR II-1161.

[66] *See* Joined Cases C-68/94 and C-30/95, *French Republic and Société Commerciale des Potasses et de l'Azote and Entreprise Minières et Chimique*, [1998] ECR I-1375; Case C-42/01, *Portugal v. Commission*, judgment of June 22, 2004, not yet reported in the ECR.

[67] *See* O.J. 2000 No. L 322/1. The European Court of Justice similarly amended its rules to provide for fast track procedures, O.J. 2000 No. L 322/1, December 19, 2000. It is however open to question whether there may be instances in which both an application for an expedited procedure and for interim measures (*see* below) may prove necessary. This could have been the case, for example, in the *Tetra Laval* and *Schneider Electric* appeals to the Court of First Instance, had the Commission not accepted to extend the divestiture periods initially foreseen so as to ensure the practical enforceability of a judgment of the Court favorable to the appellants.

and (iii) whether, given its complexity and the volume of the pleadings lodged, the case lends itself to comprehensive, in-depth oral argument, a centerpiece of the expedited procedure.

Four of the most prominent recent judgments of the Court of First Instance -- *Tetra Laval, Schneider Electric*, *BaByliss* and *Philips* -- were adjudicated under the expedited procedure. In all cases, recourse to the expedited procedure led to the cases being resolved in approximately one year -- as the *Tetra Laval/Sidel* case shows, this may under certain circumstances be fast enough to allow a victorious party still to close the transaction.[68] While the expedited procedure increases the possibility of parties obtaining timely and adequate relief, it does have limitations. The Courts can only order the expedited procedure in a small number of cases, and will insist that in exchange applicants strictly limit the volume of their pleadings.

4.4 Interim Relief

Parties to the transaction and third parties affected by the transaction can apply to the Court of First Instance for interim measures while their application for annulment is pending. A successful request for interim relief requires a showing that the annulment action has a reasonable chance of succeeding ("*prima facie* case") and that the Commission decision will cause "serious and irreparable" damage to the applicant. The Court of First Instance ordered interim measures in the *Kali + Salz* case, but it has made clear that it will grant such measures only in exceptional circumstances.[69]

Applications for interim relief were also lodged in the *Tetra Laval* and *Schneider Electric* proceedings in parallel to the applications for an expedited procedure, as a means of preserving the interests of the parties pending the outcome of the main appeal. In both cases, the Commission agreed to extend the period for the divestiture of the parties' acquired shareholdings so as to permit prior resolution of the main appeal, and the applications for interim measures were subsequently dropped.

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[68] Following the clearance decision in *Tetra Laval/Sidel (II)*, Case No. COMP/M.2416, Commission decision of January 13, 2003. Also in January 2003, the Commission brought an appeal to the European Court of Justice against the Court of First Instance's judgment in the *Tetra Laval v. Commission* case.

[69] Case T-88/94 R, *Société Commerciale des Potasses et de L'Azote and Entreprise Minière et Chimique v. Commission*, [1994] ECR II-263, paras. 39 and 44, and [1994] ECR II-401, paras. 33-37; *see also* Case T-322/94 R, *Union Carbide v. Commission*, [1994] ECR II-1159. *Kali + Salz* is the only case in which interim measures have been granted for the duration of the appeal. In another case, the President of the Court of First Instance ordered interim measures suspending a divestiture, but only until such time as he could evaluate the application for interim measures on the merits (the President later rejected such application on the merits), Case T-12/93 R, *Comité Central d'Entreprise de la SA Vittel and Comité d'Etablissement de Pierval v. Commission*, [1993] ECR II-449, II-785.

4.5 Consequences of a Successful Appeal

Article 10(5) ECMR governs the procedure for the adoption of a new Commission decision following a successful appeal. As a result of the 2004 amendments to the Merger Regulation, it now explicitly provides that the (Phase I) deadlines under the Merger Regulation begin to run once the notifying parties have submitted either:

- A new notification.
- A supplement to the original notification.
- A certification that there have been no intervening changes in market conditions since they filed their original notification.

The Commission is to make its substantive assessment on the basis of current market conditions.[70]

[70] In *Kali + Salz*, the Commission however followed a "mixed approach". While assessing the transaction on the basis of the prevailing market conditions at the time of the re-notification, the Commission relied, to assert jurisdiction, on the information provided by the parties to the transaction at the time of the first notification. Likewise, the applicability of the "failing firm" defense had to be verified on the basis of the situation at the time of the original notification, the company being acquired having effectively ceased to operate at the time of the re-notification, *see Kali + Salz/MdK/Treuhand (II)*, Case No. IV/M.308, Commission decision of July 9, 1998 and Commission's XXVIIIth Report on Competition Policy (1998) SEC(99)743 final at paras. 175-179.

PART THREE: THE SUBSTANTIVE TEST

Article 2(3) of the Merger Regulation provides that any concentration falling within its scope will be incompatible with the common market (and must therefore be prohibited unless sufficient remedies are offered) if it would "significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position".[71]

For full-function joint ventures, in addition the Commission is required:

- To examine whether the joint venture has as its object or effect the coordination of the competitive behavior of undertakings that remain independent; and
- to assess the compatibility of the coordinated effects with the common market in accordance with the criteria of Article 81(1) and (3) EC.

Both of these tests normally require the Commission first to define the relevant markets and then to carry out the substantive assessment of the transaction's impact on these markets.

5 Defining the Relevant Market

Defining the relevant market requires identifying the principal competitive constraints that the parties to the concentration face. Often market definition will have a decisive effect on the outcome of the Commission's assessment. For this reason, the Commission sometimes goes to great lengths precisely to define the market, whereas it will often leave the market definition open when the concentration does not raise any substantive issues. It is conceivable that the introduction of non-coordinated (unilateral) effects analysis in the new Merger Regulation may shift the focus in some cases from market definition to a more direct quantitative assessment of market power, but market definition normally will still be of decisive importance. The Commission's Market Definition Notice provides guidance on its method for defining relevant markets.[72]

Relevant markets are defined both in terms of the products or services that belong to the market (product market) and the market's geographic scope (geographic market).

[71] Note that this wording marks a material change in the Merger Regulation's substantive test. Under the former merger regulation, the substantive test was whether a concentration "creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it".

[72] Notice on the definition of relevant market for the purposes of Community competition law (O.J. 1997 No. C 372/5), attached as Annex 10.

5.1 Product Market Definition

Under Section 6 of Form CO, the decisive criterion for defining the relevant product market is demand-side substitution. Thus the market comprises "all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use".[73] The Commission's practice, which is summarized in the Market Definition Notice, has refined this concept of demand-side substitutability and has supplemented it with supply-side considerations in appropriate cases.

5.1.1 Demand Substitution

Concept of demand substitution. According to the Market Definition Notice, demand substitution provides the most immediate and effective discipline for suppliers of a given product (*see* Market Definition Notice, para. 18). Demand substitution analysis therefore plays a pre-eminent role in the Commission's practice. To determine whether product A and product B belong to the same market, the Market Definition Notice applies the so-called "SSNIP"[74] test:

- Assuming a hypothetical 5%-10% permanent price increase by all suppliers for product A.
- Would the number of customers switching to product B be sufficient to make the price increase unprofitable for the supplier(s) of product A?
- If so, products A and B belong to the same product market.

The SSNIP test is a clear improvement over the Commission's early tendency to focus on product characteristics and use criteria which invite value judgments that may not accurately reflect the behavior of marginal consumers who often drive pricing decisions. However, the Commission's approach to market definition still lacks consistency. In particular in cases involving new and inchoate markets, for example for on-line music[75] and for portals,[76] it has tended to follow its previous practice of defining markets based on functionality.

Evidence of demand substitution. To assess the likely effects of a hypothetical price increase, the Commission relies on various forms of evidence depending on the

[73] Market Definition Notice, at para. 7, attached as Annex 10.

[74] The SSNIP acronym stands for "Small but Significant Non-transitory Increase in Price" and is also used in the US Department of Justice and Federal Trade Commission Horizontal Merger Guidelines ("US Merger Guidelines"), available at http://www.usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html.

[75] *See AOL/Time Warner*, Case No. COMP/M.1845, Commission decision of October 11, 2000.

[76] *See Vivendi/Canal +/Seagram*, Case No. COMP/M.2050, Commission decision of October 13, 2000.

nature of the particular case. Some of the specific approaches referred to in the Market Definition Notice are:

- **Shock analysis.** The econometric study of sudden, unanticipated changes in market conditions in the recent past ("shocks") can often reveal examples of substitution between two products. For example, the launch of a new type of product might have resulted in only certain types of products losing sales to the new product. Other types of market shocks that can provide useful information include market entry and exit, technological changes, regulatory intervention or any other event that results in a sudden, unanticipated change in supply or demand conditions.

- **Analysis of pricing data.** The Commission may also rely on evidence gathered by applying specific econometric or statistical methods to pricing data. For example, analysis may reveal a correlation in price movements over time between products A and B, implying that they belong to the same market. Nominal price differences may also be revealing. When product A is twice as expensive as product B for a sustained period, that may indicate that the products belong to separate markets.[77]

- **Views of competitors, customers and consumers**. The Commission will contact the parties' main customers and competitors to solicit their views about the boundaries of the market and likely responses to price increases. In the case of consumer goods, the Commission may rely on marketing studies and consumer surveys.[78] In practice, the Commission also relies heavily (and perhaps unduly) on customer and competitor opinions about market definition, opinions which are often not informed by the SSNIP test or other accepted antitrust principles of market definition.

Distinction between customer categories. The degree of demand substitution may vary considerably between different customer categories. Indeed, some customers may have strong preferences for, or even be "captive" to, the products of a narrower subset of suppliers. However, this distinction becomes relevant for assessing market power only when suppliers are able to price-discriminate between different categories of customers. Accordingly, the Commission states in its Market Definition Notice that the relevant product market should be limited to one category of customers, when (i) it is possible to identify clearly which group an individual customer belongs to at the time of sale; and (ii) trade among customers or arbitrage by third parties is not feasible.

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[77] *See Nestlé/Perrier*, Case IV/M.190, Commission decision of July 22, 1992.

[78] The Commission will normally give more weight to pre-existing studies prepared in the normal course of business than to studies that are carried out for purposes of the merger investigation (*see* Market Definition Notice, para. 41).

One example of such distinct customer categories is the supply of spare parts to motor vehicle manufacturers for sale through the manufacturer's authorized distribution networks (OEM/OES market), as opposed to the supply of the same spare parts to independent repair shops (aftermarket).[79]

5.1.2 Supply-side Substitution

When a supplier can easily switch from manufacturing product A to manufacturing product B in response to a price increase for product B, such supply substitutability may provide a competitive constraint similar to that provided by demand substitutability, in terms of effectiveness and immediacy. In the Commission's practice, supply-side substitution has become a relevant factor in cases where most producers market a wide range of qualities or grades of the same product, *e.g.*, spices[80] or paper.[81] In such cases, a pure demand-side substitution analysis would often suggest that there are separate markets for individual qualities or grades. If suppliers are able quickly to adapt their production facilities to offer any quality or grade in question, however, that will suggest a broader market definition.[82] To prove supply-side substitutability, the parties may carry out a *pro forma* analysis of the costs of changing production or a margin correlation assessment. Unless substitution is rapid and effective, however, the Commission tends to exclude supply-side substitution considerations when defining the market,[83] relegating them instead to the analysis of potential competition and barriers to entry.

5.2 Geographic Market Definition

Economic conditions in the European Union are still far from homogeneous. The parties to the concentration may have a strong market position in their home countries, whereas their Community-wide market shares may be significantly lower. Therefore, the substantive assessment of a concentration often turns on geographic market definition, in particular on whether the market is regional, national, Community-wide or worldwide.

Commission's general approach to defining the relevant geographic market. Section 6 of Form CO defines the relevant geographic market as comprising "the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighboring areas because, in particular, conditions of competition are appreciably different in those areas". The

[79] *See, e.g.*, *Bosch/Allied Signal*, Case No. IV/M.726, Commission decision of April 9, 1996.

[80] *McCormick/CPC/Rabobank/Ostmann*, Case No. IV/M.330, Commission decision of October 29, 1993.

[81] *Kimberly-Clark/Scott Paper*, Case No. IV/M.623, Commission decision of January 16, 1996.

[82] *See* Market Definition Notice, paras. 20-23.

[83] *See* Market Definition Notice, paras. 23-24.

Commission has set out in its Market Definition Notice (paras. 28-31) a three-step approach that it will generally follow to define the relevant geographic market:

- **Geographic distribution of market shares and price differences.** When the market shares of the parties and their competitors are distributed more or less evenly throughout various Member States, and/or price differences between Member States are relatively small, the Commission will normally take the initial view that the geographic market is wider than national, and *vice-versa*.[84] These factors, however, create only a working hypothesis, because they may not adequately reflect true competitive dynamics.

- **Demand characteristics.** As a next step, the Commission analyzes whether suppliers located in other areas constitute a real alternative source of supply for consumers in a given area. Factors pointing towards national markets include national preferences, language barriers, cultural differences, and lifestyle distinctions. As with product market definition, the analytical model is the SSNIP test, *i.e.*, whether a small but significant non-transitory increase in price (5%-10%) is likely to prove unprofitable because a sufficient number of consumers would switch to suppliers located at a greater distance.

- **Obstacles to cross-border supply.** The Commission will also identify any obstacles that may isolate companies in a given geographic area from competition from outside that area. The most important factor in the Commission's analysis of such barriers has been relative transport costs. The geographic market for bulky, low-value products will normally be limited in scope, unless high transport costs are offset by other factors such as lower labor costs. As a general rule, the Commission will consider transport costs insignificant for purposes of geographic market definition if they represent less than 5% of the total market value of the product.[85] Other barriers to cross-border supply may result from the need for a local presence, costs associated with setting up a distribution network, regulatory hurdles and divergent technical standards.

Other factors the Commission considers in defining the geographic market. In appropriate cases, the Commission will consider other factors that may suggest a broader geographic market, including:

- **Continuing progress of market integration.** When national markets have traditionally been artificially isolated from each other due to legislative barriers, the Commission frequently takes into account the likely medium to long-term effects of the Community's liberalization and harmonization programs and its

[84] *See, e.g.*, *Verbund/Energie Allianz*, Case COMP/M.2947, Commission decision of June 11, 2003.

[85] *See, e.g.*, *Pechiney/VIAG*, Case No. IV/M.198, Commission decision of August 10, 1992.

public procurement legislation (*see* Market Definition Notice, para. 32). Such regulatory factors sometimes lead the Commission to adopt a wider market definition than historic market data would suggest.

- **Chains of substitution.** The Commission recognizes that competitive conditions may be homogeneous in a given geographic area because of "chain substitution effects," even though transport costs or other factors make direct competition between all or most producers unlikely (*see* Market Definition Notice, paras. 57-58). The concept of "chain substitution" refers, *inter alia*, to a situation in which products can only be profitably sold within a certain "catchment area" around each production facility, due to high transport costs. However, if there are considerable overlaps in these catchment areas, the pricing of products in one area will be constrained by the pricing of products in neighboring ones, and so forth. This chain substitution effect may lead to the definition of a broader geographic market.[86]

Evidence for defining the geographic market. The evidence the Commission relies on in defining the geographic market is similar to the evidence it uses in defining product markets:

- **Shock analysis.** When there is past evidence of a diversion of orders to suppliers from other areas following unusual events or "shocks," this may suggest that these areas form part of the same geographic market. Recent examples of successful[87] or failed[88] cross-border market entry may also provide relevant evidence.

- **Sourcing practices and trade flows.** When customers purchase from suppliers located in several different Member States or procure their supplies through Community-wide tendering procedures, this will normally be strong evidence of a wider-than-national market. If the number of customers is too large to determine individual purchasing patterns, an analysis of trade flows may offer reliable guidance (if sufficiently detailed trade statistics are available).

- **Econometric analysis of pricing information.** Price correlations between two regions over a sustained period of time may indicate that the regions belong to

[86] *See, e.g., Air Liquide/BOC,* Case COMP/M.1630, Commission decision of January 18, 2000, para. 39. Chain substitution can also impact on product market definition. Thus, two products can be considered to be in the same market -- even though they are not regarded as direct substitutes for one another -- because a third product, which *is* a direct substitute for both, constrains their pricing. *See, e.g.*, *OBS! Danmark*, Case No. IV/M.998, Commission decision of November 10, 1997, para. 15.

[87] *See, e.g.*, *Pechiney/VIAG*, Case No. IV/M.198, Commission decision, of August 10, 1992, para. 13.

[88] *See, e.g.*, *Nestlé/Perrier*, Case No. IV/M.190, Commission decision of July 22, 1992, para. 34.

the same geographic market, even though such evidence may not be conclusive without other evidence (such as cross-border trade flows).[89]

- **Views of customers and competitors.** When appropriate, the Commission will consider the views of the parties' principal customers and competitors concerning the boundaries of geographic markets.

[89] *See, e.g.*, *Mannesmann/Vallourec/Ilva*, Case No. IV/M.315, Commission decision of January 31, 1994, para. 32.

6 Significant Impediment of Effective Competition

6.1 Analytical Framework

The "significant impediment of effective competition" test. The aim of the Commission's substantive analysis is to assess whether a notified concentration will significantly impede effective competition. Article 2(3) ECMR provides to this effect:

> *"A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market."*

The "significant impediment of effective competition" (or "SIEC") test was introduced by the 2003/2004 merger control reform. It replaces the "dominance" test of the old Merger Regulation.[90]

Principal implications of the introduction of the SIEC test. The implications of the change from the dominance to the SIEC test are the following:

- **Continued relevance of the dominance test.** The SIEC test incorporates rather than abolishes the dominance test. Under Article 2(3) ECMR, the creation or strengthening of a dominant position is the primary example of how a concentration can significantly impede effective competition. The guidance provided by previous practice and case-law for single firm and collective dominance continues to be relevant. Indeed, the Commission expects that most cases raising concerns will be based upon a finding of dominance even under the SIEC test.[91]

- **Legal basis for challenging non-coordinated (unilateral) effects below the dominance threshold.** The SIEC test also provides a basis for Commission intervention against mergers that produce anti-competitive effects but do not create or involve the market leader and do not increase the risk of coordination among the various suppliers. Such non-coordinated ("unilateral") effects are most likely to arise in highly concentrated markets where products are

[90] The dominance test provided: "A concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market" (Article 2(3) old ECMR). The European Court of Justice has defined a dominant position as: "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition from being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers", Case 27/76 *United Brands v. Commission*, [1978] ECR 207, para. 65.

[91] Horizontal Merger Guidelines, para. 4, O.J. 2004 No. C 31/5, attached as Annex 17.

differentiated (rather than homogeneous) and the merging parties' products are close substitutes. While economic theory suggests that such mergers can be anti-competitive in certain circumstances, it is doubted generally that the dominance test allowed intervention against them, as the traditional interpretation was that only the market leader can be found to occupy a (single firm) dominant position.

- **No other broadening of Commission intervention powers.** Recital 25 of the ECMR explains that the SIEC test covers non-coordinated effects below the dominance threshold, but that it is not intended to extend the Commission's enforcement powers with respect to other theories of competitive harm. This means notably that the SIEC test does not broaden the Commission's powers to challenge vertical or conglomerate mergers.

New Commission Guidelines on Horizontal Mergers. In parallel to the legislative reform of the substantive test, the Commission adopted, for the first time, guidelines on the substantive appraisal of mergers between competitors, *i.e.* horizontal mergers (the "Horizontal Merger Guidelines").[92] While the Merger Regulation gives little guidance as to how to carry out an SIEC assessment,[93] the Horizontal Merger Guidelines explain in more detail the factors that the Commission views as raising competition concerns and countervailing factors that can defeat such concerns. The Horizontal Merger Guidelines confirm the Commission's existing practice on a number of issues, but also emphasize aspects that had not played a significant role in the past, for instance as regards non-coordinated (unilateral) effects and the treatment of efficiencies.

The SIEC test in the international merger control landscape. The SIEC test brings the European Union's merger review much closer to the US-style "substantial lessening of competition" (or "SLC") test, which is also applied in the UK and Ireland. Indeed, it is widely suggested that the SIEC test is substantively identical to the SLC test. The Horizontal Merger Guidelines also represent significant convergence between the EU and the US.[94] Within the European Union, France and the UK have merger control tests that resemble Article 2(3) ECMR, while Germany, Italy, and a number of new Member States currently follow the dominance test.

[92] O.J. 2004 No. C 31/5, attached as Annex 17. The Commission announced that it will explain the substantive analysis of so-called vertical mergers and conglomerate mergers in a separate set of guidelines that will likely be published in late 2004 or 2005.

[93] Article 2(1)(a) and (b) ECMR list certain criteria that the Commission "shall take into account", but does not provide a real framework for analysis.

[94] *See* the 1997 Horizontal Merger Guidelines of the DOJ and the FTC, available at www.usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html.

6.2 Horizontal Mergers: Non-Coordinated (Unilateral) Effects

Mergers between competitors can produce anti-competitive non-coordinated effects if the elimination of the competitive restraints that the merging firms exercised upon each other increases the combined firm's market power, *i.e.* its power to increase price, reduce output, or reduce innovation. The reduction of competition in the market can also increase market power of other competitors.[95]

Under the SIEC test, non-coordinated effects can occur whether or not the concentration leads to the creation or strengthening of a (single firm) dominant position. The starting point of the analysis is normally an assessment of the market shares of the merging parties and market concentration (*see* Section 6.2.1 below). The Commission will then assess a number of other factors (*see* Section 6.2.2 below). Some considerations are of particular relevance for non-coordinated effects below the dominance threshold (*see* Section 6.2.3 below). Resulting competition concerns can be overcome by demonstrated efficiencies or other countervailing factors (*see* Sections 6.2.4 and 6.2.5).

6.2.1 Market Shares and Market Concentration

The role of market shares, market share increases, and market concentration. The Commission has in the past relied extensively on market shares as a proxy for market power and thus for negative competitive effects. Although the Horizontal Merger Guidelines state that market shares and market share increases "only provide first indications of market power and increases in market power", it can be expected that traditional market share analysis will continue to play an important role in EC merger control.[96] In addition, the Horizontal Merger Guidelines state that market concentration and changes in market concentration, both measured by the *Herfindahl-Hirschman Index* ("HHI"), "may also provide useful information about the competitive situation".[97] The Commission had previously carried out HHI analyses in relatively few cases.[98]

Merging parties' combined market shares. As a general rule, the Commission's initial concerns will be proportionate to the merging parties' combined market share. A broad distinction can be made between three market share brackets:

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95 Horizontal Merger Guidelines, para. 24.

96 Horizontal Merger Guidelines, paras. 14 and 27.

97 The HHI is calculated by adding the squares of the individual market shares of all competitors in the relevant market. The HHI gives proportionally more weight to high market shares. The maximum possible HHI occurs in a monopoly market (one firm with 100% market share leads to an HHI of $(100)^2 = 10{,}000$). If two competitors have a 50% share each, the HHI is $(50)^2 + (50)^2 = 2500 + 2500 = 5000$. Where 100 competitors have a 1% share each, the HHI is $100 \times (1)^2 = 100$. *See* for further explanations Horizontal Merger Guidelines, para. 16.

98 *See, e.g., Exxon/Mobil*, Case No. IV/M.1383, Commission decision of September 29, 1999; and *Time Warner/ EMI*, Case No. COMP/M.1852, Commission decision of June 14, 2000.

- **Combined market share < 25%.** A combined market share of the merging parties of less than 25% indicates that a concentration will generally not significantly impede effective competition,[99] except in cases of coordinated effects (collective dominance).[100]

- **Combined market share between 25% and 40%.** A combined market share between 25% and 40% has in the past generally not led to objections under the dominance test, although the Commission raised concerns and imposed divestitures or licensing requirements in individual cases.[101] It is mergers in the 25%-40% bracket that the introduction of the SIEC test arguably affects most, as the Commission can now challenge such mergers even if the combined entity is not the market leader after the merger. An example would be the merger of companies with market shares of 15% and 20% (together 35%) in a market where the leader has a 40% share.

- **Combined market shares > 40%.** Mergers leading to a combined market share of more than 40% have often led to objections under the dominance test. This practice will likely continue. However, the fact that the Commission has also cleared without conditions a significant number of transactions where combined market shares far exceeded 40%, both in Phase I[102] and Phase II[103] procedures, demonstrates that other considerations (discussed below) can prevail over structural concerns based on high market shares. Market shares of 50% or more may in themselves be sufficient for a finding of dominance, although exceptions exist.[104]

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99 Recital 32 ECMR.

100 Horizontal Merger Guidelines, para. 18 with footnote 24.

101 *See*, *e.g.*, *Pfizer/Warner-Lambert*, Case No. COMP/M.1878, Commission decision of May 22, 2000 (combined market shares of 35% and the merger led to a more than *de minimis* increase). *See* also *Carrefour/Promodes*, Case No. COMP/M. 1684, Commission decision of January 24, 2000 (concerns about a combined market share of 26% in Spain and 27% in France; the Commission referred the case for review to the competent national authorities but imposed the divesture of the 42% non-controlling minority stake that Carrefour held in its competitor Cora). The Commission has also suggested that in heavily regulated markets such as banking and insurance, market shares of as low as 30% might suggest dominance. *See*, *e.g.*, *Bank Austria/Creditanstalt*, Case No. IV/M.873, Commission decision of March 11, 1997.

102 *See, e.g.*, *Allied Lyons/HWE-Pedro Domecq*, Case No. IV/M.400, Commission decision of April 28, 1994, paras. 27 and 38. *See also Haniel/Fels*, Case No. COMP/M.2495, Commission decision of February 21, 2002.

103 *See, e.g., Mercedes-Benz/Kässbohrer*, Case No. IV/M.477, Commission decision of February 14, 1995, paras. 59-62 and 65.

104 Horizontal Merger Guidelines, para. 17. For example, in *Enso/Stora*, the Commission did not raise concerns against the merging parties' combined market share of approximately 60% because of important countervailing buyer power (*ENSO/Stora*, Case COMP/M.1225, Commission decision of November 25, 1998). In *BASF/American Cyanamid*, (Case No. COMP/M.1932, Commission decision of June 30, 2000), the Commission did not object to combined market shares of the merging parties in the area of 60%-80%, *inter alia* (i) because it

Competitors' market shares. Although not explicitly referred to in the Horizontal Merger Guidelines, an assessment of single firm dominance will often include a comparison of the merging firms' combined market share to the market shares of their nearest competitors. Cases in which the Commission has issued a prohibition or imposed significant remedies have often involved a 20%-40% lead of the combined entity.[105] However, the SIEC test allows the Commission to challenge mergers even if the combined firm is not the market leader, and the lead over the next competitor can be expected to become less relevant also in traditional single firm dominance situations. In the future, the Commission will most likely treat a large gap to the next competitor as confirmation of its concerns, but a small gap as not necessarily evidence against its concerns.

Market Concentration - HHI analysis. The Horizontal Merger Guidelines for the first time introduce "safe harbor" rules based on HHI analysis. The Commission is unlikely to identify horizontal competition concerns in the following situations:

- Post-merger HHI below 1000;[106] or
- Post-merger HHI between 1000-2000 and increase ("delta") below 250;[107] or
- Post-merger HHI above 2000 and increase ("delta") below 150.[108]

A post-merger HHI below 1000 (first scenario above) justifies a solid expectation that the transaction does not create horizontal concerns, whereas the Commission has identified a number of possible exceptions for the second and third scenarios.[109]

Under the Guidelines, exceeding the above HHI thresholds creates no presumption of competitive concerns.[110] Indeed, the Horizontal Merger Guidelines do not contain any presumptions as to what HHI levels or increases (deltas) may lead to anticompetitive effects.

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did not view market share additions of 5% or even more to significantly alter market conditions, or, for other affected product markets (ii) because the products in question were also used for another application for which the parties' combined market share was much lower and it was not possible for the combined entity to discriminate between customers.

105 *See, e.g.*, *Kimberly-Clark/Scott Paper*, Case No. IV/M.623, Commission decision of June 8, 1994; *MCI WorldCom*, Case No. COMP/M.1742, Commission decision of June 28, 2000; *SEB/Moulinex*, Case No. COMP/M.2621, Commission decision of January 8, 2002.

106 This test is not met, for example, if <u>any</u> competitor has a market share exceeding 31% or there are two competitors with 25% and 20%.

107 This test is not met, for example, if <u>any</u> competitor has a 45% market share, or if a firm with 30% market share acquires another with a 5% market share.

108 This test is not met, for example, if a firm with a 40% market share acquires another with a 2% market share.

109 Horizontal Merger Guidelines, paras. 19 and 20.

110 Horizontal Merger Guidelines, para. 21.

Measure for calculation of market shares. As a general rule, the Commission calculates market shares based on *value* (sales revenue). It has occasionally based its assessment on *volume*[111] or *capacity*[112] when that is the industry standard or when a value-based assessment is not possible or meaningful. In certain markets, the Commission has used other measures, such as units of fleet in aerospace markets, or reserves held in the case of sectors such as mining.[113]

Attribution of sales to suppliers. Sales are normally attributed to the supplier making the sale, but there are many situations that are less straightforward. Although the Commission's practice has not resolved all attribution issues, the following general principles have emerged:

- **Companies in which undertakings concerned are minority shareholders.** Market shares of a company in which the parties to the transaction only have a minority shareholding are attributed to the parties to the transaction when they "control" these companies under the test contained in Article 3(2) ECMR (*see* Section 1.2 above), or when these companies are "related undertakings" under the turnover rules of Article 5(4) ECMR (*see* Section 2.2.2 above).[114] Which percentage of the sales should be attributed to the parties in cases where their shareholdings fall short of sole control depends very much on the specific circumstances of the case.[115] If the Commission does not attribute market shares to the merging parties, it will still take minority shareholdings into account in the overall competitive assessment of the transaction.[116]

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111 *See, e.g.*, *Air France/Sabena*, Case No. IV/M.157, Commission decision of October 5, 1992, para. 35 (number of passengers carried per route/year); *BAI/Banca Popolare di Lecco*, Case No. IV/M.391, Commission decision of December 20, 1993, para. 10 (value of assets, deposits and loans in retail banking industry); *WorldCom/MCI*, Case No. IV/M.1069, Commission decision of July 8, 1998 (amount of data traffic carried over the network); *Carnival Corporation/P&O Princess*, Case COMP/M.2706, Commission decision of July 24, 2002, para. 130 (number of passenger cruise days, *i.e.* taking into account both number of passengers and duration of cruises).

112 *See, e.g., Shell/Enterprise Oil,* Case COMP/M.2745, Commission decision of May 7, 2002, paras. 17-20 (gas transportation capacity).

113 *See* also Market Definition Notice, paras. 54 and 55, attached as Annex 10.

114 *See, e.g., Mitsui/CRVD/Caemi,* Case COMP/M.2420, Commission decision of October 30, 2001, para 68.

115 *See, e.g.*, *GE/Honeywell*, Case COMP/M.2220, Commission decision of July 3, 2001, paras. 46, 49 and 67; *BP Amoco/Arco*, Case IV/M.1532, Commission decision of September 29, 1999, para. 56; *Vodafone Airtouch/Mannesmann*, Case COMP/M.1795, Commission decision of April 12, 2000, paras. 31 and 32; *Mitsui/CVRD/Caemi*, Case COMP/M.2420, Commission decision of October 30, 2001, footnote 36, 37 and 38.

116 *See, e.g., Bank Austria/Creditanstalt*, Case No. IV/M.873, Commission decision of March 11, 1997, para. 31 (parties had potential to influence the competitive behavior of banks in which they held minority shares); *Shell/Montecatini*, Case No. IV/M.269, Commission decision of June 8, 1994, paras. 106-107 (parties were capable of influencing the competitive behavior of their joint venture partners in a market with increasing concentration).

- **Private label production.** Manufacturers of branded products frequently also supply retailers that market identical products under their own private labels. The Commission has generally not attributed the retailers' sales of private label products to the manufacturer,[117] although there have been exceptions.[118] It is noteworthy in this context that the Commission seems increasingly inclined to define separate product markets for branded and private label products.[119] This approach to market definition implies that sales of private label products from the manufacturer to the retailer are neither attributed to the manufacturer's share on, nor included in the total size of the market for branded products.

- **Licensees and franchisees.** The Commission has suggested that the market shares of the parties' licensees or franchisees should be attributed to the parties if the licensees or franchisees are so dependent on the licensor/franchisor that they are unable to exert any competitive pressure on the licensor's/franchisor's direct sales activities or to enter the market as independent competitors.[120] However, if a licensee or distributor operates under a long-term exclusive license/contract, its sales will not be attributed to the licensor/manufacturer.

- **Captive use.** The Commission generally excludes from the calculation of market size and market shares production by vertically integrated firms that is destined for internal consumption in the production of downstream products, *i.e.*, production for captive use. Captive use production is not normally available for sale on the merchant market.[121] However, in cases where a producer could

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[117] *See, e.g.*, *BSN/Euralim*, Case No. IV/M.445, Commission decision of June 7, 1994, paras. 34-35.

[118] *See, e.g., Imperial Tobacco Group plc/Reemtsma Cigarettenfabriken GmbH,* Case COMP/M.2779, Commission decision of May 8, 2002, paras. 40-45 (fact that private label cigarettes are branded in the same way as other branded cigarettes, without reference to the retailer was seen as ground to attribute private label cigarette sales to the supplier rather than the retailer); *Kimberly-Clark/Scott Paper*, Case No. IV/M.623, Commission decision of January 16, 1996, paras. 121-123 (to disregard the fact that 30%-50% of private-label sales consisted of goods manufactured by the parties would understate the true market strength of the combined entity because few or no retailers could have found alternative suppliers for private-label products *post*-merger, and the combined entity would have been in a position to tie supply of private-label goods to retailers' purchases of branded products).

[119] *See, e.g., SCA/Metsa Tissue,* Case COMP/M.2079, Commission decision of January 31, 2001, para. 28; *Nestlé/Ralston Purina*, Case COMP/M.2337, Commission decision of July 27, 2001, para 19.

[120] *See, e.g., Preussag/Hapag-Lloyd*, Case No. IV/M.1001, Commission decision of November 10, 1997; and *Kesko/Tuko*, Case No. IV/M.784, Commission decision of November 20, 1996.

[121] *See, e.g.*, *DuPont/ICI*, Case No. IV/M.214, Commission decision of September 30, 1992, para. 31; *Mitsui/CRVD/Caemi*, Commission decision of October 30, 2001, paras 168-171; *Degussa/Laporte,* Case COMP/M.2277, Commission decision of March 12, 2001, paras. 39-44 (exclusion of competitor's captive production led to significant increase in merging parties market shares from 15%-25% to 55%-65%).

be expected readily to shift production from captive use to merchant sales, the Commission has included captive production in the market share calculation.[122]

- **Integrated vs. non-integrated products.** A related issue is that of competition between suppliers of integrated systems and suppliers of individual components, when both types of suppliers sell to end customers. A recent judgment of the Court of First Instance indicates that on the market for individual components, components sold as part of an integrated system have to be included in the calculation of market size and market shares (and that, therefore, components sold as part of system sales are not discounted as captive use of the integrated manufacturer).[123]

Factors limiting the significance of current market shares. The Horizontal Merger Guidelines state that the Commission will calculate "current" market shares, even though in practice the calculation is in most cases based on figures for the last year prior to the transaction. The Commission sometimes "discounts" the significance of "current" market shares as an indicator of market power based on the following considerations:[124]

- **Likely decline in market shares.** In several cases, the Commission accepted the parties' argument that their market shares had recently declined and would likely continue to decline.[125] In contrast with its more restrictive policy in the past,[126] the Commission has in recent cases also accepted projections of declining market shares on the assumption that the combined firm will lose customers as a result of multiple sourcing and other procurement policies post-merger.[127]

- **"Lumpy" demand.** In industries characterized by a small number of large customers awarding infrequent, long-term supply contracts, the Commission may regard high market shares in a given year as an unreliable indicator of market power. In these situations, or if market shares are volatile for other reasons, the Commission's analysis will focus on average market shares over

[122] *See, e.g.*, *Pilkington-Techint/SIV*, Case No. IV/M.358, Commission decision of December 21, 1993, para. 25, footnote 4.

[123] Case T-310/01 *Schneider Electric v. Commission*, [2002] ECR II-4071, paras. 282-297.

[124] *See* also Horizontal Merger Guidelines, para. 15.

[125] *See, e.g.*, *Elf Aquitaine-Thyssen/Minol*, Case No. IV/M.235, Commission decision of September 4, 1992, para. 11.

[126] *See Volvo/Scania*, Case No. COMP/M.1672, Commission decision of March 15, 2000, paras. 116-124.

[127] *See Pirelli/BIC*, Case COMP/M.1882, Commission decision of July 19, 2000, para. 71; *Ernst & Young France/Andersen France*, Case COMP/M.2816, Commission decision of September 5, 2002, para. 62 (Commission also took into account the effects of conflicts of interest *post*-merger, and the effect of the Enron scandal on Andersen's market share).

a longer period and, in the case of lumpy demand, the number and strength of alternative suppliers to compete for future contracts.[128]

- **Bidding markets.** When competition occurs through bidding tenders, the Commission will often focus less on historical market shares and more on the number and strength of suppliers able to bid in future tenders.[129] Nevertheless, the Commission has occasionally based its analysis on normal market share calculation, in markets characterized as bidding markets.[130]

- **Technological innovation.** In industries where product cycles are short due to rapid technological evolution,[131] or where an old technology is about to be replaced by a new one, the Commission may attach less significance to high "static" market shares.[132]

- **Likely entry, exit, and expansion.** The Horizontal Merger Guidelines note that likely future exit, entry or expansion by suppliers may be a reason to adjust current market shares to account for future changes.[133]

6.2.2 Other Factors

The Horizontal Merger Guidelines discuss the following aspects that may aggravate or reduce concerns of non-coordinated effects resulting from the market share and market concentration analysis. Other factors may also become relevant in specific cases.

- **Difficulties for customers to switch suppliers** can raise or aggravate competition concerns. Such difficulties can in particular result from the limited number of alternative suppliers or high switching costs. The Horizontal Merger

[128] *See, e.g., Price Waterhouse/Coopers & Lybrand*, Case IV/M.1016, Commission decision of May 20, 1998, paras. 85-94; and *MCI Worldcom/Sprint*, Case No. COMP/M.1741, Commission decision of June 28, 2000.

[129] *See, e.g.*, *Framatome/Siemens/Cogema JV*, Case COMP/M.1940, Commission decision of December 6, 2000, para. 143; *Raytheon/Thales/JV*, Case COMP/M.2079, Commission decision of March 30, 2001, paras. 40 and 50; *Ernst & Young France/Andersen France*, COMP/M.2816, Commission decision of February 2, 2000, paras. 65-66.

[130] For examples of cases where historical market shares and "track records" were taken into account, *see GE/Honeywell*, Case COMP/M.2220, Commission decision of July 3, 2001, para. 339; and *Dow Chemical/Union Carbide*, Case COMP/M.1671, Commission decision of May 3, 2000, paras. 129-131.

[131] *See, e.g.*, *AT&T/NCR*, Case No. IV/M.50, Commission decision of January 18, 1991, para. 15.

[132] *See, e.g., Rhône Poulenc Rorer/Fisons*, Case No. IV/M.632, Commission decision of September 21, 1995, paras. 42-44.

[133] Horizontal Merger Guidelines, para. 15.

Guidelines identify customers that dual-source from two merging parties as particularly vulnerable.[134]

- **If competitors are unlikely to increase output** in response to a price increase or output reduction of the merged entity, for example due to capacity constraints, high costs of capacity expansion, or a high cost basis of the existing surplus capacity, this will increase the Commission's concerns. Conversely, if remaining competitors have sufficient spare capacity and are likely to use it if the combined entity were to increase prices or reduce output, this may eliminate concerns even if the market shares of the combined entity are high. The likelihood of output expansion is of particular relevance in homogeneous product markets.[135]

- **The ability of the merged firm to hinder expansion by competitors,** for example by its influence over inputs or distribution possibilities, control over patents, brands, or certain infrastructure, and its financial strength relative to competitors may also amplify the Commission's concerns.[136]

- **If the merger eliminates a "maverick" company** from the market, this will also be a factor that will weigh against the transaction. A "maverick" is a company that exercises a stronger competitive influence on the market than its market share suggests (for example a recent entrant on the rise or a significant innovator). The elimination of such a firm not only leads to the creation of a larger combined entity in the longer term but also may have additional anti-competitive effects in the market by reducing the competitive dynamics generally.[137]

- **If the merging firms are particularly close competitors,** the likelihood of post-merger anti-competitive behavior increases. The "closeness" of competitors is most relevant in differentiated product markets and of particular relevance when the merged firm will not be the market leader (this is further discussed in Section 6.2.3 below).[138]

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134 Horizontal Merger Guidelines, para. 31.

135 Horizontal Merger Guidelines, paras. 32-35; *Celanese/Degussa/JV (European Oxo Chemicals)*, Case COMP/M. 3056, Commission decision of June 11, 2003 (clearing without conditions a transaction leading to a 60-70% *post* merger market share mainly because competitors had sufficient spare capacity).

136 Horizontal Merger Guidelines, para. 36.

137 Horizontal Merger Guidelines, paras. 37-38.

138 However, the closeness of competitors has in the past also played a role under the traditional dominance analysis, and this mainly in bidding markets. Arguments of substitutability between the merging parties' products were used either to confirm Commission concerns in mergers creating the clear market leader (*see Volvo/Scania*, Case COMP/M.1672, Commission decision of March 15, 2000; *Barilla/BPL/Kamps*, Case COMP/M.2817, Commission decision of June 25, 2002; *Siemens/Drägerwerk/JV*, Case COMP/M.2861, Commission decision of April 30, 2003;

6.2.3 Particular Issues Regarding Non-Coordinated Effects Below the Dominance Threshold

Any of the above factors can become relevant for the analysis of non-coordinated effects whether or not the combined entity will be the market leader and the transaction could therefore be challenged under the traditional single firm dominance theory. However, non-coordinated effects below the dominance threshold are most likely to arise if the markets show one of the following three characteristics.

- **Close competitors on differentiated product markets.** Non-coordinated effects can arise in concentrated markets where firms compete with differentiated products and the products of the merging firms are particularly close substitutes. Products can belong to the same relevant product market but nevertheless be "differentiated" (rather than homogeneous), for example by virtue of brand image, technical specifications, quality, or level of service.[139] In such situations, different customer groups often prefer different suppliers and consider some of them as particularly close substitutes.[140] If close substitutes merge, the combined entity is more likely to increase price post-merger than if competitors merge that are not close substitutes.[141] High pre-merger margins make significant price increases post-merger more likely.[142] However, if rivals can be expected to reposition their products in response to the merger or extend their product portfolio so that they become close substitutes to the combined firm in the near future, this can defeat concerns of non-coordinated effects.[143] In practice, it can be expected that the Commission will seek "hard" evidence to determine the closeness of the merging parties' products, such as

and *GE/Instrumentarium*, Case COMP/M.3156, Commission decision of September 2, 2003), or as mitigation factor against a finding of dominance in cases where combined market shares were in the 35-50% area (*see Volvo/Renault V.I.*, Case COMP/M.1980, Commission decision of September 1, 2000, paras. 33-35; *Philips/Agilent Health Care Solutions*, Case COMP/M.2256, Commission decision of March 2, 2001, paras. 33-35; and *Philips/Marconi Medical Systems,* Case COMP/M.2537, Commission decision of October 17, 2001, paras. 31-34).

139 Horizontal Merger Guidelines, footnote 32.

140 For example, even if high-quality cars of suppliers A, B, C and D are comparable in terms of technical features, comfort and price (and therefore belong to the same product market), brand image will often considerably differentiate the cars. In the example, A and B may have a strong "sports" image, while C and D may generally be perceived as "reliable" cars. Accordingly, B will be the next best alternative for customers of A (and *vice-versa*), while "reliability" customers will often choose between C and D.

141 Horizontal Merger Guidelines, para. 28. In the example, if car manufacturers A and B merge, a price increase in the "sports" segment would induce only a small number of "sports" customers to switch to the "reliability" segment, and may therefore be profitable for the merged entity. On the other hand, a merger between A and D would not eliminate close substitutes in either the "sports" or "reliability" segment and therefore be less likely to raise concerns of non-coordinated effects.

142 Horizontal Merger Guidelines, para. 28.

143 Horizontal Merger Guidelines, para. 30.

customer preference surveys, analysis of purchasing patterns, estimation of cross-price elasticities, or assessment of diversion ratios.[144]

- **Close competitors due to geographic location.** Competitors can also be particularly close substitutes because of the geographic location of their sales outlets, rather than by virtue of the products they sell. Even if a relevant geographic market is relatively large, competition can be localized and the geographic location of suppliers a significant competitive factor. Examples are supermarkets in a large city, where customers in practice choose between the nearest supermarkets only. If those supermarkets merge, they may be able to behave anti-competitively because customers would be disinclined to turn to more distant stores. Other examples for closeness due to geographic location are banks, travel agencies, or petrol stations.[145]

- **Competition on capacity.** Concerns of unilateral effects below the dominance threshold can also arise if the suppliers' capacities are the main driver of competition, rather than product differentiation, and competitors would be unlikely to increase output in response to a price increase (and output reduction) of the combined entity (*see* bullet point 2 in Section 6.2.2 above).

6.2.4 Efficiencies as a Countervailing Factor

Greater openness towards efficiencies. The 2003/2004 merger control reform led to a change in the treatment of efficiencies, which are now given a more prominent role as a possible factor militating against anti-competitive concerns.[146] Although Article 2(1)(b) of the Merger Regulation had always stated that the merger analysis shall take into account the development of technical and economic progress (*i.e.*, efficiencies), the Commission had consistently rejected efficiency defenses since the first prohibition cases.[147] Indeed, in some cases, the Commission even relied on efficiencies to argue that a merger would entrench the parties' competitive advantage over competitors and therefore their dominant position.[148]

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144 Horizontal Merger Guidelines, para. 29.

145 Horizontal Merger Guidelines, footnote 32.

146 In November 2003, Wilmer, Cutler & Pickering co-hosted a seminar on "Efficiencies and Competitive Effects – Evaluating and Arguing Efficiencies in Merger Control". A CD-ROM with the conference papers can be obtained from the editors. A report on the seminar was published in Global Competition Review, *see* F. Distefano, "Efficiencies and Competitive Effects", Volume 6, Issue 11, December 2003/January 2004, p. 17.

147 *See*, *e.g.*, *Aérospatiale-Alenia/de Havilland*, Case No. IV/M.53, Commission decision of October 2, 1991, para. 69; and *MSG Media Service*, Case No. IV/M.469, Commission decision of November 9, 1994, para. 100. Two more recent examples are *Nordic Satellite Distribution,* Case No. IV/M.490, Commission decision of July 19, 1995, and *Bertelsmann/Kirch/Premiere,* Case No. IV/M.993, Commission decision of May 27, 1998, para. 122.

148 Hence the - rather provocative - claim that EC merger control law gave rein to an "efficiency offense". Most notably, some commentators interpreted the Commission's decision in

Framework for the assessment under the Horizontal Merger Guidelines. The Horizontal Merger Guidelines place the assessment of efficiency claims in the overall SIEC assessment and state that the Commission must determine whether, overall, consumers would be worse off as a result of the merger.[149] Efficiencies can take the form of cost savings (*e.g.*, in production or distribution) or of product/service improvements.[150]

Conditions for a successful efficiency defense. Efficiency claims will only succeed if the following conditions are met:[151]

- **Benefit to consumers.** Efficiencies must lead to a sufficient consumer benefit. This will only be the case if efficiencies are (i) timely, *i.e.* expected to occur reasonably soon after the merger; (ii) substantial; (iii) passed-on, at least in part, to consumers; and (iv) benefiting consumers in those relevant markets where it is otherwise likely that competition concerns would occur as a result of the transaction. The requirement that efficiencies must benefit consumers means that efficiency gains that the merging parties will keep for themselves will not be taken into account. The Horizontal Merger Guidelines state that cost efficiencies that lead to reduction in variable costs are more likely to be passed-on to consumers than reductions in fixed costs.[152]

- **Merger specificity.** The parties must demonstrate that the claimed efficiencies are a direct consequence of the concentration and cannot be achieved by less anti-competitive means. The second aspect raises the question to what extent merging parties will be required to develop models for potential alternative action that could lead to equivalent efficiencies. The Horizontal Merger Guidelines refer notably to licensing agreements, cooperative joint ventures, concentrative joint ventures, or differently structured mergers. However, they also state that only "reasonably practical" alternatives need to be considered.[153]

- **Verifiability.** Efficiency claims have to be verifiable. Where reasonably possible, efficiencies and the resulting benefits must therefore be quantified. Where that is not possible, a qualitative showing of efficiencies may suffice, but

GE/Honeywell (Case COMP/M.2220, Commission decision of July 3, 2001) as a case where the Commission viewed efficiencies resulting from the proposed merger as a ground for concerns of competitor foreclosure.

149 Horizontal Merger Guidelines, paras. 77 and 79.

150 Horizontal Merger Guidelines, paras. 80 and 81.

151 Horizontal Merger Guidelines, paras. 78-88.

152 Horizontal Merger Guidelines, paras. 80-84.

153 Horizontal Merger Guidelines, para. 85.

only if the positive consumer impact is clearly identifiable and not a mere possibility.[154]

Burden of proof. It is incumbent upon the parties to demonstrate that the conditions for a successful efficiency claim are met. They also need to submit supporting documents, for example documents used by the management in the decision-making process or statements of the management to investors. Pre-merger outside expert studies (for example by investment banks) and historical examples of efficiencies achieved through similar mergers are also acceptable.[155] Ex-post efficiencies calculations by economic experts retained specifically for the Commission's merger proceedings will likely not be viewed as persuasive.

Uncertain practical relevance of efficiency claims in the future. At the time of writing this Guide, it is uncertain in how many cases the outcome will be materially affected by proven efficiencies. The requirements set in the Horizontal Merger Guidelines are rather high if strictly adhered to in practice. The Horizontal Merger Guidelines also indicate that merging parties cannot normally expect that efficiencies will save their transaction if they enjoy a high degree of market power.[156]

6.2.5 Other Countervailing Factors

Countervailing buyer power. Even if market shares and other factors raise initial concerns, the Commission may still find that the merger does not significantly impede effective competition if there is a small number of large, well-informed buyers that can prevent price increases of the combined firm due to their bargaining power. The Commission has accepted buyer power arguments when the demand side consists of a monopsonist purchaser,[157] is dominated by large industrial users[158] or

[154] Horizontal Merger Guidelines, para. 86.

[155] Horizontal Merger Guidelines, paras. 87 and 88.

[156] Horizontal Merger Guidelines, para. 84, which bases this proposition on the argument that in such cases it is unlikely that efficiency gains would be passed on to consumers.

[157] *See*, *e.g.*, *ABB/Daimler-Benz*, Case No. IV/M.580, Commission decision of October 18, 1995, paras. 99, 110 and 123 (Deutsche Bahn as monopsonist purchaser of mainline and regional trains in Germany).

[158] The Commission often refers to buyer power in decisions on mergers among manufacturers of components for the automobile industry, *see, e.g.*, *Bosch/Allied Signal*, Case No. IV/M.726, Commission decision of April 9, 1996, para. 43. In *Enso/Stora* (Case COMP/M.1225, Commission decision of November 25, 1998), the Commission did not raise concerns on the merging parties' combined market share of approximately 60% because of important countervailing buyer power (mainly, the Tetra Pak group).

consists of a limited number of large purchasing or retail groups.[159] A successful buyer power argument must meet the following conditions:[160]

- The customers must pose a credible threat (i) to reduce their purchases from the merged entity if faced with a price increase, notably by switching to an existing competitor, sponsoring entry by a new competitor, or themselves starting upstream production; (ii) to delay purchases (*e.g.,* of durable goods); or (iii) to refuse to buy other products from the same supplier.

- The buyers' incentive to utilize their buyer power must not be defeated by specific circumstances, *e.g.*, concerns of free-riding by other buyers.

- Buyer power must not be limited to a specific segment of particularly strong customers.

Potential competition/Entry. The Commission recognizes that the prospect of market entry by a potential competitor may well discipline the exercise of market power and defeat a finding that the merger leads to a significant impediment of effective competition. Market entry can occur in various ways, for example through output expansion by existing competitors with excess capacity, market entry by a company active in a related product market (in particular when that company can "leverage" existing brands), direct imports from areas outside the relevant geographic market, or acquisition of smaller competitors to gain a "toehold" in the relevant geographic market.

The Commission assesses potential competition based on three factors:[161]

- **Likelihood of entry.** The Commission will determine whether market entry by potential competitors would be likely in case the merged firm attempted to raise prices or reduce output post merger. The likelihood of entry depends in particular on (i) the profitability of entry, notably in light of responses by incumbents, resulting downward price pressure, market growth, and the cost of failed entry; and (ii) the presence or absence of legal, technical or other barriers to entry. Examples of past entry or exit will be taken into account to measure the likelihood of future entry. The following characteristics of the market support the likelihood of entry: growing consumer demand; low capital requirements and absence of sunk costs; absence of economies of scale and scope; low relative transport costs; absence of essential facilities or patents on the part of the incumbents; absence of other technical advantages of the incumbents; absence of significant regulatory or legal barriers; absence of

[159] *See, e.g.*, *Philips/Grundig*, Case No. IV/M.382, Commission decision of December 3, 1993; *see*, however, *Nestlé/Perrier*, Case No. IV/M.190, Commission decision of July 22, 1992, paras. 77-89 (demand by retail chains simply reflects consumer demand).

[160] Horizontal Merger Guidelines, paras. 64-67.

[161] Horizontal Merger Guidelines, paras. 68-75.

long-term supply and distribution arrangements; easy access to raw materials; absence of consumer brand loyalty or factors that lock customers into their existing suppliers; and low risks and costs involved in entry.

- **Timeliness of entry.** Entry must occur sufficiently soon after the merger to prevent or defeat the exercise of market power by the merged firm. The Commission has not prescribed a precise time period within which entry must occur, but has indicated that entry will normally be considered timely only if it occurs within two years after the merger.

- **Sufficiency of entry.** Entry must be competitively meaningful and sufficient in magnitude and scope to remove the incentives for anti-competitive behavior.

Failing firm defense. Under the Horizontal Merger Guidelines, an otherwise problematic merger can be declared compatible with the common market if one of the merging parties is a "failing firm".[162] Based on previous Commission cases[163] and the judgment of the European Court of Justice in *Kali + Salz*,[164] the Horizontal Merger Guidelines require three conditions to be met for a successful failing firm defense:

- The acquired undertaking would in the near future be forced out of the market for financial difficulties if not taken over by another undertaking.

- There is no less anti-competitive alternative purchaser than the notified merger.

- In the absence of the merger, the assets of the failing firm would inevitably exit the market.

In some cases where these requirements were not met, the Commission nevertheless took into account that it was certain that one of the merging parties would lose its viability as competitor and that its market share would accrue to the remaining competitors,[165] or that one merging party had consistently produced losses and was therefore unlikely to continue on the market in the current form.[166] It is not certain whether these cases indicate a more general willingness of the Commission favorably to assess mergers where one party is in severe financial difficulties but the failing firm defense is not technically met.

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[162] Horizontal Merger Guidelines, paras. 89-91.

[163] Notably *BASF/Pantochim/Eurodiol*, Case COMP/M.2314, Commission decision of July 11, 2001.

[164] Joined Cases C-68/94 and C-30/95, *French Republic and Société Commerciale des Potasses et de l'Azote and Entreprise Minières et Chimique*, [1998] ECR I-1375.

[165] *Ernst & Young France/Andersen France*, Case COMP/M.2816, Commission decision of September 5, 2002, paras. 76-79.

[166] *NewsCorp/Telepiù*, Case COMP/M.2876, Commission decision of April 2, 2003.

6.3 Horizontal Mergers: Coordinated Effects (Collective Dominance)

Development of the coordinated effects doctrine (collective dominance). A concentration can be prohibited under the SIEC test if it is likely that the combined entity and remaining competitors in the market will align their competitive behavior to increase prices or reduce output. Under the dominance test of the previous Merger Regulation, these effects were analyzed under the concept of collective (or oligopolistic) dominance. The Commission applied the collective dominance theory in many cases,[167] although Article 2 of the old ECMR, unlike Article 82 EC, did not expressly mention the concept of collective dominance. The European Courts endorsed the collective dominance theory in principle.[168] In its famous *Airtours* judgment, the Court of First Instance set out the analytical framework for collective dominance.[169] The Horizontal Merger Guidelines' treatment of coordinated effects is largely based on the *Airtours* judgment and summarizes the current status of the collective dominance doctrine, now under the concept of "coordinated effects".

Essence of coordinated effects. Concerns of anti-competitive coordinated effects (collective dominance) arise if the merger increases the likelihood that the merged entity and at least one other competitor in the market would consider it possible, economically rational, and hence preferable, to coordinate their market behavior on a sustainable basis. Coordination in this sense occurs if the companies consciously act in parallel (sometimes, the term "tacit collusion" is used to characterize such behavior). An express agreement or concerted practice within the meaning of Article 81(1) EC is not necessary for coordinated effects to arise. Coordination is most likely in markets for homogeneous products with few suppliers and can concern price, output, geographic area of activity, or other parameters of competition.[170]

Assessment of coordinated effects. Following the *Airtours* judgment, the Commission assesses coordination in four steps, as explained in the Horizontal Merger Guidelines:

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[167] The first case where the Commission relied on collective dominance was *Nestlé/Perrier*, Case IV/M.190, Commission decision of July 22, 1992; *see* also, for example, *Mannesmann/Vallourec/Ilva*, Case No. IV/M.315, Commission decision of January 31, 1994; *Kali + Salz/MdK/Treuhand*, Case No. IV/M.308, Commission decision of December 14, 1993; *ABB/Daimler-Benz*, Case No. IV/M.580, Commission decision of October 17, 1995; *Gencor/Lonrho*, Case No. IV/M.619, Commission decision of April 24, 1996; *Price Waterhouse/Coopers & Lybrand*, Case No. IV/M.1016, Commission decision of May 20, 1998; *Danish Crown/Vestjyske Slagterier*, Case No. COMP/M.1313, Commission decision of March 9, 1999; *Otto Versand/Freemans*, Case No. COMP/M.1527, Commission decision of June 16, 1999; *Airtours/First Choice*, Case No. COMP/M.1524, Commission decision of September 22, 1999; *Exxon/Mobil*, Case No. IV/M.1383, Commission decision of September 29, 1999.

[168] Joined Cases C-68/94 and C-30/95, *French Republic and Société Commerciale des Potasses et de l'Azote and Entreprise Minières et Chimique*, [1998] ECR I-1375. The Court of First Instance followed in Case T-102/96, *Gencor v. Commission,* [1999] ECR II-753.

[169] Case T-342/99, *Airtours v. Commission*, [2002] ECR II-2585.

[170] Horizontal Merger Guidelines, paras. 39-40.

- **Reaching terms of coordination.** The coordinating firms must have a common perception about how coordination should work and be able to reach a common understanding on the terms of coordination. There is no single factor that determines whether firms could be expected to reach terms of coordination. Rather, the Commission makes an overall conclusion based on a multitude of factors. The following factors are conducive to coordination:[171]

  -- a high level of supply concentration (usually, two allegedly coordinating firms holding a combined market share above 50% or three firms holding roughly two-thirds of the market, with a significant gap to the largest competitor not part of the oligopoly in which coordination is allegedly taking place);

  -- the economic environment is not complex and relatively stable;

  -- products are homogeneous;

  -- demand and supply conditions are stable;

  -- demand is inelastic and stagnant or growing only moderately;

  -- production technology is mature and innovation is lacking;

  -- the market shares of the leading firms are symmetric and stable over time;

  -- the leading firms' cost structures are similar;

  -- production capacities and capacity utilization rates and/or reserves of suppliers are symmetric;

  -- entry barriers (including sunk costs) are high and prospects for new entry are slim or non-existent;

  -- suppliers have financial and structural links and contacts in many markets;[172]

  -- coordination by customer sharing is more likely if customers have simple distinctive characteristics (such as geographic location) or there is a system of information exchange between the suppliers.

- **Monitoring deviations (transparency).** Economic theory suggests that it is in each coordinating firm's individual best interest to deviate from the coordination

[171] For all these factors, *see* Horizontal Merger Guidelines, paras. 44-48.

[172] In Case T-102/96, *Gencor v. Commission*, [1999] ECR II-753, the Court of First Instance explained that structural links between members of an oligopoly are not necessary for a finding of collective dominance, although such links may be taken into consideration.

in order to sell more. If a coordinating firm cannot be reasonably certain that the others will not "cheat" in this way, coordination cannot be stable. For coordination to work, markets therefore have to be sufficiently transparent so that each firm can monitor the behavior of other suppliers. Transparency is higher if the number of competitors and customers is low. Moreover, transparency depends on how transactions are carried out: confidential bilateral negotiations lead to a low degree of transparency, while public pricing leads to high transparency.[173] The transparency required for coordination to work is not limited to knowing the market behavior of the other suppliers. Coordinating firms must also be able to interpret with a reasonable degree of certainty why other coordinating firms act the way they do. For example, sufficient transparency requires that firms can be reasonably confident that a price reduction of another firm is in line with the coordinated policy, and not due to cheating. Similarly, a firm with decreasing sales must be able to know whether this is due to declining general demand or because of cheating of others.[174]

- **Deterrent mechanisms (retaliation).** Coordination is only sustainable if the cheating firm fears retaliation from the others in case it deviates from the coordinated behavior. This requires that coordinating firms have a credible and sufficiently strong punishment mechanism against potential cheaters that can offset the gains from cheating. Where gains from cheating are large, certain and immediate, a punishment that is uncertain, small and delayed will not be sufficient to stabilize the coordination.[175]

- **Reactions of outsiders.** Finally, the Commission will analyze whether the reaction of actual or potential competitors that would not be likely to participate in coordination, or countervailing buyer power, would sufficiently destabilize coordination so that it is unlikely that coordination could be sustained.[176]

Contribution of the merger to anti-competitive coordinated effects. To support a finding of anti-competitive coordinated effects, the Commission must show that the concentration increases the likelihood of coordination or makes existing coordination between firms easier, more stable, or more effective.[177] The Commission will take into account all structural features of the market as well as past behavior of the competitors. The mere reduction, through the merger, of the number of competitors may lead to sufficiently strong anti-competitive effects. But the Commission will also assess whether one of the merging firms was a maverick, *i.e.*, a firm that had so far

[173] Transparency can also be created, *e.g.*, by most-favored party clauses, announcements of price or capacity changes, exchange of information.

[174] Horizontal Merger Guidelines, paras. 49-51.

[175] Horizontal Merger Guidelines, paras. 52-55.

[176] Horizontal Merger Guidelines, paras. 56-57.

[177] Horizontal Merger Guidelines, para. 39.

disrupted or prevented coordination of the other competitors, and whether the merged firm is more likely to align its strategies to those of competitors.[178] Evidence of past coordination in the same market or past or current coordination in similar markets is also relevant.[179]

Countervailing factors. Just as in the case of non-coordinated effects, the parties can invoke efficiencies, countervailing buyer power, market entry, and the failing firm defense to prevent a prohibition of their transaction. These countervailing factors are explained above (*see* Sections 6.2.4 and 6.2.5).

6.4 Non-Horizontal Mergers

In addition to addressing the horizontal aspects of a merger, the Commission may consider any other effects of the transaction, *i.e.*, vertical, conglomerate, portfolio, range and network effects.[180] Several recent cases have turned on the application of theories of harm other than the horizontal effects of the concentration.

6.4.1 Vertical Aspects/Foreclosure Effects

When the parties to the concentration operate at different levels of the production or distribution chain, the concentration may lead to anti-competitive effects by foreclosing competitors in upstream or downstream markets. For example, a merger between a supplier of raw materials and a manufacturer may be deemed to foreclose other manufacturers from gaining access to those raw materials (upstream foreclosure). Similarly, when a manufacturer acquires control over distribution channels, other manufacturers may no longer be able to distribute their products effectively (downstream foreclosure). Form CO requires detailed information about vertical links between the parties when any of them has a share exceeding 25% in a market that is upstream or downstream from a market in which another party participates.

Vertical concerns in media markets. Many of the cases in which the Commission has issued a prohibition or imposed conditions citing foreclosure effects have concerned transactions in the media or telecommunications sectors. In the *AOL/Time Warner*[181] and *Vivendi/Canal+/ Seagram*[182] transactions, the Commission raised certain leveraging issues based on vertical integration of media, Internet access and telecommunications. These concerns were resolved largely through the

[178] Horizontal Merger Guidelines, para. 42.

[179] Horizontal Merger Guidelines, para. 43.

[180] DG Competition is preparing guidelines for the analysis of vertical and conglomerate mergers, but as of August 2004 no draft has been released.

[181] Case No. COMP/M.1845, Commission decision of October 11, 2000.

[182] Case No. COMP/M.2050, Commission decision of October 13, 2000.

submission of behavioral undertakings.[183] Vertical integration may allow one company, who controls an infrastructure, know-how or a technology that is a crucial gateway to the market, the role of "gate-keeper" of that market. In *AOL/Time Warner*,[184] for instance, the Commission feared that the combination of AOL's leading Internet activities with Time Warner's music library would have allowed the new entity to set the technical standard for on-line distribution of music. Consequently, the Commission saw a risk that AOL/Time Warner could acquire a dominant position in the emerging downstream market for on-line music delivery.

Vertical concerns as a result of access to financing business. In *GE/Honeywell*,[185] the Commission prohibited the acquisition of Honeywell by General Electric claiming, *inter alia*, that Honeywell's access to GE's financial and leasing capabilities would allow the merged firm to secure long-term exclusive supply agreements for Honeywell's avionics and other aviation products. Similarly, the Commission concluded that the new entity would have had post-merger incentives to extend its "GE-only" financing policy from GE engines to include Honeywell's avionics and other aviation products. The Commission considered that the behavioral remedies offered by the parties were difficult to monitor and, in any event, insufficient to meet the vertical concerns raised by the proposed merger.

6.4.2 Conglomerate/Leveraging Aspects

When there is neither a horizontal nor a vertical relationship between the parties, the concentration may nevertheless affect the parties' competitive position. A concentration might, for example, bring together complementary products, patents, or know-how. Furthermore, a conglomerate concentration may make greater financial resources available to one of the parties. Contrary to the US practice, the Commission has repeatedly voiced concerns that conglomerate mergers could lead to the exercise of market power by combining technological, financial or other resources,[186] and in particular concerns about "leveraging" have come to play a prominent role in the Commission's practice.[187]

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[183] For additional examples of Commission findings of vertical foreclosure in the communications industry, s*ee MSG Media Service*, Case No. IV/M.469 (pay-TV), Commission decision of November 9, 1994; *Nordic Satellite Distribution*, Case IV/M.490 (satellite TV), Commission decision of July 19, 1995; *RTL/Veronica/ Endemol*, Case No. IV/M.553 (TV broadcasting and advertising, independent TV production), Commission decision of September 20, 1995. For examples of Commission findings of vertical foreclosure in other industries, *see TNT/Canada Post*, Case No. IV/M.102 (international express delivery), Commission decision of December 2, 1991; and *Airtours/First Choice*, Case No. COMP/M.1524 (tour operating, airline operation and travel agencies), Commission decision of September 22, 1999.

[184] Case No. COMP/M.1845, Commission decision of October 11, 2000.

[185] *GE/Honeywell*, Case No. COMP/M.2220, Commission decision of July 3, 2001.

[186] *See, e.g., GE/Honeywell*, Case No. COMP/M.2220, Commission decision of July 3, 2001; *Tetra/Laval,* Case COMP/M.2416, Commission decision of October 30, 2001; *EADS*, Case No. COMP/M.1745, Commission decision of May 11, 2000; *MMS/DASA/ASTRIUM*, Case No.

Leveraging through mixed bundling. In *GE/Honeywell,*[188] the Commission prohibited the proposed acquisition by General Electric of Honeywell *inter alia* because of the combination of their respective complementary products (engines and avionics equipment). In the Commission's view, such integration would have enabled the merged entity to leverage each company's respective market power into the products of the other, among other things through "mixed bundling", *i.e.* offering a customer a lower price if it bought both types of products together. The Commission concluded that this would have the effect of foreclosing competitors and would ultimately eliminate competition in these markets.

Leveraging through pure bundling/tying. In *Tetra Laval/Sidel,*[189] the Commission initially prohibited Tetra Laval's proposed acquisition of French plastic packaging equipment maker Sidel, arguing that the transaction would have allowed Tetra Laval to "leverage" its strong market position in carton packaging and packaging machinery into Sidel's principal area of activity by making continued sales of carton packaging equipment contingent on the acquisition of Sidel's products (*i.e.*, pure bundling). On appeal, the Court of First Instance recognized that such leveraging concerns could conceivably justify a prohibition decision, but annulled the Commission's decision because it had not proven that Tetra Laval had the ability and incentive to engage in (illegal) leveraging behavior, given the conditions in the relevant markets. The Commission subsequently cleared the Tetra Laval/Sidel transaction subject to a licensing remedy.[190]

Conglomerate issues in Form CO. While the old Form CO asked for only limited market data on conglomerate aspects,[191] the new Form CO requires the notifying parties to submit the same amount of information required for the affected markets also for "other markets in which the notified operation may have a significant impact".[192] Those markets include product markets in which any of the parties to the concentration is present and which may be considered neighboring markets closely related to a product market in which any other party to the concentration is engaged (provided that the individual or combined market shares of the parties in any one of these markets is 25% or more). Product markets are closely related neighboring

COMP/M.1636, Commission decision of March 21, 2000; *Akzo Nobel/Hoechst Roussel Vet*, Case No. COMP/M.1681, Commission decision of November 22, 1999; *Crédit Suisse/Winterthur*, Case No. IV/M.985, Commission decision of October 15, 1997; *Coca-Cola Enterprises/Amalgamated Beverages*, Case No. IV/M.794, Commission decision of January 22, 1997; *RTL/Veronica/Endemol,* Case No. IV/M.553 Commission decision of May 22, 1995.

[187] *See, e.g.,* Voelcker, "Leveraging as a theory of competitive harm in EU merger control", 40 *Common Market Law Review* (2003), 581-614.

[188] *GE/Honeywell*, Case No. COMP/M.2220, Commission decision of July 3, 2001.

[189] *Tetra/Laval,* Case COMP/M.2416, Commission decision of October 30, 2001.

[190] *Tetra/Laval,* Case COMP/M.2416, Commission decision of January 13, 2003.

[191] *See* old Section 9 of the Form CO.

[192] *See* Form CO, Section 6.3.

markets when the products are complementary to each other or when they belong to a range of products that is generally purchased by the same set of customers for the same end use. Where the parties identify such markets, the simplified procedure may not be available.[193]

6.4.3 Portfolio Power and Range Effects

Concept of portfolio power. Under the old Merger Regulation, the Commission had coined the term "portfolio power" to denote a situation in which a firm may gain or strengthen a dominant position in one or more product markets by acquiring a large portfolio of related brands. It has concluded in several merger decisions that portfolio power may create or strengthen a dominant position on a given market if certain conditions are met.[194] There are no indications that the Commission will abandon this approach under the new Merger Regulation. The rationale behind this theory is that a holder of a large portfolio of related brands may use portfolio power to reduce competition through pricing policies, product tying or refusals to supply. Additionally, a supplier with a large portfolio is deemed to enjoy greater economies of scale, greater scope in relation to marketing activities, and greater flexibility in establishing pricing and promotional structures. The Commission's use of the portfolio power theory is controversial and a significant divergence from US merger practice. At least in part, the Commission seems to have been concerned about production, marketing, and distribution efficiencies that ultimately benefit rather than hurt consumers.[195] In *BaByliss v. Commission* and *Royal Philips v. Commission*,[196] the Court of First Instance recently confirmed that the Commission can in principle rely on portfolio effects arguments to block a concentration.[197]

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[193] Simplified Procedure Notice, Annex 15, para. 8.

[194] *See*, *e.g.*, *Coca-Cola Enterprises/Amalgamated Beverages*, Case No. IV/M.794, Commission decision of January 22, 1997; *Coca-Cola/Carlsberg*, Case No. IV/M.833, Commission decision of September 11, 1997; and *Guinness/Grand Metropolitan*, Case No. IV/M.938, Commission decision of October 15, 1997.

[195] In Case T-114/02, *BaByliss v. Commission*, [2003] ECR II-1279, para. 360, the Court of First Instance departs from the Commission's approach to the merger under review (with focus on the likelihood of price increases resulting from the enlarged portfolio of brands) and stresses that other types of behavior, such as the potential for the merged entity to pass on economies of scale derived from the aggregation of brands to retailers, must also be scrutinized, as this may allow the merged entity to gain market share relative to its competitors (exclusionary discounting) or even force retailers to de-list competitors.

[196] Case T-114/02, *BaByliss v. Commission*, [2003] ECR II-1279 and Case T-119/02 *Royal Philips Electronics v. Commission*, [2003] ECR II-1433. The two judgments concern the annulment of the Commission decision in *SEB/Moulinex,* Case COMP/M.2621, Commission decision of January 8, 2002**.**

[197] *See* T-114/02, *BaByliss v. Commission*, [2003] ECR II-1279, para. 343.

Criteria for finding portfolio power. In *Guinness/Grand Metropolitan,*[198] the Commission set out the basic criteria required to establish the existence of portfolio power, as well as factors that can militate against such a finding:

- **A wide and deep portfolio.** Essentially, for a firm to hold portfolio power, it must hold a portfolio of brands within a given product range that is larger and deeper than its competitors' portfolio. The firm must be active in practically all categories within the product range and must hold leading, top-selling brands and large market shares. The firm must not have any significant gaps in its portfolio.

- **A strong position in comparison with competitors.** This criterion is related to the prior one. Portfolio power generally requires that the firm hold the largest market share in most, if not all, product categories within the range.[199] There will be little or no portfolio power when a firm faces strong competition from other manufacturers or suppliers in one or more categories. If the firm's portfolio does not include leading brands across the product range, customers could turn to competitors for alternatives, and any portfolio power would soon disappear.

- **Strong consumer demand for its product range.** To enjoy portfolio power, a firm must control a number of brands that are essential, "must have" brands. The more "must have" brands in a firm's portfolio, the more customers will depend on the firm for supplies, and the greater the firm's portfolio power. Strong brand loyalty is therefore a factor that can help create portfolio power.

- **Absence of countervailing buyer power.** For a firm to gain a position where it can exercise portfolio power, its customers must not have strong positions relative to the firm. The firm must be able to act without fear of retaliation. This criterion will generally be satisfied in markets where demand is relatively fragmented. If the firm's customers can readily turn elsewhere for supply, and the resulting loss in sales would be significant, then the firm cannot exercise such power.

- **High barriers to entry.** To enjoy portfolio power, a firm must not face strong actual or potential competition. If barriers to entry are low and new entrants accordingly could easily establish themselves in the market, any portfolio power would be eliminated or diminished. Factors that may create barriers to entry, and thus may help foster portfolio power, include strong brand loyalty, lack of technical developments, maturity of the market, and high start-up costs.

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198 Case No. IV/M.938, Commission decision of October 15, 1997, paras. 38-42.

199 In the *Guinness/Grand Metropolitan* decision, the Commission noted that the merged entity would have market shares approximately four times higher than its nearest competitors for overall trading in spirits.

In *BaByliss v. Commission*, the Court of First Instance largely upheld the factors set by the Commission in *Guinness/Grand Metropolitan* for a finding of portfolio power.[200] Interestingly, in its judgment, the Court considered the Commission position that such range effects might be limited if the merged entity only had a small turnover on markets where it would have a dominant position, because retailers would be able to punish any anti-competitive behavior through action on other markets. In the circumstances, the Court found that this was not sufficiently proved by the Commission and annulled the relevant part of its decision.

6.4.4 Network Effects

Concept of network effects. Network effects theory teaches that the attractiveness of a network to customers is a function of the number of other customers connected to the same network. The more users are connected to a network, the more attractive the network becomes to others and the larger the network is expected to grow. The first company to attain sufficient critical mass in a market sector characterized by network economics can expect to benefit from a "snowball effect" that will reinforce its position in the market.

Commission practice. The Commission has been inclined to accept the view that network externalities may play a key role in determining whether a transaction creates a dominant position. The Commission has argued that by acquiring market share in a sector characterized by strong network externalities, a leading player may be able to obtain a dominant position even when the static market share following the acquisition would not ordinarily be sufficient to indicate dominance.

Particularly in its decisions concerning the Internet backbone, the Commission has reasoned that -- even in a fast-growing market sector where customers place a premium on maintaining quality interconnection to other networks -- the company that first achieves a certain critical mass in terms of relative network size, traffic carried over the network, and customers will be able to capture the bulk of future market growth by degrading the quality of interconnection with its competitors.[201] According to the Commission, the market can then reach a tipping point, so that this competitor will be able to obtain a dominant position even in the face of vigorous (but smaller) competitors and continued rapid market growth.

In *AOL/Time Warner*,[202] the Commission feared that the combination of AOL's Internet distribution platform and Time Warner's music library would create network effects in respect of both content providers and consumers. Content providers would perceive the merged entity as the best placed distribution channel for their content, and

[200] *See* T-114/02, *BaByliss v. Commission*, [2003] ECR II-1279, paras. 347 and 352-365.

[201] *See, e.g.*, *WorldCom/MCI (II)*, Case No. IV/M.1069, Commission decision of July 8, 1998; and *MCI WorldCom/Sprint*, Case No. COMP/M.1741, Commission decision of June 28, 2000.

[202] Case No. COMP/M.1845, Commission decision of October 11, 2000.

consumers would have no incentives to opt for competing content/distribution platforms. Ultimately the market would "tip" in favor of AOL's Internet platform, which would become the only on-line outlet for all available music.

These decisions clearly were influenced by perceptions as to the growth of the Internet and related business models in the years 1999-2001. It can be expected that going forward, the Commission will be somewhat more cautious in embracing theories of competitive harm based on network effects in merger cases.

6.5 Special Considerations for Joint Ventures

"Spillover test" in addition to the SIEC test. As discussed above in Section 1.3, full-function joint ventures can fall under the Merger Regulation regardless of whether their creation is likely to lead to coordinated competitive behavior by their parent companies. Following the changes introduced by Regulation (EC) No. 1310/97, such "spillover" effects are evaluated in the procedural context of the Merger Regulation, but under substantive rules developed under Article 81(1) and (3) EC (ECMR Article 2(4) and (5)). In 1998, the Commission announced its intention to publish an interpretative notice explaining its approach to assessing cooperative joint ventures, which it has not issued yet.[203] Until then, parties can find interpretative guidance in the Commission's previous practice and the 1994 Notice on the distinction between cooperative and concentrative joint ventures ("1994 JV Notice"),[204] the 1993 Notice on the assessment of cooperative joint ventures under Article 85 EC (now Article 81 EC) ("Cooperative JV Notice") and the 2000 Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements ("Horizontal Cooperation Guidelines").[205]

Identification of spillover effects. In accordance with the Commission's earlier practice of distinguishing between cooperative and concentrative joint ventures, Article 2(5) of the Merger Regulation states that spillover effects may be present when two or more parent companies retain significant activities in the same product and geographic market as the joint venture or in a market that is downstream or upstream of, or neighboring the market in which the joint venture operates.

The Commission has most frequently found a risk of coordination when competing parents operate in the same market as the joint venture. On the other hand, when two or more parent companies are actual or potential competitors in product or geographic markets *outside* those of the joint venture, the Commission has been reluctant to find a risk of coordination. The Commission is most likely to find a risk of coordination when the joint venture is a production joint venture and the parents sell

[203] *See* Full Function Notice, footnote 3, attached as Annex 7.

[204] O.J. 1994 No. C 385/1 (not reproduced in this Guide).

[205] O.J. 1993 No. C 43/2, O.J. 2000 No. C3/2 (both not reproduced in this Guide).

the joint venture's products -- with little value added -- in competition with each other[206] (downstream spillover) or when the joint venture is little more than a joint sales agency distributing its competing parents' products[207] (upstream spillover).[208]

With respect to spillover into *neighboring* markets, the Commission is likely to find a risk of coordination in these markets only when: (i) they are closely related to the joint venture's market and share common characteristics including technology, customers, or competitors; and (ii) they are of significant economic importance compared with the joint venture's market.[209] When the parents compete in different *geographic* markets, the Commission will find a risk of coordination only when: (i) the joint venture's activities are of substantial economic importance when compared to the parents' activities in their home markets; (ii) there is "interaction" between the joint venture's and the parents' markets; and (iii) coordination between the parents would affect the Community or the EEA.[210]

Assessment of spillover effects. Article 2(4) and (5) of the Merger Regulation refers to the criteria of Article 81(1) and (3) EC and requires the Commission to take into account, in particular, "whether the coordination which is the direct consequence of the creation of the joint venture affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question".

To date, the Commission has found a risk of spillover effects in only a few cases. In *BT/AT&T*,[211] the first Phase II investigation involving Article 2(4) and (5) issues, the Commission concluded that the proposed joint venture would create a risk of coordination in the United Kingdom between British Telecom, on the one hand, and ACC (a subsidiary of AT&T) and Telewest (in which AT&T held an indirect 22% interest), on the other. In addition, the Commission found that AT&T's participation in the venture could limit the distribution of AT&T/Unisource ("AUCS") services in the United Kingdom. To resolve the Commission's concerns, AT&T provided undertakings to divest ACC UK and create greater structural separation between AT&T and Telewest. The parties also informed the Commission that AT&T would withdraw from its UK communications business and its interests in AUCS, WorldPartners, and Arcor (Germany) following a transitional period.

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206 *See, e.g., Ford/Volkswagen*, O.J. 1993 No. L 20/14.

207 *See* Commission Notice on the distinction between concentrative and cooperative joint ventures, O.J. 1994 No. C 385/1, para. 18, sixth indent (1994 JV Notice).

208 In both cases, the joint venture will often lack the "full functionality" required to bring it under the ECMR in the first place.

209 *See* 1994 JV Notice, para. 18, last indent.

210 *See* 1994 JV Notice, para. 19, second and third indent.

211 Case No. IV/JV.15, Commission decision of March 30, 1999.

In *Fujitsu/Siemens*,[212] Fujitsu and Siemens were to remain active in the manufacture of dynamic random access memory ("DRAM") semiconductor chips, financial and retail workstations, hardware maintenance services, and global account IT services. The Commission found that there was no incentive for coordination in the market for DRAMs, even though the four largest players (including Siemens) accounted for 60%-70% of the worldwide market. Market characteristics, such as lack of transparency in pricing, buyer power, and unpredictable general price trends, precluded interdependence between the four large players. For retail workstations, hardware maintenance services, and global account IT services, the parties' EEA market shares were limited. The Commission found, however, that coordination was likely in the markets for financial workstations, where the parties had combined EEA market shares of 20%-40% and a relationship of interdependence with NCR (30%-40%). Any coordination would have substantially affected competition, given the parties' market shares and the concentration of the market. To resolve these concerns, Siemens undertook to sell its retail and banking systems business.

In *Ericsson/Nokia/Psion*,[213] the parties were able to demonstrate that there was no likelihood of coordination of competitive behavior between the parents. The parents were leading manufacturers of wireless handsets, a market downstream or neighboring the market for developing and licensing operating systems for wireless information devices, in which the joint venture was active. In clearing the transaction, the Commission relied on the following arguments: (i) the cost of the operating system was a small proportion of the cost of the equipment, and the parents could not use the operating system joint venture as a means of coordinating prices on the equipment market; (ii) the joint venture was not active in the market for wireless information devices and a large number of competitors was expected to enter that market; and (iii) Nokia and Ericsson were unlikely to coordinate technical development of their products since they would retain the incentive to gain competitive advantages by adding increased functionality to the operating system.

Interestingly, in *BSkyB/Kirch PayTV*,[214] the Commission concluded that no Article 2(4) aspects were present, even though both parents were active in the market for pan-European broadcasting rights of sporting events, a market upstream from the joint venture's market. The Commission noted that there was a risk that the parents would jointly bid for pan-European sporting event rights and preferentially sell the territorial rights to each other. However, the Commission determined that the parents already had sufficient incentives to engage in such behavior outside the joint venture, and that participation in the joint venture would not facilitate coordination. Therefore, the Commission concluded that there was no causal link between the creation of the joint venture and possible coordination in the form of joint bidding.

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[212] Case No. IV/JV.22, Commission decision of September 30, 1999.

[213] Case No. COMP/JV.6, Commission decision of August 11, 1998.

[214] Case No. COMP/JV.37, Commission decision of March 21, 2000.

Based on the Commission's practice and its previous notices, one of the following outcomes is likely when potential spillover concerns are identified:

- **Clearance despite spillover concerns when parents' market shares are "de minimis".** As a general rule, when spillover effects are identified as a likely result of the joint venture, there is an automatic presumption of a restriction of competition within the meaning of Article 81(1) EC. Such a presumption may not apply, however, when any coordination between the parents would be *de minimis, i.e.,* the parents' combined market share in the spillover market does not exceed 5%-10%.[215]

- **Clearance despite spillover even when parents' market shares are significant.** As the cases discussed above demonstrate, even when the parents hold significant market shares in the same markets or in upstream, downstream or neighboring markets, the Commission will not be concerned about spillover if the parties lack market power to control prices or output. In addition to assessing the parties' market shares, the Commission will examine whether market characteristics (such as lack of transparency in pricing, buyer power, unpredictable general price trends, presence of strong competition, or a high rate of innovation in the market) indicate that the parties will be unable to coordinate competitive behavior.

- **Clearance despite spillover when the joint venture does not exacerbate the risk of collusion.** Alternatively, the Commission may find that there is no causal link between the transaction and the possible collusion. In other words, the formation of the joint venture does not increase the risk of collusion. Such a finding is more likely if the joint venture's activities: (a) are remote from the market in which the parents compete; (b) are upstream from the market in which the parents compete but constitute only a small portion of the total value of the product or service the parents produce in the downstream market; or (c) are downstream from a market in which the parents compete but represent only a small portion of demand for the product or service the parents produce.

- **Clearance when countervailing benefits of joint venture outweigh spillover effects.** In the context of cooperative joint ventures, the criteria under Article 81(3) EC may require an assessment as to whether the positive effects from the creation of the joint venture (*e.g.*, development of new products, investments that neither parent could have undertaken alone, or rationalization of production) outweigh any anti-competitive spillover effects.[216] To date, the

[215] *See Fujitsu/Siemens*, Case No. IV/JV.22, Commission decision of September 30, 1999; and the Commission Notice on agreements of minor importance which do not fall within the meaning of Article 81(1) EC, O.J. 2001 No. C 368/13, paras. 7 and 8.

[216] Under Article 81(3) EC, the prohibition of Article 81(1) EC is inapplicable to, *inter alia*, agreements that "(a) contribute to improving the production or distribution of goods or to promoting technical or economic progress, while (b) allowing consumers a fair share of the resulting benefits" and that do not "(a) impose on the undertakings concerned restrictions which

Commission has never conducted such an analysis, as it either found that spill-over concerns were absent or that they were adequately addressed by remedies.

Clearance of other restrictions in joint venture agreements under Article 2(4). Article 2(4) of the Merger Regulation refers only to "coordination of the competitive behavior of undertakings that remain independent". This appears to exclude any restrictions of competition that do not relate to spillover effects, *i.e.*, any restrictions of competition between the parents and the joint venture or between the parents and third parties, such as exclusive supply agreements between the parents and the joint venture. If such restrictions are not deemed directly related and necessary to the concentration (*see* Section 9 below) or are not exempted by a block exemption regulation, these restrictions may be assessed under Article 81(1) and (3) EC.

are not indispensable to the attainment of these objectives; and (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question".

7 Remedies

When the Commission identifies competition concerns with regard to a proposed concentration, the notifying parties may seek to remedy the concerns by committing to modify the notified concentration. The Commission may clear the transaction subject to the commitments where it finds that the transaction, following the implementation of the commitments, no longer raises competition concerns. In Phase I, this means that the modified concentration does not raise serious doubts as to its compatibility with the common market (Articles 6(2), 6(1)(b) of the Merger Regulation). In Phase II, the modified concentration must meet the "SIEC" test (Articles 8(2), 2(2) of the Merger Regulation).

The responsibility for formulating and offering commitments rests with the parties. To provide guidance on this process, in December 2000 the Commission adopted its Remedies Notice.[217] The Remedies Notice specifies the formal and substantive conditions that proposals for commitments must meet and outlines the requirements for their implementation.

7.1 General Principles

To be acceptable, the Remedies Notice requires commitments:

- To provide a lasting solution to the competition problem identified by the Commission.
- Not to create a new competition problem, either in the affected market or in another market.
- To be capable of speedy and effective implementation.
- To be sufficiently detailed to enable the Commission to assess the commitments fully.

7.2 Types of Acceptable Commitments

According to the Remedies Notice, the main types of acceptable commitments include: (i) divestiture of a business or assets; (ii) termination of exclusive agreements; and (iii) access to infrastructure/key technology.[218] The Commission has a clear preference for divestiture remedies[219] and has frequently expressed its

[217] Commission Notice on remedies acceptable under Council Regulation (EEC) No. 4064/89 and under Commission Regulation (EC) No. 447/98, O.J. 2001 No. C 68/3. The Remedies Notice continues to apply under the ECMR (although there may be some variations in future practice to deal with the new "SIEC" test), attached as Annex 13.

[218] Remedies Notice, paras. 26-29.

[219] Remedies Notice, paras. 13 and 26.

reluctance to accept behavioral commitments. However, the Court of First Instance has consistently held that as long as the commitments prevent the creation or strengthening of a dominant position, it is irrelevant whether the commitments are structural or behavioral.[220] Indeed, in its own practice, the Commission has accepted a considerable variety of commitments other than the above-mentioned three types, many of which contain behavioral elements. The types of commitments that have been accepted include:

- **Share divestitures**: complete divestiture of a minority shareholding or reduction of a shareholding in a competitor below the level of control.
- **License/brand arrangements (often in conjunction with toll manufacture agreements)**: divestiture of exclusive pharmaceutical licenses, grant of sub-licenses, grant of non-discriminatory access to non-exclusive licenses for key technologies; divestiture of brands.
- **Termination of agreements**: termination of cooperation agreements, dissolution of joint ventures, termination of non-exclusive vertical relationships.
- **Waivers**: waiver of take-off and landing slots at airports, waiver of exclusive pharmaceutical licenses; waiver of rights to vote in or receive information about competing undertakings.
- **Infrastructure commitments**: grant of non-discriminatory access to infrastructure.
- **Promises of future behavior**: promise to stop cross-subsidization, promise to stop accessing information from a competitor.

7.3 Essential Features of Divestiture Commitments

While in theory a clear-cut solution to most competition problems, a divestiture remedy is only effective in practice if it (i) transfers a commercially viable business, (ii) to a commercially viable purchaser, (iii) by means of an efficient and timely divestiture procedure. In order to achieve this, divestiture remedies must meet the requirements set out in the Remedies Notice and detailed in the Best Practice Guidelines on Divestiture Commitments of May 2003,[221] which are supplemented by Model Texts for Divestiture Commitments and for Trustee Mandates. The essential features of divestiture remedies provided for in these documents are the following:

[220] *See* Case T-102/96, *Gencor v. Commission*, [1999] ECR II-753; Case T-114/02, *BaByliss SA v. Commission*, [2003] ECR II-1279; and Case T-158/00, *ARD v. Commission*, judgment of September 30, 2003 (not yet reported in the ECR).

[221] Attached as Annex 14.

Divested business. To ensure the commercial viability of the divestiture package, the Commission generally asks the parties to divest not only individual assets, but (i) a complete pre-existing stand-alone business or (ii) a combination of tangible assets (such as R&D, production, distribution, sales and marketing activities) and intangible assets (such as IP rights and goodwill) as well as personnel, supply and sales agreements, customer lists, third party service agreements and so forth. Of two horizontally overlapping businesses, the more viable one has to be divested.[222] When the Commission fears that the business to be divested does not have adequate scale or scope to become an effective competitor, it may require divestitures that go beyond eliminating the immediate competitive overlap. To avoid discussions late in the divestiture procedure as to whether certain assets are part of the divestiture package or not, the Commission requires the parties to define the divestiture package with the same precision as would be done in a sales and purchase agreement.

Purchaser of business. Before the parties are allowed to divest the divestiture package, they need the Commission's approval of the purchaser. The Commission will normally only accept a proposed purchaser if it is "a viable existing or potential competitor, independent of and unconnected to the parties, possessing the financial resources, proven expertise and having the incentive to maintain and develop the divested business as an active competitive force in competition with the parties".[223] Before deciding whether a proposed purchaser is acceptable, the Commission may discuss with the proposed purchaser its incentives for competing with the merged entity on the basis of its business plans. Where the divestiture results in a concentration that has a Community dimension, the Commission's approval of a proposed purchaser is separate to its approval of the divestiture transaction under the Merger Regulation.

Divestiture procedure. According to the Best Practice Guidelines, the divestiture procedure may take two phases. In the first phase (the "Divestiture Period"), which starts when the Commission clears the transaction subject to the divestiture commitment, the parties have the sole responsibility for finding a suitable purchaser for the business to be divested. "If the parties do not succeed in divesting the business on their own in the Divestiture Period, then a Divestiture Trustee will be appointed with an exclusive mandate to dispose of the Divestment Business at no minimum price, in the Extended Divestiture Period. … The Commission will normally

[222] Remedies Notice, paras. 16 and 17. In several cases, the Commission has accepted an alternative commitment leaving open which of the competing businesses will be divested; *see*, e.g., *Bank Austria/Creditanstalt*, Case No. IV/M.873, Commission decision of March 11, 1997; *Akzo Nobel/Curtails*, Case No. IV/M.1182, Commission decision of June 30, 1998; *Volvo/Renault V.I.*, Case No. COMP/M.1980, Commission decision of September 1, 2000; and *Alcan/Pechiney (II)*, Case No. COMP/M.3225, Commission decision of September 29, 2003.

[223] Remedies Notice, para. 49. *TotalFina/Elf* (Case No. COMP/M.1628, Commission decision of February 9, 2000) was the first case in which the Commission formally rejected a proposed purchaser. The application for annulment of this Decision was rejected as admissible but unfounded by the Court of First Instance in its judgment of April 3, 2003 in Case T-342/00 *Petrolessence v Commission*, [2003] ECR II-1161.

consider a period of around 6 months for the Divestiture Period and an additional period of 3 to 6 months for the Extended Divestiture Period as appropriate".[224] The Divestiture Trustee is usually an investment bank.

Interim "hold separate" obligation. The Commission expects the parties to maintain the independence, economic viability, marketability and competitiveness of the business to be divested during the period between clearance of the transaction and completion of the required divestiture. The parties will be required to ensure that all relevant tangible and intangible assets of the divestiture package are maintained, pursuant to good business practice and in the ordinary course of business. The Commission regularly asks the parties to appoint a so-called "Monitoring Trustee" to monitor and report to the Commission on the discharge of the interim hold separate obligation by the merging parties. Where appropriate, the trustee may also play an active role in the fulfillment of the hold separate obligation, *e.g.*, by voting the parties' shares in the company to be divested or replacing the parties' members of the boards of such company. The Monitoring Trustee is often an accounting firm and may be, but does not have to be, the same person as the Divestiture Trustee.

Special provisions. Normally, commitments are fulfilled after implementation of the notified transaction. However, where the Commission is skeptical about whether the parties can find a suitable purchaser at all, it may require the parties "not to complete the notified transaction before having entered into a binding agreement with a purchaser for the divested business"[225] (so-called "up-front buyer" commitment). In some cases, the Commission has also drawn on another technique used by the US antitrust enforcement agencies, *i.e.,* the so-called "crown jewel" divestiture provisions.[226] Under such a provision, the merging parties agree that, if the sale of a designated asset is not achieved within a specified time period, they will divest a more valuable asset (the "crown jewel"). Through this mechanism, the parties have a strong incentive to complete the first alternative of the commitment quickly, while at the same time a second, workable and efficient alternative remains available.

7.4 Assessment of Commitment Proposals by the Commission

The Commission may accept commitments in either phase of the merger procedure. One of the most important instruments used by the Commission to determine the

[224] Best Practice Guidelines, para. 15.

[225] Remedies Notice, para. 20. *See* also *WorldCom/MCI*, Case No. IV/1069, Commission decision of July 8, 1998; *Bosch/Rexroth*, Case No. COMP/M.2060, Commission decision of December 4, 2000; *The Post Office/TPB/SPPL*, Case No. COMP/M.1915, Commission decision of March 13, 2001; *Masterfoods/Royal Canin*, Case No. COMP/M.2544, Commission decision of February 15, 2002.

[226] *See, e.g., AXA/GRE,* Case No. IV/M.1453, Commission decision of April 8, 1999; *BP Amoco/Arco*, Case No. COMP/M.1532, Commission decision of September 29, 1999; *Industri Kapital (Nordkem)/Dyno*, Case No. COMP/M.1813, Commission decision of July 12, 2000; *Nestlé/Ralston Purina*, Case No. COMP/M.2337, Commission decision of July 27, 2001.

acceptability of a proposed commitment is an extensive consultation of customers, suppliers and competitors ("market test").[227]

Phase I remedies. Since Phase I does not allow sufficient time for thorough market testing, the Commission only accepts commitments in Phase I when the competition problem is so straightforward and the remedies so clear-cut that no serious doubts remain as to their effectiveness.[228] If the parties wish to propose commitments in Phase I, they must do so within 20 working days from the date the Commission receives the notification.[229] However, the Commission is free to accept commitments even if they are offered later.[230] When the parties have offered commitments in Phase I, the total duration of Phase I increases from 25 to 35 working days from the date the Commission receives the notification.[231]

Phase II remedies. In Phase II, the Commission must clear the transaction as soon as it determines that the proposed commitments eliminate the serious doubts that caused the initiation of Phase II.[232] If the parties wish to propose commitments in Phase II, they must do so within 65 working days from the date on which Phase II proceedings were initiated.[233] If the total duration of Phase II is extended following a request by the parties or on the Commission's initiative, the deadline of 65 working days is extended accordingly.[234] If the parties submit their (first) commitment proposal after the 54th working day in Phase II, the total duration of Phase II is extended from 90 to 105 working days,[235] but the deadline of 65 working days for (subsequent)

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227 *See* Remedies Notice, paras. 35 and 42.

228 Recital 30 ECMR, and Remedies Notice, paras. 11 and 36; confirmed by the Court of First Instance in its judgment of April 3, 2003 in Case T-114/02, *BaByliss SA v. Commission*, [2003] ECR II-1279. The Commission has accepted substantial and complex commitment packages in Phase I already several times, for example in *Alcan/Pechiney (II)*, Case No. COMP/M.3225, Commission decision of September 29, 2003 (substantial divestitures) and *Hoechst/Rhône-Poulenc*, Case No. COMP/M.1378, (first) Commission decision of August 9, 1999 (interestingly, this highly complex commitment package was the first one to be explicitly substituted by another one in a subsequent Commission decision, namely the decision of January 30, 2004 *Hoechst/Rhône-Poulenc*, Case No. COMP/M.1378).

229 Article 19(1) of the Implementing Regulation, attached as Annex 2.

230 *See* Case T-114/02, *BaByliss SA v. Commission*, [2003] ECR II-1279; and Case T-119/02, *Philips v. Commission*, [2003] ECR II-1433. The Court thus grants the Commission full discretion, whereas Article 20(2) of the Implementing Regulation only envisages the acceptance of late commitments in "exceptional circumstances".

231 Article 10(1) ECMR.

232 Article 10(2) and Recital 30 ECMR. The Commission has granted early clearance in Phase II, for example in *BT/AT&T*, Case No. COMP/JV.15, Commission decision of March 30, 1999; and *Allied Signal/Honeywell*, Case No. COMP/M.1601, Commission decision of December 1, 1999.

233 Article 19(2)(1) of the Implementing Regulation.

234 Article 19(2)(2) of the Implementing Regulation.

235 Article 10(3)(1) ECMR.

commitment proposals is not extended.[236] The extension of Phase II is intended to give the Commission sufficient time for the required consultation within the Commission and with the authorities of the Member States as well as for extensive "market testing". It remains to be seen whether the new extended time periods will avoid situations where commitments are offered late, so that the Commission has to choose between accepting them for exceptional reasons[237] or rejecting them and - consequently - prohibiting the transaction.[238]

Burden of proof. According to the Remedies Notice, "[i]t is the responsibility of the Commission to show that a concentration creates or strengthens market structures which are liable to impede significantly effective competition in the common market. It is the responsibility of the parties to show that the proposed remedies, once implemented, eliminate the creation or strengthening of such a dominant position identified by the Commission".[239]

7.5 Enforceability of Commitments

When the parties submit commitments to the Commission, the Commission has to integrate them in its clearance decision as conditions and obligations in order to make them enforceable. If the Commission only "takes note" of commitments, as it sometimes does, the commitments are not legally enforceable.

Conditions. According to the Remedies Notice, "[t]he requirement for achievement of each measure that gives rise to the structural change of the market is a condition -- for example, that a business is to be divested. … Where … the situation rendering the concentration compatible with the common market does not materialize, that is, where the condition is not fulfilled, the compatibility decision no longer stands".[240] Consequently, where a condition is not fulfilled, the Commission may take interim measures to restore or maintain conditions of effective competition (Article 8(5)(b) ECMR) and may impose a fine of up to 10% of annual turnover (Article 14(2)(d) ECMR). The additional legal consequences depend on the function of the condition in the clearance decision:

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236 This follows from the fact that Article 19(2)(2) of the Implementing Regulation explicitly refers only to Article 10(3)(2) but not to Article 10(3)(1) ECMR.

237 *See, e.g. Telia/Telenor*, Case No. IV/M.1439, Commission decision of October 13, 1999; *TotalFina/Elf,* Case No. COMP/M.1628, Commission decision of February 9, 2000; *Alcoa/Reynolds*, Case No. COMP/M.1693, Commission decision of May 3, 2000.

238 *See, e.g. Airtours/First Choice*, Case No. COMP/M.1524, Commission decision of September 22, 1999; *Volvo/Scania*, Case No. COMP/M.1672, Commission decision of March 15, 2000; *MCI WorldCom/Sprint*, Case No. COMP/M.1741, Commission decision of June 28, 2000.

239 Remedies Notice, para. 6. Again, it must be noted that this statement was drafted before the adoption of the "SIEC" test.

240 Remedies Notice, para. 12. *See* also Recital 31 ECMR.

- **Conditions imposed in Phase I or early in Phase II.** In cases of contravention of a condition that was required to remove "serious doubts" as to the compatibility of the concentration with the common market (*i.e.*, in cases where the Commission granted the conditional clearance in Phase I or under Article 10(2) ECMR early in Phase II), Article 8(7)(a) ECMR provides for a (re-)entry into a Phase II that is not governed by time-limits.

- **Conditions imposed late in Phase II.** In cases of contravention of a condition that was required to avoid a prohibition of the concentration (*i.e.*, in cases where the Commission granted the conditional clearance late in Phase II), Article 8(4)(b) ECMR empowers the Commission to order the parties to dissolve the concentration.

Obligations. According to the Remedies Notice, the steps required for the implementation of structural measures, such as, *e.g.*, the appointment of a trustee, will generally be made obligations. If the parties breach an obligation attached to the clearance decision, the Commission can revoke that decision pursuant to Article 6(3)(b) or Article 8(6)(b) ECMR, and it can impose a fine of up to 10% of annual turnover and daily penalty payments of up to 5% of daily aggregate turnover, as provided in Articles 14(2)(d) and 15(1)(c) ECMR.

"Taking Note" of or Ignoring the Commitments. In several early cases the Commission did not make fulfillment of the commitments a condition or obligation of the clearance decision but merely "took note" of a commitment that the parties had offered.[241] In such cases, the Court of First Instance has held that the commitment "has no binding legal effects in the sense that a breach of its terms would not affect the ... decision in any way and would not entail its revocation".[242] Even so, the Commission has continued only to "take note" of some commitments, in particular those of a behavioral nature.[243] "Take note" commitments do impose a "moral" obligation on the parties to observe them and a failure to honor such commitments may lead to a loss of goodwill in future dealings with the Commission.

[241] *See*, *e.g.*, *Mercedes-Benz/Kässbohrer*, Case No. IV/M.477, Commission decision of February 14, 1995; *Coca-Cola/Amalgamated Beverages GB*, Case No. IV/M.794, Commission decision of January 22, 1997; *AlliedSignal/Honeywell*, Case No. COMP/M.1601, Commission decision of December 1, 1999; *BSkyB/KirchPayTV*, Case No. COMP/JV.37, Commission decision of March 21, 2000.

[242] Joined Cases T-125/97 and T-127/97, *The Coca-Cola Company v. Commission*, [2000] ECR II-1733.

[243] *See, e.g., AOL/Time Warner*, Case No. COMP/M.1845, Commission decision of October 11, 2000; *GE/Instrumentarium*, Case No. COMP/M.3083, Commission decision of September 2, 2003.

8 Restrictions Directly Related and Necessary to the Concentration

In connection with a merger or a joint venture, the parties often enter into contractual arrangements that limit their freedom of action in the market, but are essential to guarantee the economic success of the transaction. From both a procedural and a substantive standpoint, it makes little sense to assess these restrictions separately from the rest of the transaction and subject them to different rules for those purposes (*i.e.*, whether they infringe Article 81(1) EC and, in such case, whether they meet the criteria of Article 81(3) EC). The Merger Regulation recognizes this and accordingly provides: "A decision declaring the concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration" (ECMR Article 6(1)(b) subpara. (2); Article 8(1) subpara. (2) and (2) subpara. (3)).

For restrictions meeting these requirements, which have been referred to traditionally as "ancillary restrictions" or "ancillary restraints", a separate assessment under Article 81 EC is therefore not required.

Consistent with the Commission's modernization reforms with respect to Articles 81 and 82 EC, the new Merger Regulation incorporates the principle of "self-assessment". Accordingly, it states that the Commission's decision on compatibility of the concentration with the common market shall automatically cover ancillary restrictions, "without the Commission having to assess such restrictions in individual cases".[244] The Commission should make such an assessment in the decision only if a case presents a "novel and unresolved question giving rise to genuine uncertainty", *i.e.*, if the question is not covered by the Ancillary Restraints Notice or a published Commission decision.[245] The relevant notice is the Commission's 2004 "Notice on restrictions directly related and necessary to concentrations" ("Ancillary Restraints Notice").[246]

8.1 Three Basic Criteria

Under the Ancillary Restraints Notice, a restrictive arrangement must meet the following criteria to be considered "directly related and necessary to" the concentration:

[244] Recital 21 ECMR.

[245] Recital 21 ECMR. The Ancillary Restraints Notice (para. 5, footnote 2) indicates that for the purpose of this Notice, "a decision is considered to be published when it is published in the Official Journal of the European Union or when it is made available to the public on the Commission's website".

[246] Attached as Annex 11.

- **Restriction imposed on parties to concentration.** The arrangement, which does not form an integral part of the concentration, must limit the parties' freedom of action in the market (*see* Ancillary Restraints Notice, para. 10).

- **Restriction "directly related" to concentration.** The restrictive arrangement must have a direct link to the concentration and be subordinate in importance to the main object of the concentration. The mere fact that it is included in the same context or agreement as the concentration, or is entered into at the same time, is not in itself sufficient to find a direct link (*see* Ancillary Restraints Notice, para. 12).

- **Restriction "necessary" to implementation of concentration.** The restriction must be objectively necessary to the implementation of the concentration, *i.e.*, without such a restriction, the concentration could not be successfully implemented. A restriction satisfies this condition if it ensures the implementation of a concentration, or minimizes the uncertainty, cost, or completion time of the transaction (*see* Ancillary Restraints Notice, para. 13).[247] The mere fact that the parties claim that they would not have entered into the transaction unless certain restrictions were attached to it does not automatically make these restrictions necessary to the implementation of the concentration.

In practice, the third limb of the test is the most important. Building on precedents of the European Court of Justice, the Commission has applied a "rule of proportionality", under which the restriction's duration, subject-matter and geographic field of application may not exceed what is necessary to implement the concentration successfully. If alternatives are available, the parties must choose the one that is least restrictive of competition (*see* Ancillary Restraints Notice, para. 13).

8.2 Examples of Ancillary Restraints in the 2004 Notice

8.2.1 Non-Competition and Non-Solicitation Clauses

Sole control transactions. The buyer of a business will often insist that the seller undertake not to compete with the buyer or the acquired business for a specified period of time, *e.g.,* by re-establishing the business, acquiring shares in a competing company, or soliciting former employees or customers. Without such a restriction, the selling party could re-enter the market immediately after the transaction and compete with the buyer. This becomes particularly important when business success depends more on know-how and goodwill than on the ownership of production facilities. To be deemed "directly related and necessary to the concentration", a non-competition, non-solicitation or confidentiality clause must satisfy several conditions:

[247] Agreements that protect the value transferred, maintain the continuity of supply after the break-up of a former economic entity or enable the start-up of a new entity are often believed necessary to implementation of the transaction.

- The transferred business must involve know-how and/or goodwill, not only physical assets or exclusive industrial and commercial property rights (*see* Ancillary Restraints Notice, para. 21).

- The seller may bind itself, its subsidiaries, and its commercial agents, but not third parties, such as resellers or users (*see* Ancillary Restraints Notice, para. 24).

- The clause must be limited to products and services that form the economic activity of the undertaking transferred (s*ee* Ancillary Restraints Notice, para. 23).

- The clause must be geographically limited to the areas where the seller has sold goods or performed services in the past (*see* Ancillary Restraints Notice, para. 22).

- The clause must be of limited duration. The Commission's "rule of thumb" is that a *three-year period* will be acceptable when both goodwill and know-how are transferred. A *two-year period* will be acceptable when the transfer involves only goodwill. The Commission may accept longer periods in exceptional circumstances (*see* Ancillary Restraints Notice, para. 20). This standard is difficult to meet.

The Commission stresses that only the buyer requires the assurance of a non-compete clause, so that it will be able to recoup its investment. Restrictions that benefit the vendor are generally deemed not directly related and necessary to the concentration and, when they do meet that standard, are unlikely to need to be as extensive in scope or duration as those that would benefit the buyer (*see* Ancillary Restraints Notice, para. 17).[248]

Joint control transactions. The economic rationale for a clause restricting the right of a party to compete with a joint venture usually will be to assure that the party will use its best efforts to promote the joint venture rather than siphon off business opportunities for itself. Prohibitions on competition between parent undertakings and a joint venture may therefore be deemed directly related and necessary to the implementation of the concentration if the requirements set forth above for sole control transactions are met. The duration of such a non-competition clause may extend for the life of the joint venture, but not beyond its termination (*see* Ancillary Restraints Notice, para. 36).[249]

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[248] The Commission has only found such restrictions directly related and necessary to concentrations under limited circumstances, for example, in the case of a partial divestiture of a pre-existing integrated business, *see, e.g.*, *BHF/CCF/Charterhouse*, Case No. IV/M.319, Commission decision of August 30, 1993, para. 16.

[249] *See, e.g.*, *Framatone/Siemens/Cogema/JV*, Case No. COMP/M.1940, Commission decision of December 6, 2000. However, the Commission has recently treated as ancillary only those non-competition provisions that were limited to a period necessary to ensure the market entry of the

Prohibitions on competition between non-controlling parents and a joint venture are normally not considered directly related and necessary to the implementation of the concentration (*see* Ancillary Restraints Notice, para. 40).

The Commission assesses non-solicitation and confidentiality clauses in the same way as non-competition clauses, insofar as their restrictive effect does not exceed that of a non-competition clause (*see* Ancillary Restraints Notice, para. 41).

8.2.2 License Agreements

Sole control transactions. The business being sold may include indivisible know-how, patent, trademark or similar rights that the seller requires for other parts of its business. In such cases the parties usually solve the problem by having the seller grant a license to the buyer rather than transfer the rights.[250] The Commission accepts that such licenses may be (i) exclusive; (ii) unlimited in time; and (iii) limited to the field of use that corresponds to the transferred business (*see* Ancillary Restraints Notice, para. 28). Normally, the Commission will not view restrictions that protect the licensor rather than the licensee as necessary for the implementation of the concentration (*see* Ancillary Restraints Notice, para. 30). When the seller grants a license to the buyer, the transaction may impose on the seller a territorial restriction under the same conditions described above for non-competition clauses (*see* Ancillary Restraints Notice, para. 29). License agreements that are not deemed directly related and necessary may nevertheless benefit from the transfer of technology block exemption, Regulation (EC) No 772/2004.[251]

Joint control transactions. Parent entities usually grant licenses to the joint venture to transfer the technology necessary for carrying on the activities assigned to it. These license agreements may be deemed necessary for the implementation of the concentration or (equally) as an integral part of it, whether or not the license agreements are exclusive, unlimited, restricted to a particular field of use, or limited to the joint venture's contractual territory of activity (*see* Ancillary Restraints Notice, para. 42). License agreements between parents are not considered directly related and necessary to the implementation of the concentration (*see* Ancillary Restraints Notice, para. 43). Similarly, license agreements granted by the joint venture to one of the parents are deemed neither integral nor necessary for the creation of the joint

joint venture (*see, e.g.*, *Schneider/Thomson Multimedia/JV*, Case No. COMP/M.2403, Commission decision of June 13, 2001).

[250] In some cases, the buyer will acquire the technology and grant a limited license back to the seller.

[251] Commission Regulation (EC) No 772/2004 of April 27, 2004 on the application of Article 81(3) of the EC Treaty to categories of technology transfer agreements, O.J. 2004 No. L 123/11.

venture.[252] License agreements that are not deemed directly related and necessary may nevertheless fall under Regulation (EC) No 772/2004.

8.2.3 Purchase and Supply Agreements

Sole control transactions. Purchase and supply agreements serve to ensure the continuity of supply or sales of products after the transfer of operations to the purchaser. The Commission's Notice as a general rule requires that such agreements must: (i) be limited to pre-existing purchase/supply relationships; (ii) be non-exclusive; (iii) provide for fixed quantities; and (iv) be limited to a "transitional period" (*see* Ancillary Restraints Notice, paras. 33 and 34).[253] Unlike non-competition clauses, purchase and supply agreements may benefit either the purchaser or the seller, although the Commission's practice has emphasized protection of the purchaser (*see* Ancillary Restraints Notice, para. 32).

Joint control transactions. Purchase and supply arrangements in the context of joint ventures are subject to the same rules as those in sole control transactions (*see* Ancillary Restraints Notice, para. 44). In practice, however, the Commission's treatment of such arrangements in the context of joint ventures has been more lenient than in the context of sole control transactions. In particular, the Commission has repeatedly accepted restrictions exceeding five years[254] and providing for exclusive dealing or purchasing.[255]

8.2.4 Restrictions in Bidding Consortium Cases

The formation of a bidding consortium inevitably requires preliminary agreements among the joint acquirers. Under the Merger Regulation, agreements to abstain from submitting separate offers for the same target company or otherwise acquiring control of the target may be deemed directly related and necessary to the implementation of

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[252] However, in the case where intellectual property rights have been transferred by a parent to the joint venture, the license from the joint venture to this parent may be considered directly related and necessary to the implementation of the concentration under the same conditions as in the case of the sale of business (*see* Ancillary Restraints Notice, para. 43).

[253] The Ancillary Restraints Notice (para. 33) only refers to a limit of five years, which can be accepted where purchase or supply obligations aim at guaranteeing the quantities supplied prior to the concentration.

[254] *See*, *e.g.*, *Solvay-LaPorte/Interox*, Case No. IV/M.197, Commission decision of April 30, 1992, para. 51; *CCIE/GTE*, Case No. IV/M.258, Commission decision of September 25, 1992, para. 11; *Elf Atochem/Rohm and Haas*, Case No. IV/M.160, Commission decision of July 28, 1992, para. 9(e); *Mannesmann/Vallourec/Ilva*, Case No. IV/M.315, Commission decision of January 31, 1994, para. 8.

[255] *See, e.g., Harrisons & Crosfield/AKZO*, Case No. IV/M.310, Commission decision of April 29, 1993, paras. 10-13 and 38; *Rhône-Poulenc Chimie/SITA*, Case No. IV/M.266, Commission decision of November 26, 1992, para. 29; *Pilkington-Techint/SIV*, Case No. IV/M.358, Commission decision of December 21, 1993, para. 7; *Mannesmann/Hoesch*, Case No. IV/M.222, Commission decision of November 12, 1992, paras. 10-12.

the concentration. This will also be the case when the joint bidders intend to divide among themselves the target company or its assets and accordingly agree on how to divide the acquired assets (*see* Ancillary Restraints Notice, paras. 14 to 16).

8.2.5 Pre-Closing Restrictions

When there is an appreciable delay between signing and closing, the seller and/or the business to be sold will often undertake not to enter into any transactions outside of the ordinary course of business without the buyer's consent. The Commission's practice generally has been to view such arrangements, which serve to preserve the full value of the transferred business for the buyer, as directly related and necessary to the implementation of the concentration.[256] In some recent cases, however, the Commission has concluded that these clauses cannot be considered necessary and directly related to the implementation of the concentration, because they relate to the period before the acquisition of control.[257] Given the short-term duration of such restrictions and the fact that the underlying transaction has been approved, however, the Commission's conclusion has generally been seen as having little or no consequence.

8.3 Procedural Considerations

Parties' self-assessment. As explained above, the new Merger Regulation no longer allows the notifying parties to request the Commission to assess ancillary restraints under the Merger Regulation. The clearance decision will not specify which restraints are directly related and necessary to the implementation of the concentration. Accordingly, under the new Merger Regulation, following the trend towards modernizing the application of Article 81 EC, the parties must self-assess whether the restraint is ancillary. Ultimately, disputes in this respect may have to be resolved before national courts.[258]

Commission assessment. Only in exceptional circumstances will the Commission be forced to assess whether or not any restriction is directly related to, and necessary for, the implementation of the concentration. At the request of the notifying parties,[259]

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[256] *See*, *e.g.*, *UAP/Provincial*, Case No. IV/M.512, Commission decision of November 7, 1994, para. 13; *Hercules/Betzdearborn*, Case No. IV/M.1304, Commission decision of October 5, 1998, para. 33; *MMP/AFP*, Case No. IV/M.1442, Commission decision of March 3, 1999, para. 17; and *BAT/Rothmans*, Case No. IV/M.1415, Commission decision of March 17, 1999, para. 30.

[257] *See*, *e.g.*, *Artemis/Sanofi Beauté*, Case No. IV/M.1533, Commission decision of June 21, 1999, para. 15. *See* Ancillary Restraints Notice, para. 14.

[258] Ancillary Restraints Notice, para. 2.

[259] The Ancillary Restraints Notice does not specify how the parties should make that request. Presumably, the request should be made formally with the notification of the concentration. If the parties are of the view that their intended concentration contains ancillary restraints which they feel raise novel and unresolved issues, they would be well advised to bring these issues to the attention of the Commission during the pre-notification discussions.

the Commission will consider ancillary restraints in cases presenting novel or unresolved questions giving rise to genuine uncertainty. According to the Merger Regulation, a "case presents a novel or unresolved question giving rise to genuine uncertainty if the question is not covered by the relevant Commission notice in force or a published Commission decision".[260]

When the Commission does not agree that the "notified" restrictions are directly related and necessary to the implementation of the concentration, the parties can avoid a negative decision on this point[261] by either (i) amending their agreement to accommodate the Commission's concerns; or (ii) withdrawing their request. Whether the Commission formally rejects the qualification of ancillary restraint, or the parties withdraw their request for the Commission to make that assessment, the notifying parties will have to determine for themselves whether the restrictions fall within the scope of the prohibition of Article 81(1) EC and, if so, whether they fulfill the conditions of Article 81(3) EC. In any event, clearance of the remainder of the transaction is not jeopardized if the Commission concludes that a given restriction cannot be classified as directly related and necessary to the implementation of the concentration.

[260] Recital 21 ECMR.

[261] It is assumed that such decision, in conformity with the practice prior to the 2001 Notice, would be included in the Commission's decision to declare the concentration compatible with the common market. In this regard, the Ancillary Restraints Notice (para. 6) only provides that "subject to confidentiality requirements, the Commission will provide adequate publicity as regards such assessments that further develop the principles set out in this Notice".

PART FOUR: INTERACTION WITH OTHER REGULATORY REGIMES

Mergers and other concentrations often have effects in more than one jurisdiction, particularly in Europe, where Member State economies are increasingly linked. Consequently, whenever the ECMR applies, the issue arises as to whether the Member States can still apply their national merger control laws or other regulatory rules. The ECMR addresses this issue in a number of contexts, each of which is discussed below.

9 Applicability of Member State Laws

9.1 The "One-Stop-Shop" Principle

The ECMR is based on the fundamental principle of the "one-stop-shop", under which "no Member State shall apply its national legislation on competition to any concentration that has a Community dimension" (Article 21(3) ECMR). All transactions that fall under the ECMR are immune from review under national merger control law, regardless of whether national merger control law would otherwise require notification. As a corollary, transactions that do not have a Community dimension are not notifiable under the ECMR and, in principle, are reviewed, if at all, by the national competition authorities where the national notification thresholds are met.

9.2 Referrals to Member States

Aim of the referral process. By introducing fixed turnover criteria, and thus a "bright line" test for the allocation of jurisdiction, the ECMR ensures a degree of legal certainty for merging companies. However, the attribution of responsibility to the Commission on that basis can lead to mergers with national implications not being handled by the authority best positioned to investigate. To address this, the ECMR complements its "bright line" jurisdictional scheme with a number of mechanisms through which cases that meet the ECMR's turnover thresholds can be referred by the Commission to Member States, upon request and provided certain criteria are met.[262]

The two primary mechanisms for referral to Member States are set out in Articles 4 and 9 ECMR. Article 9 allows Member States to request that a merger already before the Commission be re-allocated to them. This provision has been substantially amended under the new Merger Regulation to bring increased flexibility to the referral mechanism, while at the same time ensuring that the fundamental principles of "one-stop-shop" and legal certainty are preserved to the fullest extent possible.

[262] Given the importance of legal certainty, the Commission stresses that referrals under the ECMR remain a derogation from the general rules which determine jurisdiction based on objectively determinable turnover thresholds, *see* Commission Case Referral Notice, para. 7, attached as Annex 16.

Additionally, Article 4(4) ECMR now allows the merging parties to trigger the referral mechanism during their pre-notification contacts with the Commission. This allows the merging parties to ascertain as early as possible where jurisdiction for review of their transaction ultimately will lie and alleviates some of the disadvantages associated with post-notification referrals under Article 9 ECMR.

Pre-notification referrals upon request by the merging parties (Article 4(4) ECMR). Article 4(4) ECMR gives the parties to a transaction the ability to request that the Commission refer a concentration, in whole or in part, to a Member State where that concentration "may significantly affect competition in a market within a Member State which presents all the characteristics of a distinct market". The request can be made during the pre-notification contacts between the merging parties and the Commission and is made by means of a reasoned submission (as provided for in Form RS).[263]

For the referral to be granted, the merging parties must substantiate that the concentration may significantly affect competition within the distinct national market. However, the parties obviously are not required to demonstrate that the effects of the transaction will be detrimental to competition on that market.[264]

The Article 4(4) ECMR referral procedure. Merging parties are encouraged to contact the Commission at the earliest possible stage, for instance, as soon as they have good faith intention to merge or as soon as the potential acquirer has announced publicly its intention to submit a bid.

The Commission must transmit any reasoned request it receives under Article 4(4) ECMR to the affected Member States "without delay" -- which normally should mean within one working day.[265] Member States then have 15 working days to determine whether they agree with the request or not (silence on the part of a Member State meaning that it agrees to the referral). Last, the Commission has a further 10 working days to decide whether the concentration should be submitted to the Member State that has agreed to handle it (the "positive silence" presumption also applies here). In total, the decision whether to refer a case or not on the basis of pre-notification contacts must be taken within 25 working days from receipt of the Form RS by the Commission.

A referral request submitted by the parties may be rejected by the Member State that has been requested to handle the case (Article 4(4) ECMR), in which case the concentration will be handled by the Commission. The Commission itself can reject

[263] Referrals of concentrations from the Commission to Member States in the context of pre-notification contacts must be made in an efficient manner, avoiding to the greatest extent possible that the same concentration is later subject to a subsequent referral after its notification, *see* Recital 14 ECMR. Form RS is attached as Annex 5.

[264] *See* Recital 16 ECMR.

[265] In its Case Referral Notice, the Commission states at para. 56 that it "will endeavor to transmit [reasoned requests] within one working day from the day they are received or issued".

the parties' request for a referral, and thus continue to assert jurisdiction over the case. While the decision whether to refer a concentration will be taken on a case-by-case basis, transactions that are likely to affect competition in national or local geographic markets and whose effects are confined to a single Member State will be better candidates for referral than transactions that may have substantial cross-border effects or whose effects will be felt in more than one Member State. Conversely, where a concentration may require coordinated investigations and remedial action by more than one Member State, the Commission will be more likely to retain jurisdiction over the entirety of the case.[266]

The confidentiality obligations provided for under the ECMR apply to communications between the Commission and Member States in the context of the referral procedure under Article 4(4) ECMR.

Post-notification referrals upon request by Member States (Article 9 ECMR). A Member State may request the Commission to yield jurisdiction over a concentration that comes within the Commission's jurisdiction where that concentration:

- threatens significantly to affect competition in a market within a Member State which presents all the characteristics of a distinct market (Article 9(2)(a) ECMR); or

- affects competition in a market within a Member State, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market (Article 9(2)(b) ECMR).

The Article 9 ECMR referral procedure. An Article 9 ECMR referral request may be made by a Member State on its own motion or upon invitation from the Commission. Member States must make a request within 15 working days from receipt by the Member State of a copy of Form CO. Once it has verified that the conditions set under Article 9 ECMR are met, the Commission has 35 working days from the date of notification to issue a decision on the post-notification referral request made by the Member State, or 65 working days from the date of notification if it has initiated Phase II proceedings.

As was the case under the previous merger regime, even if the Commission concludes in relation to a request under the first ground for referral (that a distinct national market exists on which the concentration threatens significantly to affect competition), it still has the discretion to handle the case itself (Article 9(3) ECMR). In determining whether to keep the case, the Commission will consider the general principles of case allocation, such as the effect upon legal certainty, the focus of any likely impact on competition and administrative resources involved.

[266] *See* Case Referral Notice, para. 22.

By contrast, if the conditions pertaining to the second ground for referral (effect on a distinct, non-substantial market in a Member State) are met, the Commission has no discretion, but instead has an obligation to refer the case to the requesting Member State.

However, the Commission's discretion under Article 9(2)(a) ECMR is not without bounds. The Court of First Instance has had the opportunity to review the referral mechanism set up under this section in two judgments: *Royal Philips* and *Cableuropa*.[267] In both cases, the Court of First Instance limited the discretion afforded to the Commission to make referrals under the first ground for referral by noting that the provision should be read in conjunction with Article 9(8) ECMR, so that the Commission is entitled to refer the case to a Member State only if it is satisfied that the Member State authority will take the necessary measures to safeguard or restore effective competition on the market concerned. The assessment by the Commission must take place at the time the referral measure is adopted, regardless of potential negative ex-post competition consequences deriving from such referral.

The confidentiality obligations provided for under the ECMR apply to communications between the Commission and Member States in the context of the referral procedure under Article 9(2) ECMR.

Member State jurisdiction after the referral decision. Where a referral is requested, the Commission may decide to refer the whole or only part of the case (retaining jurisdiction over the parts that have not been allocated to the affected Member State(s)). Where a case (or part of a case) is referred to a Member State, that Member State will apply its national competition law to the case.

A Member State to which a concentration has been referred must decide upon the case without "undue delay" (Article 9(6) ECMR). In particular, within 45 days of the Commission referral (or of the date on which notification was made to the Member State), the Member State must inform the merging parties of the results of its preliminary competitive assessment and whether it intends to take further action.

If the Commission refers the matter to a Member State, that Member State may take only those measures strictly necessary to safeguard or restore effective competition on the market concerned (Article 9(8) ECMR).

[267] Case T-119/02, *Royal Philips Electronics v. Commission*, [2003] ECR II-1433, and Joined Cases T-346/02 and T-347/02, *Cableuropa and Aunacable v. Commission,* judgment of September 30, 2003, not yet reported in the ECR. In *Cableuropa*, the Court of First Instance accepted that, for as long as the obligations imposed by the duty of close cooperation of Article 10 EC and by Article 9 ECMR are complied with, national authorities have the ability to conduct their own appraisal on the basis of national competition rules and are not bound by the provisional competition assessment made by the Commission in its referral decision.

Significance of referrals in practice. By March 31, 2004 the Commission had granted 57 Article 9 referrals, of which only one took place during Phase II.[268] In the first years of practice under the old ECMR, the Commission demonstrated a marked reluctance to refer cases to national authorities. Recently, however, it has been more willing to refer cases, most probably as a response both to "subsidiarity" pressure within the Community and to its ever-increasing case-load under the ECMR.[269] In 33 cases, the Commission made partial referrals where it deemed distinct markets to exist and maintained jurisdiction over the remainder of the transaction. Germany has been the most active Member State in requesting referrals, with the United Kingdom and France also making extensive use of Article 9.

9.3 Legitimate Interests Exception

Another mechanism by which Member States may review concentrations covered by the ECMR is the "legitimate interests" exception. Under this exception, Member States "may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law" (Article 21(4) ECMR). Article 21(4) ECMR operates in tandem with the Commission's review of the concentration on competition grounds. The Commission will maintain liaisons with the Member State authorities examining the transaction in light of their legitimate interests.[270] Article 21(4) ECMR gives Member States the ability to prohibit a concentration or impose additional conditions or requirements. However, the Commission takes the view that Article 21(4) ECMR does not give a Member State the ability to use "legitimate interests" to clear a concentration prohibited by the Commission on competition grounds.[271]

The Regulation automatically recognizes three legitimate interests: (i) public security protection; (ii) plurality of the media; and (iii) prudential rules (Article 21(4) ECMR, subpara. (3)). In order to come within the "legitimate interest" exception, the measures described in the Member State's request must be aimed at the concentration itself -- general ongoing regulatory activity is not precluded by the ECMR and thus does not require the Commission's recognition of a legitimate interest.[272]

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[268] *TotalFina/Elf*, Case No. COMP/M.1628, Commission decision of November 26, 1999.

[269] The Commission referred 13 cases to national authorities in 2002 and nine cases in 2003. In previous years, Commission referrals to national authorities ranged from one to seven per year, with the average being three.

[270] *See, e.g.*, *Sun Alliance/Royal Insurance*, Case No. IV/M.759, Commission decision of June 18, 1996.

[271] *See* Commission Note regarding Article 21of Council Regulation (EEC) 4064/89.

[272] *See EDF/London Electricity,* Case No. COMP/M.1346, Commission decision of January 27, 1999.

Member States may assert other public interests, in which case they must communicate the details of those interests to the Commission, which will assess their compatibility with the general principles and other provisions of Community law (Article 21(4) ECMR, subpara. (3)). To date, Member States have made only a few formal requests concerning such "other" public interests.[273] The Commission has clarified the scope of the application of this exception on a number of occasions. In the *BSCH/Champalimaud* concentration, which the Portuguese Minister of Finance blocked by administrative decision in 1999, the Commission determined that the Portuguese authorities based their action on the protection of national and strategic interests that could not be regarded as legitimate interests within the meaning of Article 21 ECMR.[274] In another case involving the Portuguese government, the Commission made it clear that protecting the development of shareholding structures in companies undergoing privatization with a view to reinforcing the corporate capacity and the efficiency of the national production apparatus is not a legitimate interest under Article 21(4) ECMR.[275]

The Commission also emphasized in the Portuguese cases that Member States are obliged to notify to the Commission any measures that they intend to adopt on the basis of the "legitimate interests" exception, where those measures are not expressly mentioned by Article 21(4) ECMR or where there is some doubt as to whether the measures are really covered by one of the exceptions listed in that article.[276]

9.4 National Security Interests

[273] *See, e.g., Lyonnaise des Eaux/Northumbrian Water*, Case No. IV/M.567, Commission decision of December 21, 1995 (rules governing the UK water industry); *EDF/London Electricity*, Case No. COMP/M.1346, Commission decision of January 27, 1999 (rules governing the UK electricity industry).

[274] The Commission ordered the Portuguese authorities to suspend the measures they had taken to block the *BSCH/Champalimaud* concentration (Case COMP/M.1616) and subsequently approved the concentration under the ECMR on August 3, 1999. The Commission opened two formal infringement procedures against the Republic of Portugal for not respecting its suspension decision and eventually submitted the cases to the European Court of Justice. In November 1999, the parties notified a new concentration, canceling the one previously notified, whereby BSCH acquired control of Banca Totta i Acores and Banco de Credito Predial Portugues (Case COMP/M.1799), which both belonged to the Champalimaud group. The Commission authorized the new concentration on January 11, 2000 and the Portuguese authorities confirmed they did not oppose the new concentration on January 19, 2000. The Commission's infringement procedures and court action have been dropped.

[275] *See Secil/Holderbank/Cimpor*, Case No. COMP/M.2054, Commission decision of November 22, 2000, where the Commission found that the measures taken by the Portuguese authorities to block a takeover bid for cement company Cimpor Cimentos de Portugal SGPS (which was in the process of privatization) by the Portuguese company Secil and the Swiss company Holderbank were incompatible with Article 21 ECMR. The Commission decision was upheld by the European Court of Justice in Case C-42/01, *Portugal v. Commission*, judgment of June 22, 2004, not yet reported in the ECR.

[276] *BSCH/Champalimaud*, Case No. IV/M.1616, Commission decision of July 20, 1999.

Article 296(1)(b) EC authorizes Member States to take such measures as are considered "necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material." Member States can invoke this article to remove all or part of a concentration in a defense related industry from the Commission's jurisdiction under the Merger Regulation.[277] The Member State can then examine the concentration, or the relevant part thereof, under its national rules, taking into account the relevant security interests.

Where the concentration concerns exclusively "arms, munitions and war material", the Member State may exempt the entire transaction from Commission review. Where the concentration concerns both defense and civilian products, the Member State can exempt the defense aspects from notification under the ECMR.[278] Where the concentration involves dual-use products (products with both civil and military uses), the Member State can exempt the defense applications of those products from review under the ECMR.[279]

Although there is no formal process set down in the EC Treaty, a Member State applies the derogation in Article 296(1)(b) by requiring the parties to the concentration not to notify the merger (or certain aspects thereof) to the Commission and then informing the Commission that it has invoked Article 296(1)(b) and explaining why the derogation is applicable. The Commission applies four criteria to determine whether it accepts the invocation of Article 296(1)(b):

- The products covered by the exemption fall within the scope of a list of "arms, munitions and war material" prepared and maintained by the Council.
- The invocation of Article 296(1)(b) is necessary for the protection of the essential security interests of the Member State.
- There is no spillover effect on the parties' non-military activities.

[277] *See* E. Mahr, D. Waters, "Member State Derogation Rights in the Area of Defense Mergers", Global Competition Review, Volume 6, Issue 3, March 2003, p. 12.

[278] *See British Aerospace/GEC Marconi*, Case No. IV/M.1438, Commission decision of June 25, 1999.

[279] *See British Aerospace/Lagardère SCA*, Case No. IV/M.820, Commission decision of September 23, 1996.

- The merger does not impact significantly on suppliers and sub-contractors of the undertakings concerned or consumers (such as defense ministries) in other Member States.

If the Commission does not accept the Member State's invocation of Article 296(1)(b), it can require the parties to provide the necessary information to allow it to examine also the defense aspects of the concentration.[280]

[280] *See SAAB/Celsius*, Case No. COMP/M.1797, Commission decision of February 4, 2000.

10 Cooperation with Other Merger Control Authorities

10.1 Cooperation in the Framework of the EEA Agreement

EEA Agreement. The European Economic Area ("EEA") Agreement is a multilateral agreement concluded between the European Community, its Member States, and three of the four remaining European Free Trade Area ("EFTA") countries -- Iceland, Norway, and Liechtenstein (Switzerland did not ratify the EEA Agreement). The Agreement applies EC competition and merger control principles to the EFTA States which have ratified the EEA agreement and establishes the EFTA Surveillance Authority ("ESA") to supervise implementation of these principles. In practice, therefore, in many cases a Commission merger control decision covers the 28 countries in the EEA.

Commission jurisdiction. Under the EEA Agreement, the Commission retains sole authority to review concentrations with a Community dimension.[281] If the turnover thresholds are met within the Community, the Commission will review the transaction regardless of the turnover in the EFTA States. Like EU Member States (*see* Section 9.1 above), the ratifying EFTA States are preempted from applying their national competition laws to concentrations with a Community dimension.

ESA jurisdiction. The ESA has jurisdiction over concentrations only when (i) the thresholds of the Regulation are not met; and (ii) the concentration has an "EFTA dimension", *i.e.*, the parties' combined worldwide turnover exceeds € 5 billion and each of at least two of the parties have a turnover of € 250 million in the geographic area comprising Iceland, Norway and Liechtenstein. In the rare case where the ESA has jurisdiction, application of the national competition laws of the EFTA States is precluded, but application of the merger control rules of EC Member States is not.

Cooperation cases. Protocol 24 of the EEA Agreement provides for a cooperation procedure between the Commission and the ESA when a transaction significantly affects competitive conditions in the EFTA countries, although the Commission retains sole jurisdiction. This cooperative procedure becomes effective in cases when, *inter alia*:

- the combined turnover of the undertakings in the territory of the EFTA States accounts for 25% or more of their total EEA turnover;
- each of at least two undertakings concerned has a turnover exceeding € 250 million in the territory of the EFTA States; or

[281] Article 57(2)(a) EEA Agreement.

- the concentration is likely to create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the territories of the EFTA States or a substantial part thereof.

The cooperation procedure provides, *inter alia*, for the forwarding of copies of the notification and the most important documents to the ESA and EFTA Member States, and a right for the ESA and EFTA Member States to be represented at oral hearings and at meetings of the Advisory Committee.

10.2 EC-United States Cooperation Agreement

In 1991, the EC and the US entered into a cooperation agreement concerning the application of their competition laws. After the European Court of Justice nullified the original agreement,[282] the agreement was re-adopted by a 1995 joint decision of the Council and the Commission.[283] As regards mergers, the agreement provides, *inter alia*, for:

- Notification when a party to the transaction (or a direct or ultimate parent company) is incorporated within the territory of the other party to the agreement.

- Exchange of information when the information is non-confidential or when the parties to the transaction have waived their rights of confidentiality, most often in connection with transactions that are reviewed in both jurisdictions.

- Cooperation and coordination of the parties' enforcement activities, where it is mutually useful.

- "Traditional comity", *i.e.*, accommodation of the other party's important interests when such interests would be adversely affected by a party's antitrust enforcement.

- "Positive comity", which allows one party to request that the other party's competition authorities initiate enforcement action; those authorities must then inform the requesting party of any relevant action taken.

Although the "positive comity" provisions have not been invoked in merger cases, there have been several merger cases in which the US or EC authorities have relied on each other to ensure the effectiveness of remedies within their respective territories.[284]

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[282] *See* Case C-327/91 *French Republic v. Commission*, [1994] ECR I-3641.

[283] O.J. 1995 No. L 95/47.

[284] In 1998, the EC and the US entered into a second cooperation agreement reinforcing the "positive comity" provisions. The 1998 agreement establishes cooperative procedures through which one jurisdiction will defer to the other for enforcement with respect to anti-competitive

Another component of EC-US cooperation is a 1999 administrative arrangement by which the European Commission and the US agencies agreed to facilitate reciprocal attendance by their officials at certain stages of their respective antitrust proceedings -- oral hearings of the Commission and final "pitch meetings" with agency decision makers in the US -- subject to the consent of the parties under investigation.

Finally, on October 30, 2002, the US agencies and the European Commission adopted "Guidelines on Best Practices" on cooperation in merger investigations that they will seek to apply when they review the same merger transaction simultaneously.

The Best Practices aim at:

- Promoting "fully-informed decision-making on the part of both sides' authorities" and minimizing "the risk of divergent outcomes on both sides of the Atlantic".
- Facilitating "coherence and compatibility in remedies" and enhancing "the efficiency of their respective investigations".
- Reducing "burdens on merging parties and third parties".
- Increasing "the overall transparency of the merger review process".

According to the Best Practices, in order to make their cooperation more complete and effective, the agencies intend essentially to promote coordination on timing, to share publicly available information and, consistent with their confidentiality obligations, to discuss their respective analysis at various stages of the investigation or the necessity of remedial measures.

Cooperation between the Commission and the US competition authorities has been extensive. The notifying parties have also usually waived their rights of confidentiality to facilitate the exchange of information.[285] In *Halliburton/Dresser*, the Commission went so far as to clear the transaction with reference to the commitments the parties

activities that occur principally and are more effectively addressed in the other jurisdiction. However, the procedure does not apply to mergers subject to pre-merger filing requirements.

[285] Examples of cases that have reportedly involved successful cooperation include *WorldCom/MCI*, Case No. IV/M.1069, Commission decision of July 8, 1998 (O.J. 1999 No. L 116/1); *BP Amoco/Arco*, Case No. COMP/M.1532, Commission decision of September 29, 1999 (O.J. 2001 No. L 18/1); *Allied Signal/Honeywell*, Case No. COMP/M.1601, Commission decision of December 1, 1999 (O.J. 2001 No. L 152/1); *MCI WorldCom/Sprint*, Case No. COMP/M.1741, Commission decision of June 28, 2000 (O.J. 2003 No. L 300/1); *United Airlines/US Airways*, Case No. COMP/M.2041, Commission decision of January 12, 2001; *Bayer/Aventis*, Case No. COMP/M.2547, Commission decision of April 17, 2002 (O.J. 2004 No. L 107/1); *Compaq/HP*, Case No. COMP/M.2609, Commission decision of January 31, 2002; *Pfizer/Pharmacia*, Case No. COMP/M.2922, Commission decision of February 27, 2003; *GE/Instrumentarium*, Case No. COMP/M.3083, Commission decision of 2 September 2003 (O.J. 2004 No. L 109/1); *Oracle/Peoplesoft*, Case No. COMP/M.3216, pending.

offered to the US Department of Justice.[286] In turn, in *KLM/Air France* the Department of Justice cleared the transaction in reliance on the parties' undertakings to the Commission in relation to transatlantic routes.[287] There have been exceptions. For example, the *Boeing/McDonnell Douglas* merger[288] was a rare instance in which bilateral cooperation failed to avert inconsistent outcomes in a transaction reviewed by both jurisdictions. After a second serious divergence four years later in *GE/Honeywell,*[289] antitrust officials on both sides of the Atlantic moved to strengthen their cooperation, bilaterally and in multilateral *fora* such as the International Competition Network. However, this cooperation does not guarantee uniform outcomes, in view of the different geographic focuses and the possibility of divergent substantive assessments.

The Commission also cooperates with competition authorities in other jurisdictions when international transactions affect both the Community and other regions.

10.3 Other Bilateral Agreements: EC-Canada and EC-Japan Cooperation Agreements

In June 1999, the EC and Canada entered into a cooperation agreement concerning the application of their competition laws. Likewise, the EC and Japan entered into a cooperation agreement in July 2003. These agreements are largely modeled along the lines of the EC-US cooperation agreement.

In relation to mergers, the agreements with Canada and Japan provide for mutual notification when a party to the transaction (or a direct or ultimate parent company) is incorporated within the territory of the other party to the agreement.[290] They also foresee the exchange of information between the parties (subject to applicable rules on confidentiality) and provide for the possibility of co-ordination of enforcement activities. In relation to comity, the agreements include both positive and traditional comity provisions, contemplating that one party may request the other to take

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[286] *Halliburton/Dresser*, Case No. IV/M.1140, Commission decision of July 6, 1998.

[287] *Air France/KLM*, Case No. COMP/M.3280, Commission decision of February 11, 2004. *See* J. Bruce McDonald, deputy assistant attorney general, Antitrust Division, US Department of Justice, "Transportation Update: Remarks to the ABA Section of Antitrust Law Transportation Industry Committee", Speech at the ABA 2004 Annual Spring meeting, Washington, DC.

[288] *Boeing/McDonnell Douglas*, Case No. IV/M.877, Commission decision of July 30, 1997.

[289] *General Electric/Honeywell,* Case No. COMP/M.2220, Commission decision of July 3, 2001.

[290] In 2002, four cases were notified by the European Commission to the Canadian authorities: *Blackstone/CDPQ/ DeTeks NRW*, Case No. COMP/M.2652; *Blackstone/CDPQ/DeTeks BW*, Case No. COMP/M. 2643; *Alcan/PlexPac*, Case No. COMP/M.3049; and *Magna/Donnelly*, Case No. COMP/M.2901, *see* 2002 Report from the Commission to the Council and the European Parliament on the application of the agreements between the European Communities and the Government of the United States of America and the Government of Canada regarding the application of their competition laws, COM(2003)500 final.

enforcement action and obliging each party to take into account the important interests of the other party in the context of its enforcement activities.

10.4 Multilateral Efforts

The clash between the EC and US antitrust authorities in *GE/Honeywell* (and earlier, in the *Boeing/McDonnell Douglas* merger) provides an instance in which bilateral cooperation and the sharing of largely common antitrust goals have proved insufficient to bring about convergent results. The case left a wake of uncertainty in the business community and has led to renewed efforts on both sides of the Atlantic to try to bridge the international gap. Such efforts have been directed towards increased transparency in bilateral cooperation, but also towards multilateral *fora*, where different views on merger policy can be debated.

In this respect, the International Competition Network ("ICN"), actively promoted by the EC and US antitrust authorities, was launched in October 2001. The broad objectives of the ICN are to develop a stable framework under which antitrust authorities from both developed and developing countries can address issues of common interest, and to promote international convergence and cooperation on both substance and procedure. The ICN's Merger Review Working Group has developed non-binding guiding principles for merger notification and review, as well as "Best Practice" recommendations for merger notification procedures. As part of its transparency efforts, the ICN posts on its website the ICN members' merger-related materials, as well as templates explaining the way merger review is conducted in each of the national jurisdictions.[291]

The work undertaken by the ICN adds to the competition related activities of other multilateral *fora*, including the Organization for Economic Cooperation and Development ("OECD"). The EC had been the leading proponent of incorporating competition law provisions in the framework of the World Trade Organization ("WTO") agreements,[292] although the WTO eventually determined not to negotiate competition rules as part of the "Doha Round".[293]

All these *fora* facilitate procedural and substantive convergence in antitrust enforcement, although they do not involve cooperation in, nor do they normally examine, individual cases.

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[291] www.internationalcompetitionnetwork.org.

[292] *See, e.g.*, Mario Monti, "A global competition policy?", Speech of September 17, 2002: "In the absence of a specialized world-wide competition organization and in view of the complementary relationship between trade and competition policy, the World Trade Organization is the institution best suited to house an International Competition Agreement".

[293] Decision adopted by the WTO General Council on August 1, 2004, WT/L/579, August 2, 2004.

11 Overview of Member State Merger Control Regimes

When a transaction does not satisfy the jurisdictional prerequisites of the Merger Regulation, it may still be subject to review under the national merger control rules of the Member States. This section outlines the most important procedural features of the merger control regimes in place in the 25 Member States of the EU, as expanded on 1 May 2004 and the EEA States.

Mandatory and voluntary pre-merger notification. With the exception of the United Kingdom, Liechtenstein and Luxembourg, pre-merger notification is mandatory in the 25 Member States and the EEA countries. The UK has a voluntary notification regime; Luxembourg and Liechtenstein have no specific merger regime in place.

Thresholds for notification. Notification thresholds vary from Member State to Member State. National merger regimes tend to use a combination of worldwide and national turnover thresholds. However, Estonia and Poland require notification on the basis of worldwide turnover; while Belgium, Greece, Iceland, Italy, Latvia, Lithuania, Malta, Norway, Portugal, Slovenia and Spain refer only to national turnover. Greece, Latvia, Portugal, Slovenia and Spain (as well as the UK) also have market share thresholds. The following tables provide an overview of national notification requirements in the EU and EEA Member States:[294]

Overview of Mandatory Notification Thresholds[295]	
Austria	(i) The combined worldwide turnover of the parties is € 300 million or more; and (ii) the combined turnover in Austria of the parties is € 15 million or more; and (iii) each of at least two of the parties has a worldwide turnover of € 2 million or more.
Belgium	(i) The combined turnover in Belgium of the parties exceeds € 40 million; and (ii) each of at least two of the parties has turnover in Belgium of € 15 million or more.
Cyprus	(i) At least one of the parties operates in Cyprus; and

[294] These tables are intended to provide only a general overview of the regulatory regimes addressed and do not reflect all of the specificities of the various national merger control laws covered. Any assessment of the notifiability of a specific transaction requires more detailed analysis, taking into account the factual circumstances of the transaction and any relevant national law provisions.

[295] This table contains an overview of the thresholds as of June 2004. Notification thresholds are generally assessed on the basis of the last financial year prior to the concentration. In this table, conversions into Euro are at the average 2003 exchange rate from the relevant local currency into Euro.

Overview of Mandatory Notification Thresholds[295]	
	(ii) the worldwide turnover of at least two of the parties to the transaction exceeds CYP 2 million (approx. € 3.4 million); and (iii) the parties have aggregate turnover in Cyprus of at least CYP 2 million (approx. € 3.4 million).
Czech Republic	(i) The aggregate net turnover of the parties in the Czech Republic exceeds CZK 1.5 billion (approx. € 47 million) and the aggregate net turnover of each of at least two of the parties in the Czech Republic exceeds CZK 250 million (approx. € 7.9 million); or (ii) the Czech turnover of the target or of at least one of the parties to a merger exceeds CZK 1.5 billion (approx. € 47 million) and the worldwide turnover of another of the parties exceeds CZK 1.5 billion (approx. € 47 million).
Denmark	(i) The parties' combined aggregate turnover in Denmark exceeds DKK 3.8 billion (€ 511.6 million) and each of at least two of the parties has an aggregate turnover in Denmark above DKK 300 million (€ 40.4 million); or (ii) the aggregate turnover in Denmark of at least one party exceeds DKK 3.8 billion (€ 511.6 million) and the aggregate worldwide turnover of at least one other party exceeds DKK 3.8 billion (€ 511.6 million).
Estonia	(i) The aggregate worldwide turnover of the parties exceeds EEK 500 million (approx. € 32 million); and (ii) the worldwide turnover of each of at least two of the parties exceeds EEK 100 million (approx. € 6.4 million); and (iii) the business activities of at least one of the merging undertakings or of the whole or part of the undertaking of which control is acquired is conducted in Estonia.
Finland	(i) The combined worldwide turnover of the parties is above € 350 million; and (ii) the turnover of each of at least two of the parties in Finland exceeds € 20 million.
France	(i) The combined aggregate worldwide turnover of the parties exceeds € 150 million; and (ii) the turnover in France of each of at least two of the parties exceeds € 50 million.
Germany	(i) The combined worldwide turnover of the parties exceeds € 500 million; and (ii) at least one party has German turnover exceeding € 25 million; unless (a) one party is an independent company with a worldwide turnover of less than € 10 million; or (b) the relevant market is in operation for at least five years and had a sales volume of less than € 15 million in the last calendar year.
Greece	(i) The parties have a combined aggregate turnover in Greece of € 150 million or more and each of at least two of the parties have an aggregate turnover in Greece of € 15 million or more; or (ii) the combined market share of the parties is at least 35% in any relevant

Overview of Mandatory Notification Thresholds[295]	
	market in Greece.
Hungary	(i) The combined turnover of the parties in Hungary exceeds HUF 10 billion (approx. € 39.6 million); and (ii) either (a) the net turnover of the party being acquired, the business unit coming under control, or each of at least two of the parties being merged exceeds HUF 500 million (approx. € 2 million) or (b) the net turnover of the party being acquired, the business unit coming under control, or each of at least two of the parties being merged would exceed HUF 500 million (approx. € 2 million) if any concentrations implemented by the merging party, the acquiring party or other participants with net turnover greater than HUF 500 million (approx. € 2 million) within the last two years were taken into account.
Iceland	(i) The total Icelandic turnover of the parties (including group companies) exceeds ISK 1 billion (approx. € 11.6 million); and (ii) each of at least two of the parties to the merger has Icelandic turnover exceeding ISK 50 million (approx. € 578,500).
Ireland	(i) The worldwide turnover of each of at least two of the parties is € 40 million or more; and (ii) the turnover in the Republic of Ireland of at least one of the parties is € 40 million or more; and (iii) each of at least two of the parties carries on business in the Republic of Ireland.
Italy	(i) The combined aggregate turnover in Italy of the parties is above € 411 million; or (ii) the aggregate turnover in Italy of the target is above € 41 million.
Latvia	(i) The combined Latvian turnover of the parties during the year preceding the transaction was not less than 25 million lati (approx. € 39 million); or (ii) at least one of the merger participants was in a dominant position (at least 40% market share) in the relevant market prior to the merger.
Lithuania	(i) The aggregate Lithuanian turnover of the parties is more than LTL 30 million (approx. € 8.7 million); and (ii) the aggregate Lithuanian turnover of each of at least two of the parties is more than LTL 5 million (approx. € 1.4 million).
Malta	The combined turnover of the parties in Malta exceeds Lm 750,000 (approx. € 1.8 million).
The Netherlands	(i) The parties' combined worldwide turnover is at least € 113.45 million; and (ii) the turnover in The Netherlands of each of at least two of the parties exceeds € 30 million.

Overview of Mandatory Notification Thresholds[295]	
Norway	(i) The combined turnover of the parties in Norway is at least NOK 20 million (approx. € 2.5 million); and (ii) each of at least two of the parties has a turnover in Norway in excess of NOK 5 million (approx. € 625,000).
Poland	(i) The combined worldwide turnover of the parties in the year prior to the notification exceeds € 50 million, unless (ii) the target's turnover in Poland did not exceed € 10 million in either of the two years preceding the transaction, provided that the concentration does not lead to the creation or strengthening of a dominant position.
Portugal	(i) The combined turnover in Portugal of the parties exceeds € 150 million and each of at least two of the parties had a turnover in Portugal above € 2 million; or (ii) the transaction leads to the creation or reinforcement of a market share exceeding 30% in any relevant market in Portugal.
Slovak Republic	(i) The combined world-wide turnover of all undertakings concerned exceeds SKK 1.2 billion (approx. € 29 million) and at the same time each of at least two undertakings concerned generated a turnover in the Slovak Republic of at least SKK 360 million (approx. € 8.7 million); or (ii) at least one undertaking concerned generated a turnover in the Slovak Republic of at least SKK 500 million (approx. € 12 million) and at the same time at least one of other remaining undertakings concerned generated a worldwide turnover of at least SKK 1.2 billion (approx. € 29 million).
Slovenia	(i) The combined aggregate annual turnover of the parties (including affiliates) is more than SIT 8 billion (approx. € 34.7 million) in the Slovenian market in each of the last two years; or (ii) the parties (including affiliates) have a combined market share of more than 40% in a substantial part of the Slovenian market concerned.
Spain	(i) The combined turnover in Spain of the parties exceeds € 240.4 million and at least two of the parties have a turnover in Spain above € 60.1 million; or (ii) the transaction leads to the creation or strengthening of a market share of 25% or more in any relevant market in Spain.
Sweden	(i) The combined worldwide turnover of the parties exceeds SEK 4 billion (approx. € 436.6 million); and (ii) at least two of the parties have a turnover in Sweden above SEK 100 million (approx. € 11 million).

Voluntary Notification Thresholds	
United Kingdom	(i) The UK turnover of the target exceeds GBP 70 million (approx. € 101.2 million); or (ii) the parties' share of supply or consumption of products or services in the UK exceeds 25%. For this purpose, there must be an increment to the share, however small.
Liechtenstein	No merger notification requirements.
Luxembourg	No merger notification requirements.

Suspensory effect. As under the Merger Regulation, national merger control regimes that provide for mandatory notification generally prohibit implementation of the notified transaction before approval from the relevant competition authority. In special circumstances, however, this suspensory effect may be lifted before the final decision.

In countries like Italy there is no automatic standstill obligation, but in any given case the competition authority may order the suspension of the concentration until approval is granted.

In Norway, notification is initially made by way of standard form, but within a period of fifteen days the authority can require a complete form to be submitted. The transaction can be closed within the initial fifteen day period, but cannot be closed once the authority requires a complete form notification. If the transaction has already closed and the authority finds that it poses competition concerns, it may require remedial measures to be taken.

In the UK, the parties may close if the second phase investigation process has not been opened. The second phase process can be opened either at the end of the first phase review or within four months of the transaction closing or being made public. Once the second phase process opens, closing is suspended. If the merger has already closed, normally the parties will be required to ensure that no further integration steps are taken pending investigation.

Deadlines for notification. Most national merger control regimes that provide for mandatory notification require notification within a certain time limit following conclusion of the agreement, announcement of a public bid, the acquisition of a controlling interest or some other act bringing about a concentration.

Jurisdictions requiring notification within one week/seven days of these events are: Cyprus, the Czech Republic,[296] Denmark, Estonia, Finland, Iceland, Lithuania, Malta,

[296] For public bids, notification is required prior to the publication of the bid.

Portugal and Slovenia. Belgium, Hungary, Ireland and the Slovak Republic require notification within one month/thirty days from these events. Greece has a ten-day notification deadline.

Austria, France, Germany, Italy, Latvia, The Netherlands, Poland, Spain and Sweden do not set a notification deadline, but simply require notification before putting the concentration into effect. Norway requires notification no later than the time of conclusion of the final agreement or acquisition of control. Since the UK is a voluntary system, there is no deadline.

Duration of procedure. Most national merger control systems provide for a two-phase procedure, similar to that under the Merger Regulation. In the first phase, the competition authority decides within a relatively short time frame whether an in-depth, second-phase investigation is necessary (sometimes by a different decision-making body) or whether the transaction can be approved without further review. The standard time periods (usually running from after receipt of a complete notification) are as follows:[297]

	Preliminary Phase	**Second Phase**[298]
Austria	6 - 7 weeks	5 months
Belgium	45 days	60 days
Cyprus	1 month	4 months
Czech Republic	30 days	4 months[299]
Denmark	1 month	2 months
Estonia	30 days	4 months
Finland	1 month	3 months
France	5 weeks	4 months
Germany	1 month	3 months
Greece	1 month	2 months
Hungary	45 days	75 days
Iceland	30 days	3 months
Ireland	1 month	3 months
Italy	30 days[300]	45 days

[297] These standard time periods provide a general indication of the timeframe for clearance only. Most jurisdictions allow for the time periods to be varied in certain instances, for example in order for the parties to respond to information requests.

[298] Time limit as of the beginning of the second phase, with the exception of Austria and Norway, where the time limit is measured from receipt of notification.

[299] In case of a tender offer, the deadline of the competent authority for rendering a decision is two months (in total).

[300] 15 days in case of public bids.

	Preliminary Phase	Second Phase[298]
Latvia	60 days	
Lithuania	1 month	3 months
Malta	6 weeks	4 months
The Netherlands	4 weeks	13 weeks
Norway	25 working days[301]	100 working days
Poland	2 months	
Portugal	30 working days	90 working days
Slovak Republic	60 working days	90 working days
Slovenia	30 days	90 days
Spain	1 month	3 months
Sweden	25 working days	3 months
United Kingdom	30 - 40 working days	24 weeks[302]

[301] This period runs from receipt of a complete notification, which must be requested by the authority within 15 days of submission of a standard form notification.

[302] The 24 week period can be extended once by up to 8 weeks.

ANNEX 1

MERGER REGULATION

Council Regulation (EC) No. 139/2004 of January 20, 2004
on the control of concentrations between undertakings,
O.J. 2004 No. L 24/1

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(Acts whose publication is obligatory)

COUNCIL REGULATION (EC) No 139/2004
of 20 January 2004
on the control of concentrations between undertakings
(the EC Merger Regulation)

(Text with EEA relevance)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 83 and 308 thereof,

Having regard to the proposal from the Commission [1],

Having regard to the opinion of the European Parliament [2],

Having regard to the opinion of the European Economic and Social Committee [3],

Whereas:

(1) Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings [4] has been substantially amended. Since further amendments are to be made, it should be recast in the interest of clarity.

(2) For the achievement of the aims of the Treaty, Article 3(1)(g) gives the Community the objective of instituting a system ensuring that competition in the internal market is not distorted. Article 4(1) of the Treaty provides that the activities of the Member States and the Community are to be conducted in accordance with the principle of an open market economy with free competition. These principles are essential for the further development of the internal market.

(3) The completion of the internal market and of economic and monetary union, the enlargement of the European Union and the lowering of international barriers to trade and investment will continue to result in major corporate reorganisations, particularly in the form of concentrations.

(4) Such reorganisations are to be welcomed to the extent that they are in line with the requirements of dynamic competition and capable of increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living in the Community.

(5) However, it should be ensured that the process of reorganisation does not result in lasting damage to competition; Community law must therefore include provisions governing those concentrations which may significantly impede effective competition in the common market or in a substantial part of it.

(6) A specific legal instrument is therefore necessary to permit effective control of all concentrations in terms of their effect on the structure of competition in the Community and to be the only instrument applicable to such concentrations. Regulation (EEC) No 4064/89 has allowed a Community policy to develop in this field. In the light of experience, however, that Regulation should now be recast into legislation designed to meet the challenges of a more integrated market and the future enlargement of the European Union. In accordance with the principles of subsidiarity and of proportionality as set out in Article 5 of the Treaty, this Regulation does not go beyond what is necessary in order to achieve the objective of ensuring that competition in the common market is not distorted, in accordance with the principle of an open market economy with free competition.

(7) Articles 81 and 82, while applicable, according to the case-law of the Court of Justice, to certain concentrations, are not sufficient to control all operations which may prove to be incompatible with the system of undistorted competition envisaged in the Treaty. This Regulation should therefore be based not only on Article 83 but, principally, on Article 308 of the Treaty, under which the Community may give itself the additional powers of action necessary for the attainment of its objectives, and also powers of action with regard to concentrations on the markets for agricultural products listed in Annex I to the Treaty.

[1] OJ C 20, 28.1.2003, p. 4.
[2] Opinion delivered on 9.10.2003 (not yet published in the Official Journal).
[3] Opinion delivered on 24.10.2003 (not yet published in the Official Journal).
[4] OJ L 395, 30.12.1989, p. 1. Corrected version in OJ L 257, 21.9.1990, p. 13. Regulation as last amended by Regulation (EC) No 1310/97 (OJ L 180, 9.7.1997, p. 1). Corrigendum in OJ L 40, 13.2.1998, p. 17.

(8) The provisions to be adopted in this Regulation should apply to significant structural changes, the impact of which on the market goes beyond the national borders of any one Member State. Such concentrations should, as a general rule, be reviewed exclusively at Community level, in application of a 'one-stop shop' system and in compliance with the principle of subsidiarity. Concentrations not covered by this Regulation come, in principle, within the jurisdiction of the Member States.

(9) The scope of application of this Regulation should be defined according to the geographical area of activity of the undertakings concerned and be limited by quantitative thresholds in order to cover those concentrations which have a Community dimension. The Commission should report to the Council on the implementation of the applicable thresholds and criteria so that the Council, acting in accordance with Article 202 of the Treaty, is in a position to review them regularly, as well as the rules regarding pre-notification referral, in the light of the experience gained; this requires statistical data to be provided by the Member States to the Commission to enable it to prepare such reports and possible proposals for amendments. The Commission's reports and proposals should be based on relevant information regularly provided by the Member States.

(10) A concentration with a Community dimension should be deemed to exist where the aggregate turnover of the undertakings concerned exceeds given thresholds; that is the case irrespective of whether or not the undertakings effecting the concentration have their seat or their principal fields of activity in the Community, provided they have substantial operations there.

(11) The rules governing the referral of concentrations from the Commission to Member States and from Member States to the Commission should operate as an effective corrective mechanism in the light of the principle of subsidiarity; these rules protect the competition interests of the Member States in an adequate manner and take due account of legal certainty and the 'one-stop shop' principle.

(12) Concentrations may qualify for examination under a number of national merger control systems if they fall below the turnover thresholds referred to in this Regulation. Multiple notification of the same transaction increases legal uncertainty, effort and cost for undertakings and may lead to conflicting assessments. The system whereby concentrations may be referred to the Commission by the Member States concerned should therefore be further developed.

(13) The Commission should act in close and constant liaison with the competent authorities of the Member States from which it obtains comments and information.

(14) The Commission and the competent authorities of the Member States should together form a network of public authorities, applying their respective competences in close cooperation, using efficient arrangements for information-sharing and consultation, with a view to ensuring that a case is dealt with by the most appropriate authority, in the light of the principle of subsidiarity and with a view to ensuring that multiple notifications of a given concentration are avoided to the greatest extent possible. Referrals of concentrations from the Commission to Member States and from Member States to the Commission should be made in an efficient manner avoiding, to the greatest extent possible, situations where a concentration is subject to a referral both before and after its notification.

(15) The Commission should be able to refer to a Member State notified concentrations with a Community dimension which threaten significantly to affect competition in a market within that Member State presenting all the characteristics of a distinct market. Where the concentration affects competition on such a market, which does not constitute a substantial part of the common market, the Commission should be obliged, upon request, to refer the whole or part of the case to the Member State concerned. A Member State should be able to refer to the Commission a concentration which does not have a Community dimension but which affects trade between Member States and threatens to significantly affect competition within its territory. Other Member States which are also competent to review the concentration should be able to join the request. In such a situation, in order to ensure the efficiency and predictability of the system, national time limits should be suspended until a decision has been reached as to the referral of the case. The Commission should have the power to examine and deal with a concentration on behalf of a requesting Member State or requesting Member States.

(16) The undertakings concerned should be granted the possibility of requesting referrals to or from the Commission before a concentration is notified so as to further improve the efficiency of the system for the control of concentrations within the Community. In such situations, the Commission and national competition authorities should decide within short, clearly defined time limits whether a referral to or from the Commission ought to be made, thereby ensuring the efficiency of the system. Upon request by the undertakings concerned, the Commission should be able to refer to a Member State a concentration with a Community dimension which may significantly affect competition in a market within that Member State presenting all the characteristics of a distinct market; the undertakings concerned should not, however, be required to demonstrate that the effects of the concentration would be detrimental to competition. A concentration should not be referred from the Commission to a Member State which has expressed its disagreement to such a referral. Before notification to national authorities, the undertakings concerned should also be able to request that a concentration without a Community dimension which is capable of being reviewed under the national competition laws of at least three Member States be referred to

the Commission. Such requests for pre-notification referrals to the Commission would be particularly pertinent in situations where the concentration would affect competition beyond the territory of one Member State. Where a concentration capable of being reviewed under the competition laws of three or more Member States is referred to the Commission prior to any national notification, and no Member State competent to review the case expresses its disagreement, the Commission should acquire exclusive competence to review the concentration and such a concentration should be deemed to have a Community dimension. Such pre-notification referrals from Member States to the Commission should not, however, be made where at least one Member State competent to review the case has expressed its disagreement with such a referral.

(17) The Commission should be given exclusive competence to apply this Regulation, subject to review by the Court of Justice.

(18) The Member States should not be permitted to apply their national legislation on competition to concentrations with a Community dimension, unless this Regulation makes provision therefor. The relevant powers of national authorities should be limited to cases where, failing intervention by the Commission, effective competition is likely to be significantly impeded within the territory of a Member State and where the competition interests of that Member State cannot be sufficiently protected otherwise by this Regulation. The Member States concerned must act promptly in such cases; this Regulation cannot, because of the diversity of national law, fix a single time limit for the adoption of final decisions under national law.

(19) Furthermore, the exclusive application of this Regulation to concentrations with a Community dimension is without prejudice to Article 296 of the Treaty, and does not prevent the Member States from taking appropriate measures to protect legitimate interests other than those pursued by this Regulation, provided that such measures are compatible with the general principles and other provisions of Community law.

(20) It is expedient to define the concept of concentration in such a manner as to cover operations bringing about a lasting change in the control of the undertakings concerned and therefore in the structure of the market. It is therefore appropriate to include, within the scope of this Regulation, all joint ventures performing on a lasting basis all the functions of an autonomous economic entity. It is moreover appropriate to treat as a single concentration transactions that are closely connected in that they are linked by condition or take the form of a series of transactions in securities taking place within a reasonably short period of time.

(21) This Regulation should also apply where the undertakings concerned accept restrictions directly related to, and necessary for, the implementation of the concentration. Commission decisions declaring concentrations compatible with the common market in application of this Regulation should automatically cover such restrictions, without the Commission having to assess such restrictions in individual cases. At the request of the undertakings concerned, however, the Commission should, in cases presenting novel or unresolved questions giving rise to genuine uncertainty, expressly assess whether or not any restriction is directly related to, and necessary for, the implementation of the concentration. A case presents a novel or unresolved question giving rise to genuine uncertainty if the question is not covered by the relevant Commission notice in force or a published Commission decision.

(22) The arrangements to be introduced for the control of concentrations should, without prejudice to Article 86(2) of the Treaty, respect the principle of non-discrimination between the public and the private sectors. In the public sector, calculation of the turnover of an undertaking concerned in a concentration needs, therefore, to take account of undertakings making up an economic unit with an independent power of decision, irrespective of the way in which their capital is held or of the rules of administrative supervision applicable to them.

(23) It is necessary to establish whether or not concentrations with a Community dimension are compatible with the common market in terms of the need to maintain and develop effective competition in the common market. In so doing, the Commission must place its appraisal within the general framework of the achievement of the fundamental objectives referred to in Article 2 of the Treaty establishing the European Community and Article 2 of the Treaty on European Union.

(24) In order to ensure a system of undistorted competition in the common market, in furtherance of a policy conducted in accordance with the principle of an open market economy with free competition, this Regulation must permit effective control of all concentrations from the point of view of their effect on competition in the Community. Accordingly, Regulation (EEC) No 4064/89 established the principle that a concentration with a Community dimension which creates or strengthens a dominant position as a result of which effective competition in the common market or in a substantial part of it would be significantly impeded should be declared incompatible with the common market.

(25) In view of the consequences that concentrations in oligopolistic market structures may have, it is all the more necessary to maintain effective competition in such markets. Many oligopolistic markets exhibit a healthy degree of competition. However, under certain circumstances, concentrations involving the elimination of important competitive constraints that the merging parties had exerted upon each other, as well as a reduction of competitive pressure on the remaining competitors, may, even in the absence of a likelihood of coordination between the members of the oligopoly, result in a significant impediment to effective competition. The Community courts have, however, not to date expressly interpreted Regulation (EEC) No 4064/89 as requiring concentrations giving rise to such non-coordinated effects to be declared incompatible with the common market. Therefore, in the interests of legal certainty, it should be made clear that this Regulation permits effective control of all such concentrations by providing that any concentration which would significantly impede effective competition, in the common market or in a substantial part of it, should be declared incompatible with the common market. The notion of 'significant impediment to effective competition' in Article 2(2) and (3) should be interpreted as extending, beyond the concept of dominance, only to the anti-competitive effects of a concentration resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the market concerned.

(26) A significant impediment to effective competition generally results from the creation or strengthening of a dominant position. With a view to preserving the guidance that may be drawn from past judgments of the European courts and Commission decisions pursuant to Regulation (EEC) No 4064/89, while at the same time maintaining consistency with the standards of competitive harm which have been applied by the Commission and the Community courts regarding the compatibility of a concentration with the common market, this Regulation should accordingly establish the principle that a concentration with a Community dimension which would significantly impede effective competition, in the common market or in a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position, is to be declared incompatible with the common market.

(27) In addition, the criteria of Article 81(1) and (3) of the Treaty should be applied to joint ventures performing, on a lasting basis, all the functions of autonomous economic entities, to the extent that their creation has as its consequence an appreciable restriction of competition between undertakings that remain independent.

(28) In order to clarify and explain the Commission's appraisal of concentrations under this Regulation, it is appropriate for the Commission to publish guidance which should provide a sound economic framework for the assessment of concentrations with a view to determining whether or not they may be declared compatible with the common market.

(29) In order to determine the impact of a concentration on competition in the common market, it is appropriate to take account of any substantiated and likely efficiencies put forward by the undertakings concerned. It is possible that the efficiencies brought about by the concentration counteract the effects on competition, and in particular the potential harm to consumers, that it might otherwise have and that, as a consequence, the concentration would not significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position. The Commission should publish guidance on the conditions under which it may take efficiencies into account in the assessment of a concentration.

(30) Where the undertakings concerned modify a notified concentration, in particular by offering commitments with a view to rendering the concentration compatible with the common market, the Commission should be able to declare the concentration, as modified, compatible with the common market. Such commitments should be proportionate to the competition problem and entirely eliminate it. It is also appropriate to accept commitments before the initiation of proceedings where the competition problem is readily identifiable and can easily be remedied. It should be expressly provided that the Commission may attach to its decision conditions and obligations in order to ensure that the undertakings concerned comply with their commitments in a timely and effective manner so as to render the concentration compatible with the common market. Transparency and effective consultation of Member States as well as of interested third parties should be ensured throughout the procedure.

(31) The Commission should have at its disposal appropriate instruments to ensure the enforcement of commitments and to deal with situations where they are not fulfilled. In cases of failure to fulfil a condition attached to the decision declaring a concentration compatible with the common market, the situation rendering the concentration compatible with the common market does not materialise and the concentration, as implemented, is therefore not authorised by the Commission. As a consequence, if the concentration is implemented, it should be treated in the same way as a non-notified concentration implemented without authorisation. Furthermore, where the Commission has already found that, in the absence of the condition, the concentration would be incompatible with the common market, it should have the power to directly order the dissolution of the concentration, so as to restore the situation prevailing prior to the implementation of the concentration. Where an obligation attached to a decision declaring the concentration compatible with the common market is not fulfilled, the Commission should be able to revoke its decision. Moreover, the Commission should be able to impose appropriate financial sanctions where conditions or obligations are not fulfilled.

(32) Concentrations which, by reason of the limited market share of the undertakings concerned, are not liable to impede effective competition may be presumed to be compatible with the common market. Without prejudice to Articles 81 and 82 of the Treaty, an indication to this effect exists, in particular, where the market share of the undertakings concerned does not exceed 25 % either in the common market or in a substantial part of it.

(33) The Commission should have the task of taking all the decisions necessary to establish whether or not concentrations with a Community dimension are compatible with the common market, as well as decisions designed to restore the situation prevailing prior to the implementation of a concentration which has been declared incompatible with the common market.

(34) To ensure effective control, undertakings should be obliged to give prior notification of concentrations with a Community dimension following the conclusion of the agreement, the announcement of the public bid or the acquisition of a controlling interest. Notification should also be possible where the undertakings concerned satisfy the Commission of their intention to enter into an agreement for a proposed concentration and demonstrate to the Commission that their plan for that proposed concentration is sufficiently concrete, for example on the basis of an agreement in principle, a memorandum of understanding, or a letter of intent signed by all undertakings concerned, or, in the case of a public bid, where they have publicly announced an intention to make such a bid, provided that the intended agreement or bid would result in a concentration with a Community dimension. The implementation of concentrations should be suspended until a final decision of the Commission has been taken. However, it should be possible to derogate from this suspension at the request of the undertakings concerned, where appropriate. In deciding whether or not to grant a derogation, the Commission should take account of all pertinent factors, such as the nature and gravity of damage to the undertakings concerned or to third parties, and the threat to competition posed by the concentration. In the interest of legal certainty, the validity of transactions must nevertheless be protected as much as necessary.

(35) A period within which the Commission must initiate proceedings in respect of a notified concentration and a period within which it must take a final decision on the compatibility or incompatibility with the common market of that concentration should be laid down. These periods should be extended whenever the undertakings concerned offer commitments with a view to rendering the concentration compatible with the common market, in order to allow for sufficient time for the analysis and market testing of such commitment offers and for the consultation of Member States as well as interested third parties. A limited extension of the period within which the Commission must take a final decision should also be possible in order to allow sufficient time for the investigation of the case and the verification of the facts and arguments submitted to the Commission.

(36) The Community respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union ([1]). Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles.

(37) The undertakings concerned must be afforded the right to be heard by the Commission when proceedings have been initiated; the members of the management and supervisory bodies and the recognised representatives of the employees of the undertakings concerned, and interested third parties, must also be given the opportunity to be heard.

(38) In order properly to appraise concentrations, the Commission should have the right to request all necessary information and to conduct all necessary inspections throughout the Community. To that end, and with a view to protecting competition effectively, the Commission's powers of investigation need to be expanded. The Commission should, in particular, have the right to interview any persons who may be in possession of useful information and to record the statements made.

(39) In the course of an inspection, officials authorised by the Commission should have the right to ask for any information relevant to the subject matter and purpose of the inspection; they should also have the right to affix seals during inspections, particularly in circumstances where there are reasonable grounds to suspect that a concentration has been implemented without being notified; that incorrect, incomplete or misleading information has been supplied to the Commission; or that the undertakings or persons concerned have failed to comply with a condition or obligation imposed by decision of the Commission. In any event, seals should only be used in exceptional circumstances, for the period of time strictly necessary for the inspection, normally not for more than 48 hours.

(40) Without prejudice to the case-law of the Court of Justice, it is also useful to set out the scope of the control that the national judicial authority may exercise when it authorises, as provided by national law and as a precautionary measure, assistance from law enforcement authorities in order to overcome possible opposition on the part of the undertaking against an inspection, including the affixing of seals, ordered by Commission decision. It results from the case-law that the national judicial authority may in particular ask of the Commission further information which it needs to carry out its control and in the absence of which it could refuse the authorisation. The case-law also confirms the competence of the national courts to control the application of national rules governing the implementation of coercive measures. The competent authorities of the Member States should cooperate actively in the exercise of the Commission's investigative powers.

([1]) OJ C 364, 18.12.2000, p. 1.

(41) When complying with decisions of the Commission, the undertakings and persons concerned cannot be forced to admit that they have committed infringements, but they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against themselves or against others the existence of such infringements.

(42) For the sake of transparency, all decisions of the Commission which are not of a merely procedural nature should be widely publicised. While ensuring preservation of the rights of defence of the undertakings concerned, in particular the right of access to the file, it is essential that business secrets be protected. The confidentiality of information exchanged in the network and with the competent authorities of third countries should likewise be safeguarded.

(43) Compliance with this Regulation should be enforceable, as appropriate, by means of fines and periodic penalty payments. The Court of Justice should be given unlimited jurisdiction in that regard pursuant to Article 229 of the Treaty.

(44) The conditions in which concentrations, involving undertakings having their seat or their principal fields of activity in the Community, are carried out in third countries should be observed, and provision should be made for the possibility of the Council giving the Commission an appropriate mandate for negotiation with a view to obtaining non-discriminatory treatment for such undertakings.

(45) This Regulation in no way detracts from the collective rights of employees, as recognised in the undertakings concerned, notably with regard to any obligation to inform or consult their recognised representatives under Community and national law.

(46) The Commission should be able to lay down detailed rules concerning the implementation of this Regulation in accordance with the procedures for the exercise of implementing powers conferred on the Commission. For the adoption of such implementing provisions, the Commission should be assisted by an Advisory Committee composed of the representatives of the Member States as specified in Article 23,

HAS ADOPTED THIS REGULATION:

Article 1

Scope

1. Without prejudice to Article 4(5) and Article 22, this Regulation shall apply to all concentrations with a Community dimension as defined in this Article.

2. A concentration has a Community dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 000 million; and

(b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

3. A concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2 500 million;

(b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;

(c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and

(d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

4. On the basis of statistical data that may be regularly provided by the Member States, the Commission shall report to the Council on the operation of the thresholds and criteria set out in paragraphs 2 and 3 by 1 July 2009 and may present proposals pursuant to paragraph 5.

5. Following the report referred to in paragraph 4 and on a proposal from the Commission, the Council, acting by a qualified majority, may revise the thresholds and criteria mentioned in paragraph 3.

Article 2

Appraisal of concentrations

1. Concentrations within the scope of this Regulation shall be appraised in accordance with the objectives of this Regulation and the following provisions with a view to establishing whether or not they are compatible with the common market.

In making this appraisal, the Commission shall take into account:

(a) the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outwith the Community;

(b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

2. A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market.

3. A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.

4. To the extent that the creation of a joint venture constituting a concentration pursuant to Article 3 has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria of Article 81(1) and (3) of the Treaty, with a view to establishing whether or not the operation is compatible with the common market.

5. In making this appraisal, the Commission shall take into account in particular:

— whether two or more parent companies retain, to a significant extent, activities in the same market as the joint venture or in a market which is downstream or upstream from that of the joint venture or in a neighbouring market closely related to this market,

— whether the coordination which is the direct consequence of the creation of the joint venture affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question.

Article 3

Definition of concentration

1. A concentration shall be deemed to arise where a change of control on a lasting basis results from:

(a) the merger of two or more previously independent undertakings or parts of undertakings, or

(b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.

2. Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

(a) ownership or the right to use all or part of the assets of an undertaking;

(b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

3. Control is acquired by persons or undertakings which:

(a) are holders of the rights or entitled to rights under the contracts concerned; or

(b) while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving therefrom.

4. The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1(b).

5. A concentration shall not be deemed to arise where:

(a) credit institutions or other financial institutions or insurance companies, the normal activities of which include transactions and dealing in securities for their own account or for the account of others, hold on a temporary basis securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking or provided that they exercise such voting rights only with a view to preparing the disposal of all or part of that undertaking or of its assets or the disposal of those securities and that any such disposal takes place within one year of the date of acquisition; that period may be extended by the Commission on request where such institutions or companies can show that the disposal was not reasonably possible within the period set;

(b) control is acquired by an office-holder according to the law of a Member State relating to liquidation, winding up, insolvency, cessation of payments, compositions or analogous proceedings;

(c) the operations referred to in paragraph 1(b) are carried out by the financial holding companies referred to in Article 5(3) of Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies [1] provided however that the voting rights in respect of the holding are exercised, in particular in relation to the appointment of members of the management and supervisory bodies of the undertakings in which they have holdings, only to maintain the full value of those investments and not to determine directly or indirectly the competitive conduct of those undertakings.

Article 4

Prior notification of concentrations and pre-notification referral at the request of the notifying parties

1. Concentrations with a Community dimension defined in this Regulation shall be notified to the Commission prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest.

Notification may also be made where the undertakings concerned demonstrate to the Commission a good faith intention to conclude an agreement or, in the case of a public bid, where they have publicly announced an intention to make such a bid, provided that the intended agreement or bid would result in a concentration with a Community dimension.

For the purposes of this Regulation, the term 'notified concentration' shall also cover intended concentrations notified pursuant to the second subparagraph. For the purposes of paragraphs 4 and 5 of this Article, the term 'concentration' includes intended concentrations within the meaning of the second subparagraph.

2. A concentration which consists of a merger within the meaning of Article 3(1)(a) or in the acquisition of joint control within the meaning of Article 3(1)(b) shall be notified jointly by the parties to the merger or by those acquiring joint control as the case may be. In all other cases, the notification shall be effected by the person or undertaking acquiring control of the whole or parts of one or more undertakings.

3. Where the Commission finds that a notified concentration falls within the scope of this Regulation, it shall publish the fact of the notification, at the same time indicating the names of the undertakings concerned, their country of origin, the nature of the concentration and the economic sectors involved. The Commission shall take account of the legitimate interest of undertakings in the protection of their business secrets.

4. Prior to the notification of a concentration within the meaning of paragraph 1, the persons or undertakings referred to in paragraph 2 may inform the Commission, by means of a reasoned submission, that the concentration may significantly affect competition in a market within a Member State which presents all the characteristics of a distinct market and should therefore be examined, in whole or in part, by that Member State.

The Commission shall transmit this submission to all Member States without delay. The Member State referred to in the reasoned submission shall, within 15 working days of receiving the submission, express its agreement or disagreement as regards the request to refer the case. Where that Member State takes no such decision within this period, it shall be deemed to have agreed.

Unless that Member State disagrees, the Commission, where it considers that such a distinct market exists, and that competition in that market may be significantly affected by the concentration, may decide to refer the whole or part of the case to the competent authorities of that Member State with a view to the application of that State's national competition law.

The decision whether or not to refer the case in accordance with the third subparagraph shall be taken within 25 working days starting from the receipt of the reasoned submission by the Commission. The Commission shall inform the other Member States and the persons or undertakings concerned of its decision. If the Commission does not take a decision within this period, it shall be deemed to have adopted a decision to refer the case in accordance with the submission made by the persons or undertakings concerned.

If the Commission decides, or is deemed to have decided, pursuant to the third and fourth subparagraphs, to refer the whole of the case, no notification shall be made pursuant to paragraph 1 and national competition law shall apply. Article 9(6) to (9) shall apply *mutatis mutandis*.

5. With regard to a concentration as defined in Article 3 which does not have a Community dimension within the meaning of Article 1 and which is capable of being reviewed under the national competition laws of at least three Member States, the persons or undertakings referred to in paragraph 2 may, before any notification to the competent authorities, inform the Commission by means of a reasoned submission that the concentration should be examined by the Commission.

The Commission shall transmit this submission to all Member States without delay.

Any Member State competent to examine the concentration under its national competition law may, within 15 working days of receiving the reasoned submission, express its disagreement as regards the request to refer the case.

Where at least one such Member State has expressed its disagreement in accordance with the third subparagraph within the period of 15 working days, the case shall not be referred. The Commission shall, without delay, inform all Member States and the persons or undertakings concerned of any such expression of disagreement.

[1] OJ L 222, 14. 8. 1978, p. 11. Directive as last amended by Directive 2003/51/EC of the European Parliament and of the Council (OJ L 178, 17.7.2003, p. 16).

Where no Member State has expressed its disagreement in accordance with the third subparagraph within the period of 15 working days, the concentration shall be deemed to have a Community dimension and shall be notified to the Commission in accordance with paragraphs 1 and 2. In such situations, no Member State shall apply its national competition law to the concentration.

6. The Commission shall report to the Council on the operation of paragraphs 4 and 5 by 1 July 2009. Following this report and on a proposal from the Commission, the Council, acting by a qualified majority, may revise paragraphs 4 and 5.

Article 5

Calculation of turnover

1. Aggregate turnover within the meaning of this Regulation shall comprise the amounts derived by the undertakings concerned in the preceding financial year from the sale of products and the provision of services falling within the undertakings' ordinary activities after deduction of sales rebates and of value added tax and other taxes directly related to turnover. The aggregate turnover of an undertaking concerned shall not include the sale of products or the provision of services between any of the undertakings referred to in paragraph 4.

Turnover, in the Community or in a Member State, shall comprise products sold and services provided to undertakings or consumers, in the Community or in that Member State as the case may be.

2. By way of derogation from paragraph 1, where the concentration consists of the acquisition of parts, whether or not constituted as legal entities, of one or more undertakings, only the turnover relating to the parts which are the subject of the concentration shall be taken into account with regard to the seller or sellers.

However, two or more transactions within the meaning of the first subparagraph which take place within a two-year period between the same persons or undertakings shall be treated as one and the same concentration arising on the date of the last transaction.

3. In place of turnover the following shall be used:

(a) for credit institutions and other financial institutions, the sum of the following income items as defined in Council Directive 86/635/EEC [1], after deduction of value added tax and other taxes directly related to those items, where appropriate:

(i) interest income and similar income;

(ii) income from securities:

— income from shares and other variable yield securities,

— income from participating interests,

— income from shares in affiliated undertakings;

(iii) commissions receivable;

(iv) net profit on financial operations;

(v) other operating income.

The turnover of a credit or financial institution in the Community or in a Member State shall comprise the income items, as defined above, which are received by the branch or division of that institution established in the Community or in the Member State in question, as the case may be;

(b) for insurance undertakings, the value of gross premiums written which shall comprise all amounts received and receivable in respect of insurance contracts issued by or on behalf of the insurance undertakings, including also outgoing reinsurance premiums, and after deduction of taxes and parafiscal contributions or levies charged by reference to the amounts of individual premiums or the total volume of premiums; as regards Article 1(2)(b) and (3)(b), (c) and (d) and the final part of Article 1(2) and (3), gross premiums received from Community residents and from residents of one Member State respectively shall be taken into account.

4. Without prejudice to paragraph 2, the aggregate turnover of an undertaking concerned within the meaning of this Regulation shall be calculated by adding together the respective turnovers of the following:

(a) the undertaking concerned;

(b) those undertakings in which the undertaking concerned, directly or indirectly:

(i) owns more than half the capital or business assets, or

(ii) has the power to exercise more than half the voting rights, or

(iii) has the power to appoint more than half the members of the supervisory board, the administrative board or bodies legally representing the undertakings, or

(iv) has the right to manage the undertakings' affairs;

(c) those undertakings which have in the undertaking concerned the rights or powers listed in (b);

(d) those undertakings in which an undertaking as referred to in (c) has the rights or powers listed in (b);

(e) those undertakings in which two or more undertakings as referred to in (a) to (d) jointly have the rights or powers listed in (b).

[1] OJ L 372, 31. 12. 1986, p. 1. Directive as last amended by Directive 2003/51/EC of the European Parliament and of the Council.

5. Where undertakings concerned by the concentration jointly have the rights or powers listed in paragraph 4(b), in calculating the aggregate turnover of the undertakings concerned for the purposes of this Regulation:

(a) no account shall be taken of the turnover resulting from the sale of products or the provision of services between the joint undertaking and each of the undertakings concerned or any other undertaking connected with any one of them, as set out in paragraph 4(b) to (e);

(b) account shall be taken of the turnover resulting from the sale of products and the provision of services between the joint undertaking and any third undertakings. This turnover shall be apportioned equally amongst the undertakings concerned.

Article 6

Examination of the notification and initiation of proceedings

1. The Commission shall examine the notification as soon as it is received.

(a) Where it concludes that the concentration notified does not fall within the scope of this Regulation, it shall record that finding by means of a decision.

(b) Where it finds that the concentration notified, although falling within the scope of this Regulation, does not raise serious doubts as to its compatibility with the common market, it shall decide not to oppose it and shall declare that it is compatible with the common market.

A decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration.

(c) Without prejudice to paragraph 2, where the Commission finds that the concentration notified falls within the scope of this Regulation and raises serious doubts as to its compatibility with the common market, it shall decide to initiate proceedings. Without prejudice to Article 9, such proceedings shall be closed by means of a decision as provided for in Article 8(1) to (4), unless the undertakings concerned have demonstrated to the satisfaction of the Commission that they have abandoned the concentration.

2. Where the Commission finds that, following modification by the undertakings concerned, a notified concentration no longer raises serious doubts within the meaning of paragraph 1(c), it shall declare the concentration compatible with the common market pursuant to paragraph 1(b).

The Commission may attach to its decision under paragraph 1(b) conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.

3. The Commission may revoke the decision it took pursuant to paragraph 1(a) or (b) where:

(a) the decision is based on incorrect information for which one of the undertakings is responsible or where it has been obtained by deceit,

or

(b) the undertakings concerned commit a breach of an obligation attached to the decision.

4. In the cases referred to in paragraph 3, the Commission may take a decision under paragraph 1, without being bound by the time limits referred to in Article 10(1).

5. The Commission shall notify its decision to the undertakings concerned and the competent authorities of the Member States without delay.

Article 7

Suspension of concentrations

1. A concentration with a Community dimension as defined in Article 1, or which is to be examined by the Commission pursuant to Article 4(5), shall not be implemented either before its notification or until it has been declared compatible with the common market pursuant to a decision under Articles 6(1)(b), 8(1) or 8(2), or on the basis of a presumption according to Article 10(6).

2. Paragraph 1 shall not prevent the implementation of a public bid or of a series of transactions in securities including those convertible into other securities admitted to trading on a market such as a stock exchange, by which control within the meaning of Article 3 is acquired from various sellers, provided that:

(a) the concentration is notified to the Commission pursuant to Article 4 without delay; and

(b) the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of its investments based on a derogation granted by the Commission under paragraph 3.

3. The Commission may, on request, grant a derogation from the obligations imposed in paragraphs 1 or 2. The request to grant a derogation must be reasoned. In deciding on the request, the Commission shall take into account *inter alia* the effects of the suspension on one or more undertakings concerned by the concentration or on a third party and the threat to competition posed by the concentration. Such a derogation may be made subject to conditions and obligations in order to ensure conditions of effective competition. A derogation may be applied for and granted at any time, be it before notification or after the transaction.

4. The validity of any transaction carried out in contravention of paragraph 1 shall be dependent on a decision pursuant to Article 6(1)(b) or Article 8(1), (2) or (3) or on a presumption pursuant to Article 10(6).

This Article shall, however, have no effect on the validity of transactions in securities including those convertible into other securities admitted to trading on a market such as a stock exchange, unless the buyer and seller knew or ought to have known that the transaction was carried out in contravention of paragraph 1.

Article 8

Powers of decision of the Commission

1. Where the Commission finds that a notified concentration fulfils the criterion laid down in Article 2(2) and, in the cases referred to in Article 2(4), the criteria laid down in Article 81(3) of the Treaty, it shall issue a decision declaring the concentration compatible with the common market.

A decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration.

2. Where the Commission finds that, following modification by the undertakings concerned, a notified concentration fulfils the criterion laid down in Article 2(2) and, in the cases referred to in Article 2(4), the criteria laid down in Article 81(3) of the Treaty, it shall issue a decision declaring the concentration compatible with the common market.

The Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.

A decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration.

3. Where the Commission finds that a concentration fulfils the criterion defined in Article 2(3) or, in the cases referred to in Article 2(4), does not fulfil the criteria laid down in Article 81(3) of the Treaty, it shall issue a decision declaring that the concentration is incompatible with the common market.

4. Where the Commission finds that a concentration:

(a) has already been implemented and that concentration has been declared incompatible with the common market, or

(b) has been implemented in contravention of a condition attached to a decision taken under paragraph 2, which has found that, in the absence of the condition, the concentration would fulfil the criterion laid down in Article 2(3) or, in the cases referred to in Article 2(4), would not fulfil the criteria laid down in Article 81(3) of the Treaty,

the Commission may:

— require the undertakings concerned to dissolve the concentration, in particular through the dissolution of the merger or the disposal of all the shares or assets acquired, so as to restore the situation prevailing prior to the implementation of the concentration; in circumstances where restoration of the situation prevailing before the implementation of the concentration is not possible through dissolution of the concentration, the Commission may take any other measure appropriate to achieve such restoration as far as possible,

— order any other appropriate measure to ensure that the undertakings concerned dissolve the concentration or take other restorative measures as required in its decision.

In cases falling within point (a) of the first subparagraph, the measures referred to in that subparagraph may be imposed either in a decision pursuant to paragraph 3 or by separate decision.

5. The Commission may take interim measures appropriate to restore or maintain conditions of effective competition where a concentration:

(a) has been implemented in contravention of Article 7, and a decision as to the compatibility of the concentration with the common market has not yet been taken;

(b) has been implemented in contravention of a condition attached to a decision under Article 6(1)(b) or paragraph 2 of this Article;

(c) has already been implemented and is declared incompatible with the common market.

6. The Commission may revoke the decision it has taken pursuant to paragraphs 1 or 2 where:

(a) the declaration of compatibility is based on incorrect information for which one of the undertakings is responsible or where it has been obtained by deceit; or

(b) the undertakings concerned commit a breach of an obligation attached to the decision.

7. The Commission may take a decision pursuant to paragraphs 1 to 3 without being bound by the time limits referred to in Article 10(3), in cases where:

(a) it finds that a concentration has been implemented

(i) in contravention of a condition attached to a decision under Article 6(1)(b), or

(ii) in contravention of a condition attached to a decision taken under paragraph 2 and in accordance with Article 10(2), which has found that, in the absence of the condition, the concentration would raise serious doubts as to its compatibility with the common market; or

(b) a decision has been revoked pursuant to paragraph 6.

8. The Commission shall notify its decision to the undertakings concerned and the competent authorities of the Member States without delay.

Article 9

Referral to the competent authorities of the Member States

1. The Commission may, by means of a decision notified without delay to the undertakings concerned and the competent authorities of the other Member States, refer a notified concentration to the competent authorities of the Member State concerned in the following circumstances.

2. Within 15 working days of the date of receipt of the copy of the notification, a Member State, on its own initiative or upon the invitation of the Commission, may inform the Commission, which shall inform the undertakings concerned, that:

(a) a concentration threatens to affect significantly competition in a market within that Member State, which presents all the characteristics of a distinct market, or

(b) a concentration affects competition in a market within that Member State, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market.

3. If the Commission considers that, having regard to the market for the products or services in question and the geographical reference market within the meaning of paragraph 7, there is such a distinct market and that such a threat exists, either:

(a) it shall itself deal with the case in accordance with this Regulation; or

(b) it shall refer the whole or part of the case to the competent authorities of the Member State concerned with a view to the application of that State's national competition law.

If, however, the Commission considers that such a distinct market or threat does not exist, it shall adopt a decision to that effect which it shall address to the Member State concerned, and shall itself deal with the case in accordance with this Regulation.

In cases where a Member State informs the Commission pursuant to paragraph 2(b) that a concentration affects competition in a distinct market within its territory that does not form a substantial part of the common market, the Commission shall refer the whole or part of the case relating to the distinct market concerned, if it considers that such a distinct market is affected.

4. A decision to refer or not to refer pursuant to paragraph 3 shall be taken:

(a) as a general rule within the period provided for in Article 10(1), second subparagraph, where the Commission, pursuant to Article 6(1)(b), has not initiated proceedings; or

(b) within 65 working days at most of the notification of the concentration concerned where the Commission has initiated proceedings under Article 6(1)(c), without taking the preparatory steps in order to adopt the necessary measures under Article 8(2), (3) or (4) to maintain or restore effective competition on the market concerned.

5. If within the 65 working days referred to in paragraph 4(b) the Commission, despite a reminder from the Member State concerned, has not taken a decision on referral in accordance with paragraph 3 nor has taken the preparatory steps referred to in paragraph 4(b), it shall be deemed to have taken a decision to refer the case to the Member State concerned in accordance with paragraph 3(b).

6. The competent authority of the Member State concerned shall decide upon the case without undue delay.

Within 45 working days after the Commission's referral, the competent authority of the Member State concerned shall inform the undertakings concerned of the result of the preliminary competition assessment and what further action, if any, it proposes to take. The Member State concerned may exceptionally suspend this time limit where necessary information has not been provided to it by the undertakings concerned as provided for by its national competition law.

Where a notification is requested under national law, the period of 45 working days shall begin on the working day following that of the receipt of a complete notification by the competent authority of that Member State.

7. The geographical reference market shall consist of the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because, in particular, conditions of competition are appreciably different in those areas. This assessment should take account in particular of the nature and characteristics of the products or services concerned, of the existence of entry barriers or of consumer preferences, of appreciable differences of the undertakings' market shares between the area concerned and neighbouring areas or of substantial price differences.

8. In applying the provisions of this Article, the Member State concerned may take only the measures strictly necessary to safeguard or restore effective competition on the market concerned.

9. In accordance with the relevant provisions of the Treaty, any Member State may appeal to the Court of Justice, and in particular request the application of Article 243 of the Treaty, for the purpose of applying its national competition law.

Article 10

Time limits for initiating proceedings and for decisions

1. Without prejudice to Article 6(4), the decisions referred to in Article 6(1) shall be taken within 25 working days at most. That period shall begin on the working day following that of the receipt of a notification or, if the information to be supplied with the notification is incomplete, on the working day following that of the receipt of the complete information.

That period shall be increased to 35 working days where the Commission receives a request from a Member State in accordance with Article 9(2)or where, the undertakings concerned offer commitments pursuant to Article 6(2) with a view to rendering the concentration compatible with the common market.

2. Decisions pursuant to Article 8(1) or (2) concerning notified concentrations shall be taken as soon as it appears that the serious doubts referred to in Article 6(1)(c) have been removed, particularly as a result of modifications made by the undertakings concerned, and at the latest by the time limit laid down in paragraph 3.

3. Without prejudice to Article 8(7), decisions pursuant to Article 8(1) to (3) concerning notified concentrations shall be taken within not more than 90 working days of the date on which the proceedings are initiated. That period shall be increased to 105 working days where the undertakings concerned offer commitments pursuant to Article 8(2), second subparagraph, with a view to rendering the concentration compatible with the common market, unless these commitments have been offered less than 55 working days after the initiation of proceedings.

The periods set by the first subparagraph shall likewise be extended if the notifying parties make a request to that effect not later than 15 working days after the initiation of proceedings pursuant to Article 6(1)(c). The notifying parties may make only one such request. Likewise, at any time following the initiation of proceedings, the periods set by the first subparagraph may be extended by the Commission with the agreement of the notifying parties. The total duration of any extension or extensions effected pursuant to this subparagraph shall not exceed 20 working days.

4. The periods set by paragraphs 1 and 3 shall exceptionally be suspended where, owing to circumstances for which one of the undertakings involved in the concentration is responsible, the Commission has had to request information by decision pursuant to Article 11 or to order an inspection by decision pursuant to Article 13.

The first subparagraph shall also apply to the period referred to in Article 9(4)(b).

5. Where the Court of Justice gives a judgment which annuls the whole or part of a Commission decision which is subject to a time limit set by this Article, the concentration shall be re-examined by the Commission with a view to adopting a decision pursuant to Article 6(1).

The concentration shall be re-examined in the light of current market conditions.

The notifying parties shall submit a new notification or supplement the original notification, without delay, where the original notification becomes incomplete by reason of intervening changes in market conditions or in the information provided. Where there are no such changes, the parties shall certify this fact without delay.

The periods laid down in paragraph 1 shall start on the working day following that of the receipt of complete information in a new notification, a supplemented notification, or a certification within the meaning of the third subparagraph.

The second and third subparagraphs shall also apply in the cases referred to in Article 6(4) and Article 8(7).

6. Where the Commission has not taken a decision in accordance with Article 6(1)(b), (c), 8(1), (2) or (3) within the time limits set in paragraphs 1 and 3 respectively, the concentration shall be deemed to have been declared compatible with the common market, without prejudice to Article 9.

Article 11

Requests for information

1. In order to carry out the duties assigned to it by this Regulation, the Commission may, by simple request or by decision, require the persons referred to in Article 3(1)(b), as well as undertakings and associations of undertakings, to provide all necessary information.

2. When sending a simple request for information to a person, an undertaking or an association of undertakings, the Commission shall state the legal basis and the purpose of the request, specify what information is required and fix the time limit within which the information is to be provided, as well as the penalties provided for in Article 14 for supplying incorrect or misleading information.

3. Where the Commission requires a person, an undertaking or an association of undertakings to supply information by decision, it shall state the legal basis and the purpose of the request, specify what information is required and fix the time limit within which it is to be provided. It shall also indicate the penalties provided for in Article 14 and indicate or impose the penalties provided for in Article 15. It shall further indicate the right to have the decision reviewed by the Court of Justice.

4. The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or associations having no legal personality, the persons authorised to represent them by law or by their constitution, shall supply the information requested on behalf of the undertaking concerned. Persons duly authorised to act may supply the information on behalf of their clients. The latter shall remain fully responsible if the information supplied is incomplete, incorrect or misleading.

5. The Commission shall without delay forward a copy of any decision taken pursuant to paragraph 3 to the competent authorities of the Member State in whose territory the residence of the person or the seat of the undertaking or association of undertakings is situated, and to the competent authority of the Member State whose territory is affected. At the specific request of the competent authority of a Member State, the Commission shall also forward to that authority copies of simple requests for information relating to a notified concentration.

6. At the request of the Commission, the governments and competent authorities of the Member States shall provide the Commission with all necessary information to carry out the duties assigned to it by this Regulation.

7. In order to carry out the duties assigned to it by this Regulation, the Commission may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation. At the beginning of the interview, which may be conducted by telephone or other electronic means, the Commission shall state the legal basis and the purpose of the interview.

Where an interview is not conducted on the premises of the Commission or by telephone or other electronic means, the Commission shall inform in advance the competent authority of the Member State in whose territory the interview takes place. If the competent authority of that Member State so requests, officials of that authority may assist the officials and other persons authorised by the Commission to conduct the interview.

Article 12

Inspections by the authorities of the Member States

1. At the request of the Commission, the competent authorities of the Member States shall undertake the inspections which the Commission considers to be necessary under Article 13(1), or which it has ordered by decision pursuant to Article 13(4). The officials of the competent authorities of the Member States who are responsible for conducting these inspections as well as those authorised or appointed by them shall exercise their powers in accordance with their national law.

2. If so requested by the Commission or by the competent authority of the Member State within whose territory the inspection is to be conducted, officials and other accompanying persons authorised by the Commission may assist the officials of the authority concerned.

Article 13

The Commission's powers of inspection

1. In order to carry out the duties assigned to it by this Regulation, the Commission may conduct all necessary inspections of undertakings and associations of undertakings.

2. The officials and other accompanying persons authorised by the Commission to conduct an inspection shall have the power:

(a) to enter any premises, land and means of transport of undertakings and associations of undertakings;

(b) to examine the books and other records related to the business, irrespective of the medium on which they are stored;

(c) to take or obtain in any form copies of or extracts from such books or records;

(d) to seal any business premises and books or records for the period and to the extent necessary for the inspection;

(e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers.

3. Officials and other accompanying persons authorised by the Commission to conduct an inspection shall exercise their powers upon production of a written authorisation specifying the subject matter and purpose of the inspection and the penalties provided for in Article 14, in the production of the required books or other records related to the business which is incomplete or where answers to questions asked under paragraph 2 of this Article are incorrect or misleading. In good time before the inspection, the Commission shall give notice of the inspection to the competent authority of the Member State in whose territory the inspection is to be conducted.

4. Undertakings and associations of undertakings are required to submit to inspections ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the penalties provided for in Articles 14 and 15 and the right to have the decision reviewed by the Court of Justice. The Commission shall take such decisions after consulting the competent authority of the Member State in whose territory the inspection is to be conducted.

5. Officials of, and those authorised or appointed by, the competent authority of the Member State in whose territory the inspection is to be conducted shall, at the request of that authority or of the Commission, actively assist the officials and other accompanying persons authorised by the Commission. To this end, they shall enjoy the powers specified in paragraph 2.

6. Where the officials and other accompanying persons authorised by the Commission find that an undertaking opposes an inspection, including the sealing of business premises, books or records, ordered pursuant to this Article, the Member State concerned shall afford them the necessary assistance, requesting where appropriate the assistance of the police or of an equivalent enforcement authority, so as to enable them to conduct their inspection.

7. If the assistance provided for in paragraph 6 requires authorisation from a judicial authority according to national rules, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure.

8. Where authorisation as referred to in paragraph 7 is applied for, the national judicial authority shall ensure that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of proportionality of the coercive measures, the national judicial authority may ask the Commission, directly or through the competent authority of that Member State, for detailed explanations relating to the subject matter of the inspection. However, the national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with the information in the Commission's file. The lawfulness of the Commission's decision shall be subject to review only by the Court of Justice.

Article 14

Fines

1. The Commission may by decision impose on the persons referred to in Article 3(1)b, undertakings or associations of undertakings, fines not exceeding 1 % of the aggregate turnover of the undertaking or association of undertakings concerned within the meaning of Article 5 where, intentionally or negligently:

(a) they supply incorrect or misleading information in a submission, certification, notification or supplement thereto, pursuant to Article 4, Article 10(5) or Article 22(3);

(b) they supply incorrect or misleading information in response to a request made pursuant to Article 11(2);

(c) in response to a request made by decision adopted pursuant to Article 11(3), they supply incorrect, incomplete or misleading information or do not supply information within the required time limit;

(d) they produce the required books or other records related to the business in incomplete form during inspections under Article 13, or refuse to submit to an inspection ordered by decision taken pursuant to Article 13(4);

(e) in response to a question asked in accordance with Article 13(2)(e),

— they give an incorrect or misleading answer,

— they fail to rectify within a time limit set by the Commission an incorrect, incomplete or misleading answer given by a member of staff, or

— they fail or refuse to provide a complete answer on facts relating to the subject matter and purpose of an inspection ordered by a decision adopted pursuant to Article 13(4);

(f) seals affixed by officials or other accompanying persons authorised by the Commission in accordance with Article 13(2)(d) have been broken.

2. The Commission may by decision impose fines not exceeding 10 % of the aggregate turnover of the undertaking concerned within the meaning of Article 5 on the persons referred to in Article 3(1)b or the undertakings concerned where, either intentionally or negligently, they:

(a) fail to notify a concentration in accordance with Articles 4 or 22(3) prior to its implementation, unless they are expressly authorised to do so by Article 7(2) or by a decision taken pursuant to Article 7(3);

(b) implement a concentration in breach of Article 7;

(c) implement a concentration declared incompatible with the common market by decision pursuant to Article 8(3) or do not comply with any measure ordered by decision pursuant to Article 8(4) or (5);

(d) fail to comply with a condition or an obligation imposed by decision pursuant to Articles 6(1)(b), Article 7(3) or Article 8(2), second subparagraph.

3. In fixing the amount of the fine, regard shall be had to the nature, gravity and duration of the infringement.

4. Decisions taken pursuant to paragraphs 1, 2 and 3 shall not be of a criminal law nature.

Article 15

Periodic penalty payments

1. The Commission may by decision impose on the persons referred to in Article 3(1)b, undertakings or associations of undertakings, periodic penalty payments not exceeding 5 % of the average daily aggregate turnover of the undertaking or association of undertakings concerned within the meaning of Article 5 for each working day of delay, calculated from the date set in the decision, in order to compel them:

(a) to supply complete and correct information which it has requested by decision taken pursuant to Article 11(3);

(b) to submit to an inspection which it has ordered by decision taken pursuant to Article 13(4);

(c) to comply with an obligation imposed by decision pursuant to Article 6(1)(b), Article 7(3) or Article 8(2), second subparagraph; or;

(d) to comply with any measures ordered by decision pursuant to Article 8(4) or (5).

2. Where the persons referred to in Article 3(1)(b), undertakings or associations of undertakings have satisfied the obligation which the periodic penalty payment was intended to enforce, the Commission may fix the definitive amount of the periodic penalty payments at a figure lower than that which would arise under the original decision.

Article 16

Review by the Court of Justice

The Court of Justice shall have unlimited jurisdiction within the meaning of Article 229 of the Treaty to review decisions whereby the Commission has fixed a fine or periodic penalty payments; it may cancel, reduce or increase the fine or periodic penalty payment imposed.

Article 17

Professional secrecy

1. Information acquired as a result of the application of this Regulation shall be used only for the purposes of the relevant request, investigation or hearing.

2. Without prejudice to Article 4(3), Articles 18 and 20, the Commission and the competent authorities of the Member States, their officials and other servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the Member States shall not disclose information they have acquired through the application of this Regulation of the kind covered by the obligation of professional secrecy.

3. Paragraphs 1 and 2 shall not prevent publication of general information or of surveys which do not contain information relating to particular undertakings or associations of undertakings.

Article 18

Hearing of the parties and of third persons

1. Before taking any decision provided for in Article 6(3), Article 7(3), Article 8(2) to (6), and Articles 14 and 15, the Commission shall give the persons, undertakings and associations of undertakings concerned the opportunity, at every stage of the procedure up to the consultation of the Advisory Committee, of making known their views on the objections against them.

2. By way of derogation from paragraph 1, a decision pursuant to Articles 7(3) and 8(5) may be taken provisionally, without the persons, undertakings or associations of undertakings concerned being given the opportunity to make known their views beforehand, provided that the Commission gives them that opportunity as soon as possible after having taken its decision.

3. The Commission shall base its decision only on objections on which the parties have been able to submit their observations. The rights of the defence shall be fully respected in the proceedings. Access to the file shall be open at least to the parties directly involved, subject to the legitimate interest of undertakings in the protection of their business secrets.

4. In so far as the Commission or the competent authorities of the Member States deem it necessary, they may also hear other natural or legal persons. Natural or legal persons showing a sufficient interest and especially members of the administrative or management bodies of the undertakings concerned or the recognised representatives of their employees shall be entitled, upon application, to be heard.

Article 19

Liaison with the authorities of the Member States

1. The Commission shall transmit to the competent authorities of the Member States copies of notifications within three working days and, as soon as possible, copies of the most important documents lodged with or issued by the Commission pursuant to this Regulation. Such documents shall include commitments offered by the undertakings concerned vis-à-vis the Commission with a view to rendering the concentration compatible with the common market pursuant to Article 6(2) or Article 8(2), second subparagraph.

2. The Commission shall carry out the procedures set out in this Regulation in close and constant liaison with the competent authorities of the Member States, which may express their views upon those procedures. For the purposes of Article 9 it shall obtain information from the competent authority of the Member State as referred to in paragraph 2 of that Article and give it the opportunity to make known its views at every stage of the procedure up to the adoption of a decision pursuant to paragraph 3 of that Article; to that end it shall give it access to the file.

3. An Advisory Committee on concentrations shall be consulted before any decision is taken pursuant to Article 8(1) to (6), Articles 14 or 15 with the exception of provisional decisions taken in accordance with Article 18(2).

4. The Advisory Committee shall consist of representatives of the competent authorities of the Member States. Each Member State shall appoint one or two representatives; if unable to attend, they may be replaced by other representatives. At least one of the representatives of a Member State shall be competent in matters of restrictive practices and dominant positions.

5. Consultation shall take place at a joint meeting convened at the invitation of and chaired by the Commission. A summary of the case, together with an indication of the most important documents and a preliminary draft of the decision to be taken for each case considered, shall be sent with the invitation. The meeting shall take place not less than 10 working days after the invitation has been sent. The Commission may in exceptional cases shorten that period as appropriate in order to avoid serious harm to one or more of the undertakings concerned by a concentration.

6. The Advisory Committee shall deliver an opinion on the Commission's draft decision, if necessary by taking a vote. The Advisory Committee may deliver an opinion even if some members are absent and unrepresented. The opinion shall be delivered in writing and appended to the draft decision. The Commission shall take the utmost account of the opinion delivered by the Committee. It shall inform the Committee of the manner in which its opinion has been taken into account.

7. The Commission shall communicate the opinion of the Advisory Committee, together with the decision, to the addressees of the decision. It shall make the opinion public together with the decision, having regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 20

Publication of decisions

1. The Commission shall publish the decisions which it takes pursuant to Article 8(1) to (6), Articles 14 and 15 with the exception of provisional decisions taken in accordance with Article 18(2) together with the opinion of the Advisory Committee in the *Official Journal of the European Union*.

2. The publication shall state the names of the parties and the main content of the decision; it shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 21

Application of the Regulation and jurisdiction

1. This Regulation alone shall apply to concentrations as defined in Article 3, and Council Regulations (EC) No 1/2003 [1], (EEC) No 1017/68 [2], (EEC) No 4056/86 [3] and (EEC) No 3975/87 [4] shall not apply, except in relation to joint ventures that do not have a Community dimension and which have as their object or effect the coordination of the competitive behaviour of undertakings that remain independent.

2. Subject to review by the Court of Justice, the Commission shall have sole jurisdiction to take the decisions provided for in this Regulation.

3. No Member State shall apply its national legislation on competition to any concentration that has a Community dimension.

The first subparagraph shall be without prejudice to any Member State's power to carry out any enquiries necessary for the application of Articles 4(4), 9(2) or after referral, pursuant to Article 9(3), first subparagraph, indent (b), or Article 9(5), to take the measures strictly necessary for the application of Article 9(8).

4. Notwithstanding paragraphs 2 and 3, Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law.

Public security, plurality of the media and prudential rules shall be regarded as legitimate interests within the meaning of the first subparagraph.

Any other public interest must be communicated to the Commission by the Member State concerned and shall be recognised by the Commission after an assessment of its compatibility with the general principles and other provisions of Community law before the measures referred to above may be taken. The Commission shall inform the Member State concerned of its decision within 25 working days of that communication.

[1] OJ L 1, 4.1.2003, p. 1.
[2] OJ L 175, 23. 7. 1968, p. 1. Regulation as last amended by Regulation (EC) No 1/2003 (OJ L 1, 4.1.2003, p. 1).
[3] OJ L 378, 31. 12. 1986, p. 4. Regulation as last amended by Regulation (EC) No 1/2003.
[4] OJ L 374. 31. 12. 1987, p. 1. Regulation as last amended by Regulation (EC) No 1/2003.

Article 22

Referral to the Commission

1. One or more Member States may request the Commission to examine any concentration as defined in Article 3 that does not have a Community dimension within the meaning of Article 1 but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request.

Such a request shall be made at most within 15 working days of the date on which the concentration was notified, or if no notification is required, otherwise made known to the Member State concerned.

2. The Commission shall inform the competent authorities of the Member States and the undertakings concerned of any request received pursuant to paragraph 1 without delay.

Any other Member State shall have the right to join the initial request within a period of 15 working days of being informed by the Commission of the initial request.

All national time limits relating to the concentration shall be suspended until, in accordance with the procedure set out in this Article, it has been decided where the concentration shall be examined. As soon as a Member State has informed the Commission and the undertakings concerned that it does not wish to join the request, the suspension of its national time limits shall end.

3. The Commission may, at the latest 10 working days after the expiry of the period set in paragraph 2, decide to examine, the concentration where it considers that it affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request. If the Commission does not take a decision within this period, it shall be deemed to have adopted a decision to examine the concentration in accordance with the request.

The Commission shall inform all Member States and the undertakings concerned of its decision. It may request the submission of a notification pursuant to Article 4.

The Member State or States having made the request shall no longer apply their national legislation on competition to the concentration.

4. Article 2, Article 4(2) to (3), Articles 5, 6, and 8 to 21 shall apply where the Commission examines a concentration pursuant to paragraph 3. Article 7 shall apply to the extent that the concentration has not been implemented on the date on which the Commission informs the undertakings concerned that a request has been made.

Where a notification pursuant to Article 4 is not required, the period set in Article 10(1) within which proceedings may be initiated shall begin on the working day following that on which the Commission informs the undertakings concerned that it has decided to examine the concentration pursuant to paragraph 3.

5. The Commission may inform one or several Member States that it considers a concentration fulfils the criteria in paragraph 1. In such cases, the Commission may invite that Member State or those Member States to make a request pursuant to paragraph 1.

Article 23

Implementing provisions

1. The Commission shall have the power to lay down in accordance with the procedure referred to in paragraph 2:

(a) implementing provisions concerning the form, content and other details of notifications and submissions pursuant to Article 4;

(b) implementing provisions concerning time limits pursuant to Article 4(4), (5) Articles 7, 9, 10 and 22;

(c) the procedure and time limits for the submission and implementation of commitments pursuant to Article 6(2) and Article 8(2);

(d) implementing provisions concerning hearings pursuant to Article 18.

2. The Commission shall be assisted by an Advisory Committee, composed of representatives of the Member States.

(a) Before publishing draft implementing provisions and before adopting such provisions, the Commission shall consult the Advisory Committee.

(b) Consultation shall take place at a meeting convened at the invitation of and chaired by the Commission. A draft of the implementing provisions to be taken shall be sent with the invitation. The meeting shall take place not less than 10 working days after the invitation has been sent.

(c) The Advisory Committee shall deliver an opinion on the draft implementing provisions, if necessary by taking a vote. The Commission shall take the utmost account of the opinion delivered by the Committee.

Article 24

Relations with third countries

1. The Member States shall inform the Commission of any general difficulties encountered by their undertakings with concentrations as defined in Article 3 in a third country.

2. Initially not more than one year after the entry into force of this Regulation and, thereafter periodically, the Commission shall draw up a report examining the treatment accorded to undertakings having their seat or their principal fields of activity in the Community, in the terms referred to in paragraphs 3 and 4, as regards concentrations in third countries. The Commission shall submit those reports to the Council, together with any recommendations.

3. Whenever it appears to the Commission, either on the basis of the reports referred to in paragraph 2 or on the basis of other information, that a third country does not grant undertakings having their seat or their principal fields of activity in the Community, treatment comparable to that granted by the Community to undertakings from that country, the Commission may submit proposals to the Council for an appropriate mandate for negotiation with a view to obtaining comparable treatment for undertakings having their seat or their principal fields of activity in the Community.

4. Measures taken under this Article shall comply with the obligations of the Community or of the Member States, without prejudice to Article 307 of the Treaty, under international agreements, whether bilateral or multilateral.

Article 25

Repeal

1. Without prejudice to Article 26(2), Regulations (EEC) No 4064/89 and (EC) No 1310/97 shall be repealed with effect from 1 May 2004.

2. References to the repealed Regulations shall be construed as references to this Regulation and shall be read in accordance with the correlation table in the Annex.

Article 26

Entry into force and transitional provisions

1. This Regulation shall enter into force on the 20th day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 1 May 2004.

2. Regulation (EEC) No 4064/89 shall continue to apply to any concentration which was the subject of an agreement or announcement or where control was acquired within the meaning of Article 4(1) of that Regulation before the date of application of this Regulation, subject, in particular, to the provisions governing applicability set out in Article 25(2) and (3) of Regulation (EEC) No 4064/89 and Article 2 of Regulation (EEC) No 1310/97.

3. As regards concentrations to which this Regulation applies by virtue of accession, the date of accession shall be substituted for the date of application of this Regulation.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 20 January 2004.

For the Council

The President

C. McCREEVY

ANNEX

Correlation table

Regulation (EEC) No 4064/89	This Regulation
Article 1(1), (2) and (3)	Article 1(1), (2) and (3)
Article 1(4)	Article 1(4)
Article 1(5)	Article 1(5)
Article 2(1)	Article 2(1)
—	Article 2(2)
Article 2(2)	Article 2(3)
Article 2(3)	Article 2(4)
Article 2(4)	Article 2(5)
Article 3(1)	Article 3(1)
Article 3(2)	Article 3(4)
Article 3(3)	Article 3(2)
Article 3(4)	Article 3(3)
—	Article 3(4)
Article 3(5)	Article 3(5)
Article 4(1) first sentence	Article 4(1) first subparagraph
Article 4(1) second sentence	—
—	Article 4(1) second and third subparagraphs
Article 4(2) and (3)	Article 4(2) and (3)
—	Article 4(4) to (6)
Article 5(1) to (3)	Article 5(1) to (3)
Article 5(4), introductory words	Article 5(4), introductory words
Article 5(4) point (a)	Article 5(4) point (a)
Article 5(4) point (b), introductory words	Article 5(4) point (b), introductory words
Article 5(4) point (b), first indent	Article 5(4) point (b)(i)
Article 5(4) point (b), second indent	Article 5(4) point (b)(ii)
Article 5(4) point (b), third indent	Article 5(4) point (b)(iii)
Article 5(4) point (b), fourth indent	Article 5(4) point (b)(iv)
Article 5(4) points (c), (d) and (e)	Article 5(4) points (c), (d) and (e)
Article 5(5)	Article 5(5)
Article 6(1), introductory words	Article 6(1), introductory words
Article 6(1) points (a) and (b)	Article 6(1) points (a) and (b)
Article 6(1) point (c)	Article 6(1) point (c), first sentence
Article 6(2) to (5)	Article 6(2) to (5)
Article 7(1)	Article 7(1)
Article 7(3)	Article 7(2)
Article 7(4)	Article 7(3)
Article 7(5)	Article 7(4)
Article 8(1)	Article 6(1) point (c), second sentence
Article 8(2)	Article 8(1) and (2)
Article 8(3)	Article 8(3)

Regulation (EEC) No 4064/89	This Regulation
Article 8(4)	Article 8(4)
—	Article 8(5)
Article 8(5)	Article 8(6)
Article 8(6)	Article 8(7)
—	Article 8(8)
Article 9(1) to (9)	Article 9(1) to (9)
Article 9(10)	—
Article 10(1) and (2)	Article 10(1) and (2)
Article 10(3)	Article 10(3) first subparagraph, first sentence
—	Article 10(3) first subparagraph, second sentence
—	Article 10(3) second subparagraph
Article 10(4)	Article 10(4) first subparagraph
—	Article 10(4), second subparagraph
Article 10(5)	Article 10(5), first and fourth subparagraphs
—	Article 10(5), second, third and fifth subparagraphs
Article 10(6)	Article 10(6)
Article 11(1)	Article 11(1)
Article 11(2)	—
Article 11(3)	Article 11(2)
Article 11(4)	Article 11(4) first sentence
—	Article 11(4) second and third sentences
Article 11(5) first sentence	—
Article 11(5) second sentence	Article 11(3)
Article 11(6)	Article 11(5)
—	Article 11(6) and (7)
Article 12	Article 12
Article 13(1) first subparagraph	Article 13(1)
Article 13(1) second subparagraph, introductory words	Article 13(2) introductory words
Article 13(1) second subparagraph, point (a)	Article 13(2) point (b)
Article 13(1) second subparagraph, point (b)	Article 13(2) point (c)
Article 13(1) second subparagraph, point (c)	Article 13(2) point (e)
Article 13(1) second subparagraph, point (d)	Article 13(2) point (a)
—	Article 13(2) point (d)
Article 13(2)	Article 13(3)
Article 13(3)	Article 13(4) first and second sentences
Article 13(4)	Article 13(4) third sentence
Article 13(5)	Article 13(5), first sentence
—	Article 13(5), second sentence
Article 13(6) first sentence	Article 13(6)
Article 13(6) second sentence	—
—	Article 13(7) and (8)
Article 14(1) introductory words	Article 14(1) introductory words
Article 14(1) point (a)	Article 14(2) point (a)
Article 14(1) point (b)	Article 14(1) point (a)
Article 14(1) point (c)	Article 14(1) points (b) and (c)

Regulation (EEC) No 4064/89	This Regulation
Article 14(1) point (d)	Article 14(1) point (d)
—	Article 14(1) points (e) and (f)
Article 14(2) introductory words	Article 14(2) introductory words
Article 14(2) point (a)	Article 14(2) point (d)
Article 14(2) points (b) and (c)	Article 14(2) points (b) and (c)
Article 14(3)	Article 14(3)
Article 14(4)	Article 14(4)
Article 15(1) introductory words	Article 15(1) introductory words
Article 15(1) points (a) and (b)	Article 15(1) points (a) and (b)
Article 15(2) introductory words	Article 15(1) introductory words
Article 15(2) point (a)	Article 15(1) point (c)
Article 15(2) point (b)	Article 15(1) point (d)
Article 15(3)	Article 15(2)
Articles 16 to 20	Articles 16 to 20
Article 21(1)	Article 21(2)
Article 21(2)	Article 21(3)
Article 21(3)	Article 21(4)
Article 22(1)	Article 21(1)
Article 22(3)	—
—	Article 22(1) to (3)
Article 22(4)	Article 22(4)
Article 22(5)	—
—	Article 22(5)
Article 23	Article 23(1)
—	Article 23(2)
Article 24	Article 24
—	Article 25
Article 25(1)	Article 26(1), first subparagraph
—	Article 26(1), second subparagraph
Article 25(2)	Article 26(2)
Article 25(3)	Article 26(3)
—	Annex

ANNEX 2

IMPLEMENTING REGULATION

Commission Regulation (EC) No. 802/2004 of April 7, 2004 implementing
Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings,
O.J. 2004 No. L 133/1

I

(Acts whose publication is obligatory)

COMMISSION REGULATION (EC) No 802/2004
of 7 April 2004
implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings

(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (EC Merger Regulation) ([1]), and in particular Article 23(1) thereof,

Having regard to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings ([2]), as last amended by Regulation (EC) No 1310/97 ([3]), and in particular Article 23 thereof,

Having consulted the Advisory Committee,

Whereas:

(1) Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings has been recast, with substantial amendments to various provisions of that Regulation.

(2) Commission Regulation (EC) No 447/98 ([4])of 1 March 1998 on the notifications, time-limits and hearings provided for in Council Regulation (EEC) No 4064/89 must be modified in order to take account of those amendments. For the sake of clarity it should therefore be repealed and replaced by a new regulation.

(3) The Commission has adopted measures concerning the terms of reference of hearing officers in certain competition proceedings.

(4) Regulation (EC) No 139/2004 is based on the principle of compulsory notification of concentrations before they are put into effect. On the one hand, a notification has important legal consequences which are favourable to the parties to the proposed concentration, while, on the other hand, failure to comply with the obligation to notify renders the parties liable to fines and may also entail civil law disadvantages for them. It is therefore necessary in the interests of legal certainty to define precisely the subject matter and content of the information to be provided in the notification.

(5) It is for the notifying parties to make a full and honest disclosure to the Commission of the facts and circumstances which are relevant for taking a decision on the notified concentration.

(6) Regulation (EC) No 139/2004 also allows the undertakings concerned to request, in a reasoned submission, prior to notification, that a concentration fulfilling the requirements of that Regulation be referred to the Commission by one or more Member States, or referred by the Commission to one or more Member States, as the case may be. It is important to provide the Commission and the competent authorities of the Member States concerned with sufficient information, in order to enable them to assess, within a short period of time, whether or not a referral ought to be made. To that end, the reasoned submission requesting the referral should contain certain specific information.

(7) In order to simplify and expedite examination of notifications and of reasoned submissions, it is desirable to prescribe that forms be used.

(8) Since notification sets in motion legal time-limits pursuant to Regulation (EC) No 139/2004, the conditions governing such time-limits and the time when they become effective should also be determined.

(9) Rules must be laid down in the interests of legal certainty for calculating the time-limits provided for in Regulation (EC) No 139/2004. In particular, the beginning and end of time periods and the circumstances suspending the running of such periods must be determined, with due regard to the requirements resulting from the exceptionally tight legal timeframe available for the proceedings.

([1]) OJ L 24, 29.1.2004, p. 1.
([2]) OJ L 395, 30.12.1989, p. 1.
([3]) OJ L 180, 9.7.1997, p. 1.
([4]) OJ L 61, 2.3.1998, p. 1. Regulation as amended by the 2003 Act of Accession.

(10) The provisions relating to the Commission's procedure must be framed in such a way as to safeguard fully the right to be heard and the rights of defence. For these purposes, the Commission should distinguish between the parties who notify the concentration, other parties involved in the proposed concentration, third parties and parties regarding whom the Commission intends to take a decision imposing a fine or periodic penalty payments.

(11) The Commission should give the notifying parties and other parties involved in the proposed concentration, if they so request, an opportunity before notification to discuss the intended concentration informally and in strict confidence. In addition, the Commission should, after notification, maintain close contact with those parties, to the extent necessary to discuss with them any practical or legal problems which it discovers on a first examination of the case, with a view, if possible, to resolving such problems by mutual agreement.

(12) In accordance with the principle of respect for the rights of defence, the notifying parties must be given the opportunity to submit their comments on all the objections which the Commission proposes to take into account in its decisions. The other parties involved in the proposed concentration should also be informed of the Commission's objections and should be granted the opportunity to express their views.

(13) Third parties demonstrating a sufficient interest must also be given the opportunity of expressing their views, if they make a written application to that effect.

(14) The various persons entitled to submit comments should do so in writing, both in their own interests and in the interests of sound administration, without prejudice to their right to request a formal oral hearing, where appropriate, to supplement the written procedure. In urgent cases, however, the Commission must be enabled to proceed immediately to formal oral hearings of the notifying parties, of other parties involved or of third parties.

(15) It is necessary to define the rights of persons who are to be heard, to what extent they should be granted access to the Commission's file and on what conditions they may be represented or assisted.

(16) When granting access to the file, the Commission should ensure the protection of business secrets and other confidential information. The Commission should be able to ask undertakings that have submitted documents or statements to identify confidential information.

(17) In order to enable the Commission to carry out a proper assessment of commitments offered by the notifying parties with a view to rendering the concentration compatible with the common market, and to ensure due consultation with other parties involved, with third parties and with the authorities of the Member States as provided for in Regulation (EC) No 139/2004, in particular Article 18(1), 18(4), Article 19(1), 19(2), 19(3) and 19(5) thereof, the procedure and time-limits for submitting the commitments referred to in Article 6(2) and Article 8(2) of that Regulation should be laid down.

(18) It is also necessary to define the rules applicable to certain time limits set by the Commission.

(19) The Advisory Committee on Concentrations must deliver its opinion on the basis of a preliminary draft decision. It must therefore be consulted on a case after the inquiry in to that case has been completed. Such consultation does not, however, prevent the Commission from reopening an inquiry if need be.

HAS ADOPTED THIS REGULATION:

CHAPTER I

SCOPE

Article 1

Scope

This Regulation shall apply to the control of concentrations conducted pursuant to Regulation (EC) No 139/2004.

CHAPTER II

NOTIFICATIONS AND OTHER SUBMISSIONS

Article 2

Persons entitled to submit notifications

1. Notifications shall be submitted by the persons or undertakings referred to in Article 4(2) of Regulation (EC) No 139/2004.

2. Where notifications are signed by representatives of persons or of undertakings, such representatives shall produce written proof that they are authorised to act.

3. Joint notifications shall be submitted by a joint representative who is authorised to transmit and to receive documents on behalf of all notifying parties.

Article 3

Submission of notifications

1. Notifications shall be submitted in the manner prescribed by Form CO as set out in Annex I. Under the conditions set out in Annex II, notifications may be submitted in Short Form as defined therein. Joint notifications shall be submitted on a single form.

2. One original and 35 copies of the Form CO and the supporting documents shall be submitted to the Commission. The notification shall be delivered to the address referred to in Article 23(1) and in the format specified by the Commission.

3. The supporting documents shall be either originals or copies of the originals; in the latter case the notifying parties shall confirm that they are true and complete.

4. Notifications shall be in one of the official languages of the Community. For the notifying parties, this language shall also be the language of the proceeding, as well as that of any subsequent proceedings relating to the same concentration. Supporting documents shall be submitted in their original language. Where the original language is not one of the official languages of the Community, a translation into the language of the proceeding shall be attached.

5. Where notifications are made pursuant to Article 57 of the Agreement on the European Economic Area, they may also be submitted in one of the official languages of the EFTA States or the working language of the EFTA Surveillance Authority. If the language chosen for the notifications is not an official language of the Community, the notifying parties shall simultaneously supplement all documentation with a translation into an official language of the Community. The language which is chosen for the translation shall determine the language used by the Commission as the language of the proceeding for the notifying parties.

Article 4

Information and documents to be provided

1. Notifications shall contain the information, including documents, requested in the applicable forms set out in the Annexes. The information shall be correct and complete.

2. The Commission may dispense with the obligation to provide any particular information in the notification, including documents, or with any other requirement specified in Annexes I and II where the Commission considers that compliance with those obligations or requirements is not necessary for the examination of the case.

3. The Commission shall without delay acknowledge in writing to the notifying parties or their representatives receipt of the notification and of any reply to a letter sent by the Commission pursuant to Article 5(2) and 5(3).

Article 5

Effective date of notification

1. Subject to paragraphs 2, 3 and 4, notifications shall become effective on the date on which they are received by the Commission.

2. Where the information, including documents, contained in the notification is incomplete in any material respect, the Commission shall inform the notifying parties or their representatives in writing without delay. In such cases, the notification shall become effective on the date on which the complete information is received by the Commission.

3. Material changes in the facts contained in the notification coming to light subsequent to the notification which the notifying parties know or ought to know, or any new information coming to light subsequent to the notification which the parties know or ought to know and which would have had to be notified if known at the time of notification, shall be communicated to the Commission without delay. In such cases, when these material changes or new information could have a significant effect on the appraisal of the concentration, the notification may be considered by the Commission as becoming effective on the date on which the relevant information is received by the Commission; the Commission shall inform the notifying parties or their representatives of this in writing and without delay.

4. Incorrect or misleading information shall be considered to be incomplete information.

5. When the Commission publishes the fact of the notification pursuant to Article 4(3) of Regulation (EC) No 139/2004, it shall specify the date upon which the notification has been received. Where, further to the application of paragraphs 2, 3 and 4 of this Article, the effective date of notification is later than the date specified in that publication, the Commission shall issue a further publication in which it shall state the later date.

Article 6

Specific provisions relating to reasoned submissions, supplements and certifications

1. Reasoned submissions within the meaning of Article 4(4) and 4(5) of Regulation (EC) No 139/2004 shall contain the information, including documents, requested in accordance with Annex III to this Regulation.

2. Article 2, Article 3(1), third sentence, 3(2) to (5), Article 4, Article 5(1), 5 (2) first sentence, 5 (3), 5 (4), Article 21 and Article 23 of this Regulation shall apply *mutatis mutandis* to reasoned submissions within the meaning of Article 4(4) and 4(5) of Regulation (EC) No 139/2004.

Article 2, Article 3(1), third sentence, 3(2) to (5), Article 4, Article 5(1) to (4), Article 21 and Article 23 of this Regulation shall apply *mutatis mutandis* to supplements to notifications and certifications within the meaning of Article 10(5) of Regulation (EC) No 139/2004.

CHAPTER III

TIME-LIMITS

Article 7

Beginning of time periods

Time periods shall begin on the working day, as defined in Article 24 of this Regulation, following the event to which the relevant provision of Regulation (EC) No 139/2004 refers.

Article 8

Expiry of time periods

A time period calculated in working days shall expire at the end of its last working day.

A time period set by the Commission in terms of a calendar date shall expire at the end of that day.

Article 9

Suspension of time limit

1. The time limits referred to in Articles 9(4), Article 10(1) and 10(3) of Regulation (EC) No 139/2004 shall be suspended where the Commission has to take a decision pursuant to Article 11(3) or Article 13(4) of that Regulation, on any of the following grounds:

(a) information which the Commission has requested pursuant to Article 11(2) of Regulation (EC) No 139/2004 from one of the notifying parties or another involved party, as defined in Article 11 of this Regulation, is not provided or not provided in full within the time limit fixed by the Commission;

(b) information which the Commission has requested pursuant to Article 11(2) of Regulation (EC) No 139/2004 from a third party, as defined in Article 11 of this Regulation, is not provided or not provided in full within the time limit fixed by the Commission owing to circumstances for which one of the notifying parties or another involved party, as defined in Article 11 of this Regulation, is responsible;

(c) one of the notifying parties or another involved party, as defined in Article 11 of this Regulation, has refused to submit to an inspection deemed necessary by the Commission on the basis of Article 13(1) of Regulation (EC) No 139/2004 or to cooperate in the carrying out of such an inspection in accordance with Article 13(2) of that Regulation;

(d) the notifying parties have failed to inform the Commission of material changes in the facts contained in the notification, or of any new information of the kind referred to in Article 5(3) of this Regulation.

2. The time limits referred to in Articles 9(4), Article 10(1) and 10(3) of Regulation (EC) No 139/2004 shall be suspended where the Commission has to take a decision pursuant to Article 11(3) of that Regulation, without proceeding first by way of simple request for information, owing to circumstances for which one of the undertakings involved in the concentration is responsible.

3. The time limits referred to in Articles 9(4), Article 10(1) and (3) of Regulation (EC) No 139/2004 shall be suspended:

(a) in the cases referred to in points (a) and (b) of paragraph 1, for the period between the expiry of the time limit set in the simple request for information, and the receipt of the complete and correct information required by decision;

(b) in the cases referred to in point (c) of paragraph 1, for the period between the unsuccessful attempt to carry out the inspection and the completion of the inspection ordered by decision;

(c) in the cases referred to in point (d) of paragraph 1, for the period between the occurrence of the change in the facts referred to therein and the receipt of the complete and correct information.

(d) in the cases referred to in paragraph 2 for the period between the expiry of the time limit set in the decision and the receipt of the complete and correct information required by decision.

4. The suspension of the time limit shall begin on the working day following the date on which the event causing the suspension occurred. It shall expire with the end of the day on which the reason for suspension is removed. Where such a day is not a working day, the suspension of the time-limit shall expire with the end of the following working day.

Article 10

Compliance with the time-limits

1. The time limits referred to in Article 4(4), fourth subparagraph, Article 9(4), Article 10(1) and (3), and Article 22(3) of Regulation (EC) No 139/2004 shall be met where the Commission has taken the relevant decision before the end of the period.

2. The time limits referred to in Article 4(4), second subparagraph, Article 4(5), third subparagraph, Article 9(2), Article 22(1), second subparagraph, and 22(2), second subparagraph, of Regulation (EC) No 139/2004 shall be met by a Member State concerned where that Member State, before the end of the period, informs the Commission in writing or makes or joins the request in writing, as the case may be.

3. The time limit referred to in Article 9(6) of Regulation (EC) No 139/2004 shall be met where the competent authority of a Member State concerned informs the undertakings concerned in the manner set out in that provision before the end of the period.

CHAPTER IV

EXERCISE OF THE RIGHT TO BE HEARD; HEARINGS

Article 11

Parties to be heard

For the purposes of the rights to be heard pursuant to Article 18 of Regulation (EC) No 139/2004, the following parties are distinguished:

(a) notifying parties, that is, persons or undertakings submitting a notification pursuant to Article 4(2) of Regulation (EC) No 139/2004;

(b) other involved parties, that is, parties to the proposed concentration other than the notifying parties, such as the seller and the undertaking which is the target of the concentration;

(c) third persons, that is natural or legal persons, including customers, suppliers and competitors, provided they demonstrate a sufficient interest within the meaning of Article 18(4), second sentence, of Regulation (EC) No 139/2004, which is the case in particular

— for members of the administrative or management bodies of the undertakings concerned or the recognised representatives of their employees;

— for consumer associations, where the proposed concentration concerns products or services used by final consumers.

(d) parties regarding whom the Commission intends to take a decision pursuant to Article 14 or Article 15 of Regulation (EC) No 139/2004.

Article 12

Decisions on the suspension of concentrations

1. Where the Commission intends to take a decision pursuant to Article 7(3) of Regulation (EC) No 139/2004 which adversely affects one or more of the parties, it shall, pursuant to Article 18(1) of that Regulation, inform the notifying parties and other involved parties in writing of its objections and shall set a time limit within which they may make known their views in writing.

2. Where the Commission, pursuant to Article 18(2) of Regulation (EC) No 139/2004, has taken a decision referred to in paragraph 1 of this Article provisionally without having given the notifying parties and other involved parties the opportunity to make known their views, it shall without delay send them the text of the provisional decision and shall set a time limit within which they may make known their views in writing.

Once the notifying parties and other involved parties have made known their views, the Commission shall take a final decision annulling, amending or confirming the provisional decision. Where they have not made known their views in writing within the time limit set, the Commission's provisional decision shall become final with the expiry of that period.

Article 13

Decisions on the substance of the case

1. Where the Commission intends to take a decision pursuant to Article 6(3) or Article 8(2) to (6) of Regulation (EC) No 139/2004, it shall, before consulting the Advisory Committee on Concentrations, hear the parties pursuant to Article 18(1) and (3) of that Regulation.

Article 12(2) of this Regulation shall apply *mutatis mutandis* where, in application of Article 18(2) of Regulation (EC) No 139/2004, the Commission has taken a decision pursuant to Article 8(5) of that Regulation provisionally.

2. The Commission shall address its objections in writing to the notifying parties.

The Commission shall, when giving notice of objections, set a time limit within which the notifying parties may inform the Commission of their comments in writing.

The Commission shall inform other involved parties in writing of these objections.

The Commission shall also set a time limit within which those other involved parties may inform the Commission of their comments in writing.

The Commission shall not be obliged to take into account comments received after the expiry of a time limit which it has set.

3. The parties to whom the Commission's objections have been addressed or who have been informed of those objections shall, within the time limit set, submit in writing their comments on the objections. In their written comments, they may set out all facts and matters known to them which are relevant to their defence, and shall attach any relevant documents as proof of the facts set out. They may also propose that the Commission hear persons who may corroborate those facts. They shall submit one original and 10 copies of their comments to the Commission to the address of the Commission's Directorate General for Competition. An electronic copy shall also be submitted at the same address and in the format specified by the Commission. The Commission shall forward copies of such written comments without delay to the competent authorities of the Member States.

4. Where the Commission intends to take a decision pursuant to Article 14 or Article 15 of Regulation (EC) No 139/2004, it shall, before consulting the Advisory Committee on Concentrations, hear pursuant to Article 18(1) and (3) of that Regulation the parties regarding whom the Commission intends to take such a decision.

The procedure provided for in paragraph 2, first and second subparagraphs, and paragraph 3 shall apply, *mutatis mutandis*.

Article 14

Oral hearings

1. Where the Commission intends to take a decision pursuant to Article 6(3) or Article 8(2) to (6) of Regulation (EC) No 139/2004, it shall afford the notifying parties who have so requested in their written comments the opportunity to develop their arguments in a formal oral hearing. It may also, at other stages in the proceedings, afford the notifying parties the opportunity of expressing their views orally.

2. Where the Commission intends to take a decision pursuant to Article 6(3) or Article 8(2) to (6) of Regulation (EC) No 139/2004, it shall also afford other involved parties who have so requested in their written comments the opportunity to develop their arguments in a formal oral hearing. It may also, at other stages in the proceedings, afford other involved parties the opportunity of expressing their views orally.

3. Where the Commission intends to take a decision pursuant to Article 14 or Article 15 of Regulation (EC) No 139/2004, it shall afford parties on whom it proposes to impose a fine or periodic penalty payment the opportunity to develop their arguments in a formal oral hearing, if so requested in their written comments. It may also, at other stages in the proceedings, afford such parties the opportunity of expressing their views orally.

Article 15

Conduct of formal oral hearings

1. Formal oral hearings shall be conducted by the Hearing Officer in full independence.

2. The Commission shall invite the persons to be heard to attend the formal oral hearing on such date as it shall determine.

3. The Commission shall invite the competent authorities of the Member States to take part in any formal oral hearing.

4. Persons invited to attend shall either appear in person or be represented by legal representatives or by representatives authorised by their constitution as appropriate. Undertakings and associations of undertakings may also be represented by a duly authorised agent appointed from among their permanent staff.

5. Persons heard by the Commission may be assisted by their lawyers or other qualified and duly authorised persons admitted by the Hearing Officer.

6. Formal oral hearings shall not be public. Each person may be heard separately or in the presence of other persons invited to attend, having regard to the legitimate interest of the undertakings in the protection of their business secrets and other confidential information.

7. The Hearing Officer may allow all parties within the meaning of Article 11, the Commission services and the competent authorities of the Member States to ask questions during the formal oral hearing.

The Hearing Officer may hold a preparatory meeting with the parties and the Commission services, so as to facilitate the efficient organisation of the formal oral hearing.

8. The statements made by each person heard shall be recorded. Upon request, the recording of the formal oral hearing shall be made available to the persons who attended that hearing. Regard shall be had to the legitimate interest of the undertakings in the protection of their business secrets and other confidential information.

Article 16

Hearing of third persons

1. If third persons apply in writing to be heard pursuant to Article 18(4), second sentence, of Regulation (EC) No 139/2004, the Commission shall inform them in writing of the nature and subject matter of the procedure and shall set a time limit within which they may make known their views.

2. The third persons referred to in paragraph 1 shall make known their views in writing within the time limit set. The Commission may, where appropriate, afford such third parties who have so requested in their written comments the opportunity to participate in a formal hearing. It may also in other cases afford such third parties the opportunity of expressing their views orally.

3. The Commission may likewise invite any other natural or legal person to express its views, in writing as well as orally, including at a formal oral hearing.

CHAPTER V

ACCESS TO THE FILE AND TREATMENT OF CONFIDENTIAL INFORMATION

Article 17

Access to the file and use of documents

1. If so requested, the Commission shall grant access to the file to the parties to whom it has addressed a statement of objections, for the purpose of enabling them to exercise their rights of defence. Access shall be granted after the notification of the statement of objections.

2. The Commission shall, upon request, also give the other involved parties who have been informed of the objections access to the file in so far as this is necessary for the purposes of preparing their comments.

3. The right of access to the file shall not extend to confidential information, or to internal documents of the Commission or of the competent authorities of the Member States. The right of access to the file shall equally not extend to correspondence between the Commission and the competent authorities of the Member States or between the latter.

4. Documents obtained through access to the file pursuant to this Article may only be used for the purposes of the relevant proceeding pursuant to Regulation (EC) No 139/2004.

Article 18

Confidential information

1. Information, including documents, shall not be communicated or made accessible by the Commission in so far as it contains business secrets or other confidential information the disclosure of which is not considered necessary by the Commission for the purpose of the procedure.

2. Any person which makes known its views or comments pursuant to Articles 12, Article 13 and Article 16 of this Regulation, or supplies information pursuant to Article 11 of Regulation (EC) No 139/2004, or subsequently submits further information to the Commission in the course of the same procedure, shall clearly identify any material which it considers to be confidential, giving reasons, and provide a separate non-confidential version by the date set by the Commission.

3. Without prejudice to paragraph 2, the Commission may require persons referred to in Article 3 of Regulation (EC) No 139/2004, undertakings and associations of undertakings in all cases where they produce or have produced documents or statements pursuant to Regulation (EC) No 139/2004 to identify the documents or parts of documents which they consider to contain business secrets or other confidential information belonging to them and to identify the undertakings with regard to which such documents are to be considered confidential.

The Commission may also require persons referred to in Article 3 of Regulation (EC) No 139/2004, undertakings or associations of undertakings to identify any part of a statement of objections, case summary or a decision adopted by the Commission which in their view contains business secrets.

Where business secrets or other confidential information are identified, the persons, undertakings and associations of undertakings shall give reasons and provide a separate non-confidential version by the date set by the Commission.

CHAPTER VI

COMMITMENTS OFFERED BY THE UNDERTAKINGS CONCERNED

Article 19

Time limits for submission of commitments

1. Commitments offered by the undertakings concerned pursuant to Article 6(2) of Regulation (EC) No 139/2004 shall be submitted to the Commission within not more than 20 working days from the date of receipt of the notification.

2. Commitments offered by the undertakings concerned pursuant to Article 8(2) of Regulation (EC) No 139/2004 shall be submitted to the Commission within not more than 65 working days from the date on which proceedings were initiated.

Where pursuant to Article 10(3), second subparagraph, of Regulation (EC) No 139/2004 the period for the adoption of a decision pursuant to Article 8(1), (2) and (3) is extended, the period of 65 working days for the submission of commitments shall automatically be extended by the same number of working days.

In exceptional circumstances, the Commission may accept commitments offered after the expiry of the time limit for their submission within the meaning of this paragraph provided that the procedure provided for in Article 19(5) of Regulation (EC) No 139/2004 is complied with.

3. Articles 7, 8 and 9 shall apply *mutatis mutandis*.

Article 20

Procedure for the submission of commitments

1. One original and 10 copies of commitments offered by the undertakings concerned pursuant to Article 6(2) or Article 8(2) of Regulation (EC) No 139/2004 shall be submitted to the Commission at the address of the Commission's Directorate General for Competition. An electronic copy shall also be submitted at the same address and in the format specified by the Commission. The Commission shall forward copies of such commitments without delay to the competent authorities of the Member States.

2. When offering commitments pursuant to Articles 6(2) or Article 8(2) of Regulation (EC) No 139/2004, the undertakings concerned shall at the same time clearly identify any information which they consider to be confidential, giving reasons, and shall provide a separate non-confidential version.

CHAPTER VII

MISCELLANEOUS PROVISIONS

Article 21

Transmission of documents

1. Transmission of documents and invitations from the Commission to the addressees may be effected in any of the following ways:

(a) delivery by hand against receipt;

(b) registered letter with acknowledgement of receipt;

(c) fax with a request for acknowledgement of receipt;

(d) telex;

(e) electronic mail with a request for acknowledgement of receipt.

2. Unless otherwise provided in this Regulation, paragraph 1 also applies to the transmission of documents from the notifying parties, from other involved parties or from third parties to the Commission.

3. Where a document is sent by telex, by fax or by electronic mail, it shall be presumed that it has been received by the addressee on the day on which it was sent.

Article 22

Setting of time limits

In setting the time limits provided for pursuant to Article 12(1) and (2), Article 13(2) and Article 16(1), the Commission shall have regard to the time required for the preparation of statements and to the urgency of the case. It shall also take account of working days as well as public holidays in the country of receipt of the Commission's communication.

Time limits shall be set in terms of a precise calendar date.

Article 23

Receipt of documents by the Commission

1. In accordance with the provisions of Article 5(1) of this Regulation, notifications shall be delivered to the Commission at the address of the Commission's Directorate General for Competition as published by the Commission in the *Official Journal of the European Union*.

2. Additional information requested to complete notifications must reach the Commission at the address referred to in paragraph 1.

3. Written comments on Commission communications pursuant to Article 12(1) and (2), Article 13(2) and Article 16(1) of this Regulation must have reached the Commission at the address referred to in paragraph 1 before the expiry of the time limit set in each case.

Article 24

Definition of working days

The expression working days in Regulation (EC) No 139/2004 and in this Regulation means all days other than Saturdays, Sundays, and Commission holidays as published in the *Official Journal of the European Union* before the beginning of each year.

Article 25

Repeal and transitional provision

1. Without prejudice to paragraphs 2 and 3, Regulation (EC) No 447/98 is repealed with effect from 1 May 2004.

References to the repealed Regulation shall be construed as references to this Regulation.

2. Regulation (EC) No 447/98 shall continue to apply to any concentration falling within the scope of Regulation (EEC) No 4064/89.

3. For the purposes of paragraph 2, Sections 1 to 12 of the Annex to Regulation (EC) No 447/98 shall be replaced by Sections 1 to 11 of Annex I to this Regulation. In such cases references in those sections to the 'EC Merger Regulation' and to the 'Implementing Regulation' shall be read as referring to the corresponding provisions of Regulation (EEC) No 4064/89 and Regulation (EC) N° 447/98, respectively.

Article 26

Entry into force

This Regulation shall enter into force on 1 May 2004.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 7 April 2004.

For the Commission

Franz FISCHLER

Member of the Commission

ANNEX 3

FORM CO

Form CO relating to the notification of a concentration pursuant to Regulation (EC) No. 139/2004, O.J. 2004 No. L 133/9

ANNEX I

FORM CO RELATING TO THE NOTIFICATION OF A CONCENTRATION PURSUANT TO REGULATION (EC) No 139/2004

1. INTRODUCTION

1.1. The purpose of this Form

This Form specifies the information that must be provided by notifying parties when submitting a notification to the European Commission of a proposed merger, acquisition or other concentration. The merger control system of the European Union is laid down in Council Regulation (EC) No 139/2004 (hereinafter referred to as 'the EC Merger Regulation'), and in Commission Regulation (EC) No xx/2004 (hereinafter referred to as 'the Implementing Regulation'), to which this Form CO is annexed. ([1]) The text of these regulations, as well as other relevant documents, can be found on the Competition page of the Commission's Europa web site.

In order to limit the time and expense involved in complying with various merger control procedures in several individual countries, the European Union has put in place a system of merger control by which concentrations having a Community dimension (normally, where the parties to the concentration fulfil certain turnover thresholds) ([2]) are assessed by the European Commission in a single procedure (the 'one stop shop' principle). Mergers which do not meet the turnover thresholds may fall within the competence of the Member States' authorities in charge of merger control.

The EC Merger Regulation requires the Commission to reach a decision within a legal deadline. In an initial phase the Commission normally has 25 working days to decide whether to clear the concentration or to 'initiate proceedings', i.e., to undertake an in-depth investigation ([3]). If the Commission decides to initiate proceedings, it normally has to take a final decision on the operation within no more than 90 working days of the date when proceedings are initiated ([4]).

In view of these deadlines, and for the 'one stop shop' principle to work, it is essential that the Commission is provided, in a timely fashion, with the information required to carry out the necessary investigation and to assess the impact of the concentration on the markets concerned. This requires that a certain amount of information be provided at the time of notification.

It is recognised that the information requested in this Form is substantial. However, experience has shown that, depending on the specific characteristics of the case, not all information is always necessary for an adequate examination of the proposed concentration. Accordingly, if you consider that any particular information requested by this Form may not be necessary for the Commission's examination of the case, you are encouraged to ask the Commission to dispense with the obligation to provide certain information ('waiver'). See Section 1.3(g) for more details.

Pre-notification contacts are extremely valuable to both the notifying parties and the Commission in determining the precise amount of information required in a notification and, in the majority of cases, will result in a significant reduction of the information required. Notifying parties may refer to the Commission's Best Practices on the Conduct of EC Merger Control Proceedings, which provides guidance on pre-notification contacts and the preparation of notifications.

In addition, it should be noted that certain concentrations, which are unlikely to pose any competition concerns, can be notified using a Short Form, which is attached to the Implementing Regulation, as Annex II.

1.2. Who must notify

In the case of a merger within the meaning of Article 3(1)(a) of the EC Merger Regulation or the acquisition of joint control of an undertaking within the meaning of Article 3(1)(b) of the EC Merger Regulation, the notification shall be completed jointly by the parties to the merger or by those acquiring joint control, as the case may be ([5]).

([1]) Council Regulation (EC) No 139/2004 of 20 January 2004, OJ L 24, 29.01.2004, p. 1. Your attention is drawn to the corresponding provisions of the Agreement on the European Economic Area (hereinafter referred to as 'the EEA Agreement'). See in particular Article 57 of the EEA Agreement, point 1 of Annex XIV to the EEA Agreement and Protocol 4 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice, as well as Protocols 21 and 24 to the EEA Agreement and Article 1 and the Agreed Minutes of the Protocol adjusting the EEA Agreement. Any reference to EFTA States shall be understood to mean those EFTA States which are Contracting Parties to the EEA Agreement. As of 1 May 2004, these States are Iceland, Liechtenstein and Norway.

([2]) The term 'concentration' is defined in Article 3 of the EC Merger Regulation and the term 'Community dimension' in Article 1 thereof. Furthermore, Article 4(5) provides that in certain circumstances where the Community turnover thresholds are not met, notifying parties may request that the Commission treat their proposed concentration as having a Community dimension.

([3]) See Article 10(1) of the EC Merger Regulation.

([4]) See Article 10(3) of the EC Merger Regulation.

([5]) See Article 4(2) of the EC Merger Regulation.

In case of the acquisition of a controlling interest in one undertaking by another, the acquirer must complete the notification.

In the case of a public bid to acquire an undertaking, the bidder must complete the notification.

Each party completing the notification is responsible for the accuracy of the information which it provides.

1.3. The requirement for a correct and complete notification

All information required by this Form must be correct and complete. The information required must be supplied in the appropriate Section of this Form.

In particular you should note that:

(a) In accordance with Article 10(1) of the EC Merger Regulation and Article 5(2) and (4) of the Implementing Regulation, the time-limits of the EC Merger Regulation linked to the notification will not begin to run until all the information that has to be supplied with the notification has been received by the Commission. This requirement is to ensure that the Commission is able to assess the notified concentration within the strict time-limits provided by the EC Merger Regulation.

(b) The notifying parties should verify, in the course of preparing their notification, that contact names and numbers, and in particular fax numbers and e-mail addresses, provided to the Commission are accurate, relevant and up-to-date.

(c) Incorrect or misleading information in the notification will be considered to be incomplete information (Article 5(4) of the Implementing Regulation).

(d) If a notification is incomplete, the Commission will inform the notifying parties or their representatives in writing and without delay. The notification will only become effective on the date on which the complete and accurate information is received by the Commission (Article 10(1) of the EC Merger Regulation, Articles 5(2) and (4) of the Implementing Regulation).

(e) Under Article 14(1)(a) of the EC Merger Regulation, notifying parties who, either intentionally or negligently, supply incorrect or misleading information, may be liable to fines of up to 1 % of the aggregate turnover of the undertaking concerned. In addition, pursuant to Article 6(3)(a) and Article 8(6)(a) of the EC Merger Regulation the Commission may revoke its decision on the compatibility of a notified concentration where it is based on incorrect information for which one of the undertakings is responsible.

(f) You may request in writing that the Commission accept that the notification is complete notwithstanding the failure to provide information required by this Form, if such information is not reasonably available to you in part or in whole (for example, because of the unavailability of information on a target company during a contested bid).

The Commission will consider such a request, provided that you give reasons for the unavailability of that information, and provide your best estimates for missing data together with the sources for the estimates. Where possible, indications as to where any of the requested information that is unavailable to you could be obtained by the Commission should also be provided.

(g) You may request in writing that the Commission accept that the notification is complete notwithstanding the failure to provide information required by this Form, if you consider that any particular information required, in the full or short form version, may not be necessary for the Commission's examination of the case.

The Commission will consider such a request, provided that you give adequate reasons why that information is not relevant and necessary to its inquiry into the notified operation. You should explain this during your pre-notification contacts with the Commission and, submit a written request for a waiver, asking the Commission to dispense with the obligation to provide that information, pursuant to Article 4(2) of the Implementing Regulation.

1.4. How to notify

The notification must be completed in one of the official languages of the European Community. This language will thereafter be the language of the proceedings for all notifying parties. Where notifications are made in accordance with Article 12 of Protocol 24 to the EEA Agreement in an official language of an EFTA State which is not an official language of the Community, the notification must simultaneously be supplemented with a translation into an official language of the Community.

The information requested by this Form is to be set out using the sections and paragraph numbers of the Form, signing a declaration as provided in Section 11, and annexing supporting documentation. In completing Sections 7 to 9 of this Form, the notifying parties are invited to consider whether, for purposes of clarity, these sections are best presented in numerical order, or whether they can be grouped together for each individual affected market (or group of affected markets).

For the sake of clarity, certain information may be put in annexes. However, it is essential that all key substantive pieces of information, and in particular market share information for the parties and their largest competitors, are presented in the body of Form CO. Annexes to this Form shall only be used to supplement the information supplied in the Form itself.

Contact details must be provided in a format provided by the Commission's Directorate-General for Competition (DG Competition). For a proper investigatory process, it is essential that the contact details are accurate. Multiple instances of incorrect contact details may be a ground for declaring a notification incomplete.

Supporting documents are to be submitted in their original language; where this is not an official language of the Community, they must be translated into the language of the proceeding (Article 3(4) of the Implementing Regulation).

Supporting documents may be originals or copies of the originals. In the latter case, the notifying party must confirm that they are true and complete.

One original and 35 copies of the Form CO and the supporting documents shall be submitted to the Commission's Directorate-General for Competition.

The notification shall be delivered to the address referred to in Article 23 (1) of the Implementing Regulation and in the format specified by the Commission from time to time. This address is published in the *Official Journal of the European Union*. The notification must be deliveredto the Commission on working days as defined by Article 24 of the Implementing Regulation. In order to enable it to be registered on the same day, it must be delivered before 17.00 hrs on Mondays to Thursdays and before 16.00 hrs on Fridays and workdays preceding public holidays and other holidays as determined by the Commission and published in the *Official Journal of the European Union*. The security instructions given on DG Competition's website must be adhered to.

1.5. Confidentiality

Article 287 of the Treaty and Article 17(2) of the EC Merger Regulation as well as the corresponding provisions of the EEA Agreement [1] require the Commission, the Member States, the EFTA Surveillance Authority and the EFTA States, their officials and other servants not to disclose information they have acquired through the application of the Regulation of the kind covered by the obligation of professional secrecy. The same principle must also apply to protect confidentiality between notifying parties.

If you believe that your interests would be harmed if any of the information you are asked to supply were to be published or otherwise divulged to other parties, submit this information separately with each page clearly marked 'Business Secrets'. You should also give reasons why this information should not be divulged or published.

In the case of mergers or joint acquisitions, or in other cases where the notification is completed by more than one of the parties, business secrets may be submitted under separate cover, and referred to in the notification as an annex. All such annexes must be included in the submission in order for a notification to be considered complete.

1.6. Definitions and instructions for purposes of this Form

Notifying party or parties: in cases where a notification is submitted by only one of the undertakings who is a party to an operation, 'notifying parties' is used to refer only to the undertaking actually submitting the notification.

Party(ies) to the concentration or parties: these terms relate to both the acquiring and acquired parties, or to the merging parties, including all undertakings in which a controlling interest is being acquired or which is the subject of a public bid.

Except where otherwise specified, the terms notifying party(ies) and party(ies) to the concentration include all the undertakings which belong to the same groups as those parties.

Affected markets: Section 6 of this Form requires the notifying parties to define the relevant product markets, and further to identify which of those relevant markets are likely to be affected by the notified operation. This definition of affected market is used as the basis for requiring information for a number of other questions contained in this Form. The definitions thus submitted by the notifying parties are referred to in this Form as the affected market(s). This term can refer to a relevant market made up either of products or of services.

[1] See, in particular, Article 122 of the EEA Agreement, Article 9 of Protocol 24 to the EEA Agreement and Article 17(2) of Chapter XIII of Protocol 4 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (ESA Agreement).

Year: all references to the word year in this Form should be read as meaning calendar year, unless otherwise stated. All information requested in this Form must, unless otherwise specified, relate to the year preceding that of the notification.

The financial data requested in Sections 3.3 to 3.5 must be provided in euros at the average exchange rates prevailing for the years or other periods in question.

All references contained in this Form are to the relevant articles and paragraphs of the EC Merger Regulation, unless otherwise stated.

1.7. **Provision of information to Employees and their representatives**

The Commission would like to draw attention to the obligations to which the parties to a concentration may be subject under Community and/or national rules on information and consultation regarding transactions of a concentrative nature vis-à-vis employees and/or their representatives.

SECTION 1

Description of the concentration

1.1. Provide an executive summary of the concentration, specifying the parties to the concentration, the nature of the concentration (for example, merger, acquisition, or joint venture), the areas of activity of the notifying parties, the markets on which the concentration will have an impact (including the main affected markets ([1])), and the strategic and economic rationale for the concentration.

1.2. Provide a summary (up to 500 words) of the information provided under Section 1.1. It is intended that this summary will be published on the Commission's website at the date of notification. The summary must be drafted so that it contains no confidential information or business secrets.

SECTION 2

Information about the parties

2.1. Information on notifying party (or parties)

Give details of:

2.1.1. name and address of undertaking;

2.1.2. nature of the undertaking's business;

2.1.3. name, address, telephone number, fax number and e-mail address of, and position held by, the appropriate contact person; and

2.1.4. an address for service of the notifying party (or each of the notifying parties) to which documents and, in particular, Commission decisions may be delivered. The name, telephone number and e-mail address of a person at this address who is authorised to accept service must be provided.

2.2. Information on other parties ([2]) to the concentration

For each party to the concentration (except the notifying party or parties) give details of:

2.2.1. name and address of undertaking;

2.2.2. nature of undertaking's business;

2.2.3. name, address, telephone number, fax number and e-mail address of, and position held by, the appropriate contact person; and

2.2.4. an address for service of the party (or each of the parties) to which documents and, in particular, Commission Decisions may be delivered. The name, e-mail address and telephone number of a person at this address who is authorised to accept service must be provided.

([1]) See Section 6.III for the definition of affected markets.
([2]) This includes the target company in the case of a contested bid, in which case the details should be completed as far as is possible.

2.3. Appointment of representatives

Where notifications are signed by representatives of undertakings, such representatives must produce written proof that they are authorised to act. The written proof must contain the name and position of the persons granting such authority.

Provide the following contact details of any representatives who have been authorised to act for any of the parties to the concentration, indicating whom they represent:

2.3.1. name of representative;

2.3.2. address of representative;

2.3.3. name, address, telephone number, fax number and e-mail address of person to be contacted; and

2.3.4. an address of the representative (in Brussels if available) to which correspondence may be sent and documents delivered.

SECTION 3

Details of the concentration

3.1. Describe the nature of the concentration being notified. In doing so, state:

(a) whether the proposed concentration is a full legal merger, an acquisition of sole or joint control, a full-function joint venture within the meaning of Article 3(4) of the EC Merger Regulation or a contract or other means of conferring direct or indirect control within the meaning of Article 3(2) of the EC Merger Regulation;

(b) whether the whole or parts of parties are subject to the concentration;

(c) a brief explanation of the economic and financial structure of the concentration;

(d) whether any public offer for the securities of one party by another party has the support of the former's supervisory boards of management or other bodies legally representing that party;

(e) the proposed or expected date of any major events designed to bring about the completion of the concentration;

(f) the proposed structure of ownership and control after the completion of the concentration;

(g) any financial or other support received from whatever source (including public authorities) by any of the parties and the nature and amount of this support; and

(h) the economic sectors involved in the concentration.

3.2. State the value of the transaction (the purchase price or the value of all the assets involved, as the case may be).

3.3. For each of the undertakings concerned by the concentration [1] provide the following data [2] for the last financial year:

3.3.1. world-wide turnover;

3.3.2. Community-wide turnover;

3.3.3. EFTA-wide turnover;

3.3.4. turnover in each Member State;

3.3.5. turnover in each EFTA State;

[1] See Commission Notice on the concept of undertakings concerned.

[2] See, generally, the Commission Notice on calculation of turnover. Turnover of the acquiring party or parties to the concentration should include the aggregated turnover of all undertakings within the meaning of Article 5(4) of the EC Merger Regulation. Turnover of the acquired party or parties should include the turnover relating to the parts subject to the transaction within the meaning of Article 5(2) of the EC Merger Regulation. Special provisions are contained in Articles 5(3), (4) and 5(5) of the EC Merger Regulation for credit, insurance, other financial institutions and joint undertakings.

3.3.6. the Member State, if any, in which more than two-thirds of Community-wide turnover is achieved; and

3.3.7. the EFTA State, if any, in which more than two-thirds of EFTA-wide turnover is achieved.

3.4. For the purposes of Article 1(3) of the EC Merger Regulation, if the operation does not meet the thresholds set out in Article 1(2), provide the following data for the last financial year:

3.4.1. the Member States, if any, in which the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million; and

3.4.2. the Member States, if any, in which the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million.

3.5. For the purposes of determining whether the concentration qualifies as an EFTA cooperation case ([1]), provide the following information with respect to the last financial year:

3.5.1. does the combined turnover of the undertakings concerned in the territory of the EFTA States equal 25 % or more of their total turnover in the EEA territory?

3.5.2. does each of at least two undertakings concerned have a turnover exceeding EUR 250 million in the territory of the EFTA States?

3.6. Describe the economic rationale of the concentration.

SECTION 4

Ownership and control ([2])

4.1. For each of the parties to the concentration provide a list of all undertakings belonging to the same group.

This list must include:

4.1.1. all undertakings or persons controlling these parties, directly or indirectly;

4.1.2. all undertakings active on any affected market ([3]) that are controlled, directly or indirectly:

(a) by these parties;

(b) by any other undertaking identified in 4.1.1.

For each entry listed above, the nature and means of control should be specified.

The information sought in this section may be illustrated by the use of organization charts or diagrams to show the structure of ownership and control of the undertakings.

4.2. With respect to the parties to the concentration and each undertaking or person identified in response to Section 4.1, provide:

4.2.1. a list of all other undertakings which are active in affected markets (affected markets are defined in Section 6) in which the undertakings, or persons, of the group hold individually or collectively 10 % or more of the voting rights, issued share capital or other securities;

in each case, identify the holder and state the percentage held;

4.2.2. a list for each undertaking of the members of their boards of management who are also members of the boards of management or of the supervisory boards of any other undertaking which is active in affected markets; and (where applicable) for each undertaking a list of the members of their supervisory boards who are also members of the boards of management of any other undertaking which is active in affected markets;

in each case, identify the name of the other undertaking and the positions held;

([1]) See Article 57 of the EEA Agreement and, in particular, Article 2(1) of Protocol 24 to the EEA Agreement. A case qualifies as a cooperation case if the combined turnover of the undertakings concerned in the territory of the EFTA States equals 25 % or more of their total turnover within the territory covered by the EEA Agreement; or each of at least two undertakings concerned has a turnover exceeding EUR 250 million in the territory of the EFTA States; or the concentration is liable to create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the territories of the EFTA States or a substantial part thereof.

([2]) See Articles 3(3), 3(4) and 3(5) and Article 5(4) of the EC Merger Regulation.

([3]) See Section 6 for the definition of affected markets.

4.2.3. details of acquisitions made during the last three years by the groups identified above (Section 4.1) of undertakings active in affected markets as defined in Section 6.

Information provided here may be illustrated by the use of organization charts or diagrams to give a better understanding.

SECTION 5

Supporting documentation

Notifying parties must provide the following:

5.1. copies of the final or most recent versions of all documents bringing about the concentration, whether by agreement between the parties to the concentration, acquisition of a controlling interest or a public bid;

5.2. in a public bid, a copy of the offer document; if it is unavailable at the time of notification, it should be submitted as soon as possible and not later than when it is posted to shareholders;

5.3. copies of the most recent annual reports and accounts of all the parties to the concentration; and

5.4. copies of all analyses, reports, studies, surveys, and any comparable documents prepared by or for any member(s) of the board of directors, or the supervisory board, or the other person(s) exercising similar functions (or to whom such functions have been delegated or entrusted), or the shareholders' meeting, for the purpose of assessing or analysing the concentration with respect to market shares, competitive conditions, competitors (actual and potential), the rationale of the concentration, potential for sales growth or expansion into other product or geographic markets, and/or general market conditions. [1]

For each of these documents, indicate (if not contained in the document itself) the date of preparation, the name and title of each individual who prepared each such document.

SECTION 6

Market definitions

The relevant product and geographic markets determine the scope within which the market power of the new entity resulting from the concentration must be assessed. [2]

The notifying party or parties must provide the data requested having regard to the following definitions:

I. **Relevant product markets:**

A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use. A relevant product market may in some cases be composed of a number of individual products and/or services which present largely identical physical or technical characteristics and are interchangeable.

Factors relevant to the assessment of the relevant product market include the analysis of why the products or services in these markets are included and why others are excluded by using the above definition, and having regard to, for example, substitutability, conditions of competition, prices, cross-price elasticity of demand or other factors relevant for the definition of the product markets (for example, supply-side substitutability in appropriate cases).

II. **Relevant geographic markets:**

The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of relevant products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring geographic areas because, in particular, conditions of competition are appreciably different in those areas.

[1] As set out in introductory Parts 1.1 and 1.3(g), in the context of pre-notification, you may want to discuss with the Commission to what extent dispensation (waivers) to provide the requested documents would be appropriate. Where waivers are sought, the Commission may specify the documents to be provided in a particular case in a request for information under Article 11 of the EC Merger Regulation.

[2] See Commission Notice on the definition of the relevant market for the purposes of Community competition law.

Factors relevant to the assessment of the relevant geographic market include *inter alia* the nature and characteristics of the products or services concerned, the existence of entry barriers, consumer preferences, appreciable differences in the undertakings' market shares between neighbouring geographic areas or substantial price differences.

III. Affected markets:

For purposes of information required in this Form, affected markets consist of relevant product markets where, in the EEA territory, in the Community, in the territory of the EFTA States, in any Member State or in any EFTA State:

(a) two or more of the parties to the concentration are engaged in business activities in the same product market and where the concentration will lead to a combined market share of 15 % or more. These are horizontal relationships;

(b) one or more of the parties to the concentration are engaged in business activities in a product market, which is upstream or downstream of a product market in which any other party to the concentration is engaged, and any of their individual or combined market shares at either level is 25 % or more, regardless of whether there is or is not any existing supplier/customer relationship between the parties to the concentration [1]. These are vertical relationships.

On the basis of the above definitions and market share thresholds, provide the following information: [2]

— Identify each affected market within the meaning of Section III, at:

— the EEA, Community or EFTA level;

— the individual Member States or EFTA States level.

6.2. In addition, state and explain the parties' view regarding the scope of the relevant geographic market within the meaning of Section II that applies in relation to each affected market identified above.

IV. Other markets in which the notified operation may have a significant impact

6.3. On the basis of the above definitions, describe the product and geographic scope of markets other than affected markets identified in Section 6.1 in which the notified operation may have a significant impact, for example, where:

(a) any of the parties to the concentration has a market share larger than 25 % and any other party to the concentration is a potential competitor into that market. A party may be considered a potential competitor, in particular, where it has plans to enter a market, or has developed or pursued such plans in the past two years;

(b) any of the parties to the concentration has a market share larger than 25 % and any other party to the concentration holds important intellectual property rights for that market;

(c) any of the parties to the concentration is present in a product market, which is a neighbouring market closely related to a product market in which any other party to the concentration is engaged, and the individual or combined market shares of the parties in any one of these markets is 25 % or more. Product markets are closely related neighbouring markets when the products are complementary to each other [3] or when they belong to a range of products that is generally purchased by the same set of customers for the same end use [4];

where such markets include the whole or a part of the EEA.

In order to enable the Commission to consider, from the outset, the competitive impact of the proposed concentration in the markets identified under this Section 6.3, notifying parties are invited to submit the information under Sections 7 and 8 of this Form in relation to those markets.

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[1] For example, if a party to the concentration holds a market share larger than 25 % in a market that is upstream to a market in which the other party is active, then both the upstream and the downstream markets are affected markets. Similarly, if a vertically integrated company merges with another party which is active at the downstream level, and the merger leads to a combined market share downstream of 25 % or more, then both the upstream and the downstream markets are affected markets.

[2] As set out in introductory Parts 1.1 and 1.3(g), in the context of pre-notification, you may want to discuss with the Commission to what extent dispensation (waivers) to provide the requested information would be appropriate for certain affected markets, or for certain other markets (as described under IV).

[3] Products (or services) are called complementary when, for example, the use (or consumption) of one product essentially implies the use (or consumption) of the other product, such as for staple machines and staples, and printers and printer cartridges.

[4] Examples of products belonging to such a range would be whisky and gin sold to bars and restaurants, and different materials for packaging a certain category of goods sold to producers of such goods.

SECTION 7

Information on affected markets

For each affected relevant product market, for each of the last three financial years [1]:

(a) for the EEA territory;

(b) for the Community as a whole;

(c) for the territory of the EFTA States as a whole;

(d) individually for each Member State and EFTA State where the parties to the concentration do business; and

(e) where in the opinion of the notifying parties, the relevant geographic market is different;

provide the following:

7.1. an estimate of the total size of the market in terms of sales value (in euros) and volume (units) [2]. Indicate the basis and sources for the calculations and provide documents where available to confirm these calculations;

7.2. the sales in value and volume, as well as an estimate of the market shares, of each of the parties to the concentration;

7.3. an estimate of the market share in value (and where appropriate, volume) of all competitors (including importers) having at least 5 % of the geographic market under consideration. On this basis, provide an estimate of the HHI index [3] pre- and post-merger, and the difference between the two (the delta) [4].Indicate the proportion of market shares used as a basis to calculate the HHI. Identify the sources used to calculate these market shares and provide documents where available to confirm the calculation;

7.4. the name, address, telephone number, fax number and e-mail address of the head of the legal department (or other person exercising similar functions; and in cases where there is no such person, then the chief executive) for the competitors identified under 7.3;

7.5. an estimate of the total value and volume and source of imports from outside the EEA territory and identify:

(a) the proportion of such imports that are derived from the groups to which the parties to the concentration belong;

(b) an estimate of the extent to which any quotas, tariffs or non-tariff barriers to trade, affect these imports; and

(c) an estimate of the extent to which transportation and other costs affect these imports;

7.6. the extent to which trade among States within the EEA territory is affected by:

(a) transportation and other costs; and

(b) other non-tariff barriers to trade;

7.7. the manner in which the parties to the concentration produce, price and sell the products and/or services; for example, whether they manufacture and price locally, or sell through local distribution facilities;

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(1) Without prejudice to Article 4(2) of the Implementing Regulation.

(2) The value and volume of a market should reflect output less exports plus imports for the geographic areas under consideration. If readily available, please provide disaggregated information on imports and exports by country of origin and destination, respectively.

(3) HHI stands for Herfindahl-Hirschman Index, a measure of market concentration. The HHI is calculated by summing the squares of the individual market shares of all the firms in the market. For example, a market containing five firms with market shares of 40 %, 20 %, 15 %, 15 %, and 10 %, respectively, has an HHI of 2 550 ($40^2 + 20^2 + 15^2 + 15^2 + 10^2 = 2\,550$). The HHI ranges from close to zero (in an atomistic market) to 10 000 (in the case of a pure monopoly). The post-merger HHI is calculated on the working assumption that the individual market shares of the companies do not change. Although it is best to include all firms in the calculation, lack of information about very small firms may not be important because such firms do not affect the HHI significantly.

(4) The increase in concentration as measured by the HHI can be calculated independently of the overall market concentration by doubling the product of the market shares of the merging firms. For example, a merger of two firms with market shares of 30 % and 15 % respectively would increase the HHI by 900 ($30 \times 15 \times 2 = 900$). The explanation for this technique is as follows: Before the merger, the market shares of the merging firms contribute to the HHI by their squares individually: $(a)^2 + (b)^2$. After the merger, the contribution is the square of their sum: $(a + b)^2$, which equals $(a)^2 + (b)^2 + 2ab$. The increase in the HHI is therefore represented by 2ab.

7.8. a comparison of price levels in each Member State and EFTA State by each party to the concentration and a similar comparison of price levels between the Community, the EFTA States and other areas where these products are produced (e.g. Russia, the United States of America, Japan, China, or other relevant areas); and

7.9. the nature and extent of vertical integration of each of the parties to the concentration compared with their largest competitors.

SECTION 8

General conditions in affected markets

8.1. Identify the five largest independent [1] suppliers to the parties to the concentration and their individual shares of purchases from each of these suppliers (of raw materials or goods used for purposes of producing the relevant products). Provide the name, address, telephone number, fax number and e-mail address of the head of the legal department (or other person exercising similar functions; and in cases where there is no such person, then the chief executive) for each of these suppliers.

Structure of supply in affected markets

8.2. Explain the distribution channels and service networks that exist in the affected markets. In so doing, take account of the following where appropriate:

(a) the distribution systems prevailing in the market and their importance. To what extent is distribution performed by third parties and/or undertakings belonging to the same group as the parties identified in Section 4?

(b) the service networks (for example, maintenance and repair) prevailing and their importance in these markets. To what extent are such services performed by third parties and/or undertakings belonging to the same group as the parties identified in Section 4?

8.3. Provide an estimate of the total Community-wide and EFTA-wide capacity for the last three years. Over this period what proportion of this capacity is accounted for by each of the parties to the concentration, and what have been their respective rates of capacity utilization. If applicable, identify the location and capacity of the manufacturing facilities of each of the parties to the concentration in affected markets.

8.4. Specify whether any of the parties to the concentration, or any of the competitors, have 'pipeline products', products likely to be brought to market in the near term, or plans to expand (or contract) production or sales capacity. If so, provide an estimate of the projected sales and market shares of the parties to the concentration over the next three to five years.

8.5. If you consider any other supply-side considerations to be relevant, they should be specified.

Structure of demand in affected markets

8.6. Identify the five [2] largest independent customers of the parties in each affected market and their individual share of total sales for such products accounted for by each of those customers. Provide the name, address, telephone number, fax number and e-mail address of the head of the legal department (or other person exercising similar functions; and in cases where there is no such person, then the chief executive) for each of these customers.

8.7. Explain the structure of demand in terms of:

(a) the phases of the markets in terms of, for example, take-off, expansion, maturity and decline, and a forecast of the growth rate of demand;

(b) the importance of customer preferences, for example in terms of brand loyalty, the provision of pre- and after-sales services, the provision of a full range of products, or network effects;

(c) the role of product differentiation in terms of attributes or quality, and the extent to which the products of the parties to the concentration are close substitutes;

(d) the role of switching costs (in terms of time and expense) for customers when changing from one supplier to another;

(e) the degree of concentration or dispersion of customers;

[1] That is, suppliers which are not subsidiaries, agents or undertakings forming part of the group of the party in question. In addition to those five independent suppliers the notifying parties can, if they consider it necessary for a proper assessment of the case, identify the intra-group suppliers. The same will apply in 8.6 in relation to customers.

[2] Experience has shown that the examination of complex cases often requires more customer contact details. In the course of pre-notification contacts, the Commission's services may ask for more customer contact details for certain affected markets.

(f) segmentation of customers into different groups with a description of the 'typical customer' of each group;

(g) the importance of exclusive distribution contracts and other types of long-term contracts; and

(h) the extent to which public authorities, government agencies, State enterprises or similar bodies are important participants as a source of demand.

Market entry

8.8. Over the last five years, has there been any significant entry into any affected markets? If so, identify such entrants and provide the name, address, telephone number, fax number and e-mail address of the head of the legal department (or other person exercising similar functions; and in cases where there is no such person, then the chief executive) and an estimate of the current market share of each such entrant. If any of the parties to the concentration entered an affected market in the past five years, provide an analysis of the barriers to entry encountered.

8.9. In the opinion of the notifying parties, are there undertakings (including those at present operating only outside the Community or the EEA) that are likely to enter the market? If so, identify such entrants and provide the name, address, telephone number, fax number and e-mail address of the head of the legal department (or other person exercising similar functions; and in cases where there is no such person, then the chief executive). Explain why such entry is likely and provide an estimate of the time within which such entry is likely to occur.

8.10. Describe the various factors influencing entry into affected markets, examining entry from both a geographical and product viewpoint. In so doing, take account of the following where appropriate:

(a) the total costs of entry (R&D, production, establishing distribution systems, promotion, advertising, servicing, and so forth) on a scale equivalent to a significant viable competitor, indicating the market share of such a competitor;

(b) any legal or regulatory barriers to entry, such as government authorization or standard setting in any form, as well as barriers resulting from product certification procedures, or the need to have a proven track record;

(c) any restrictions created by the existence of patents, know-how and other intellectual property rights in these markets and any restrictions created by licensing such rights;

(d) the extent to which each of the parties to the concentration are holders, licensees or licensors of patents, know-how and other rights in the relevant markets;

(e) the importance of economies of scale for the production or distribution of products in the affected markets; and

(f) access to sources of supply, such as availability of raw materials and necessary infrastructure.

Research and development

8.11. Give an account of the importance of research and development in the ability of a firm operating the relevant market(s) to compete in the long term. Explain the nature of the research and development in affected markets carried out by the parties to the concentration.

In so doing, take account of the following, where appropriate:

(a) trends and intensities of research and development ([1]) in these markets and for the parties to the concentration;

(b) the course of technological development for these markets over an appropriate time period (including developments in products and/or services, production processes, distribution systems, and so on);

(c) the major innovations that have been made in these markets and the undertakings responsible for these innovations; and

(d) the cycle of innovation in these markets and where the parties are in this cycle of innovation.

Cooperative Agreements

8.12. To what extent do cooperative agreements (horizontal, vertical, or other) exist in the affected markets?

8.13. Give details of the most important cooperative agreements engaged in by the parties to the concentration in the affected markets, such as research and development, licensing, joint production, specialization, distribution, long term supply and exchange of information agreements and, where deemed useful, provide a copy of these agreements.

([1]) Research and development intensity is defined as research development expenditure as a proportion of turnover.

Trade associations

8.14. With respect to the trade associations in the affected markets:

(a) identify those of which the parties to the concentration are members; and

(b) identify the most important trade associations to which the customers and suppliers of the parties to the concentration belong.

Provide the name, address, telephone number, fax number and e-mail address of the appropriate contact person for all trade associations listed above.

SECTION 9

Overall market context and efficiencies

9.1. Describe the world wide context of the proposed concentration, indicating the position of each of the parties to the concentration outside of the EEA territory in terms of size and competitive strength.

9.2. Describe how the proposed concentration is likely to affect the interests of intermediate and ultimate consumers and the development of technical and economic progress.

9.3. Should you wish the Commission specifically to consider from the outset [1] whether efficiency gains generated by the concentration are likely to enhance the ability and incentive of the new entity to act pro-competitively for the benefit of consumers, please provide a description of, and supporting documents relating to, each efficiency (including cost savings, new product introductions, and service or product improvements) that the parties anticipate will result from the proposed concentration relating to any relevant product [2].

For each claimed efficiency, provide:

(i) a detailed explanation of how the proposed concentration would allow the new entity to achieve the efficiency. Specify the steps that the parties anticipate taking to achieve the efficiency, the risks involved in achieving the efficiency, and the time and costs required to achieve it;

(ii) where reasonably possible, a quantification of the efficiency and a detailed explanation of how the quantification was calculated. Where relevant, also provide an estimate of the significance of efficiencies related to new product introductions or quality improvements. For efficiencies that involve cost savings, state separately the one-time fixed cost savings, recurring fixed cost savings, and variable cost savings (in euros per unit and euros per year);

(iii) the extent to which customers are likely to benefit from the efficiency and a detailed explanation of how this conclusion is arrived at; and

(iv) the reason why the party or parties could not achieve the efficiency to a similar extent by means other than through the concentration proposed, and in a manner that is not likely to raise competition concerns.

SECTION 10

Cooperative effects of a joint venture

10. For the purpose of Article 2(4) of the EC Merger Regulation, answer the following questions:

(a) Do two or more parents retain to a significant extent activities in the same market as the joint venture or in a market which is upstream or downstream from that of the joint venture or in a neighbouring market closely related to this market? [3]

[1] It should be noted that submitting information in response to Section 9.3 is voluntary. Parties are not required to offer any justification for not completing this section. Failure to provide information on efficiencies will not be taken to imply that the proposed concentration does not create efficiencies or that the rationale for the concentration is to increase market power. Not providing the requested information on efficiencies at the notification stage does not preclude providing the information at a later stage. However, the earlier the information is provided, the better the Commission can verify the efficiency claim.

[2] For further guidance on the assessment of efficiencies, see the Commission Notice on the assessment of horizontal mergers.

[3] For market definitions refer to Section 6.

If the answer is affirmative, please indicate for each of the markets referred to here:

— the turnover of each parent company in the preceding financial year;

— the economic significance of the activities of the joint venture in relation to this turnover;

— the market share of each parent.

If the answer is negative, please justify your answer.

(b) If the answer to (a) is affirmative and in your view the creation of the joint venture does not lead to coordination between independent undertakings that restricts competition within the meaning of Article 81(1) of the EC Treaty, give your reasons.

(c) Without prejudice to the answers to (a) and (b) and in order to ensure that a complete assessment of the case can be made by the Commission, please explain how the criteria of Article 81(3) apply. Under Article 81(3), the provisions of Article 81(1) may be declared inapplicable if the operation:

(i) contributes to improving the production or distribution of goods, or to promoting technical or economic progress;

(ii) allows consumers a fair share of the resulting benefit;

(iii) does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; and

(iv) does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

SECTION 11

Declaration

Article 2(2) of the Implementing Regulation states that where notifications are signed by representatives of undertakings, such representatives must produce written proof that they are authorized to act. Such written authorization must accompany the notification.

The notification must conclude with the following declaration which is to be signed by or on behalf of all the notifying parties:

The notifying party or parties declare that, to the best of their knowledge and belief, the information given in this notification is true, correct, and complete, that true and complete copies of documents required by Form CO have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere.

They are aware of the provisions of Article 14(1)(a) of the EC Merger Regulation.

Place and date:

Signatures:

Name/s and positions:

On behalf of:

ANNEX 4

SHORT FORM

Short Form for the notification of a concentration pursuant to
Regulation (EC) No. 139/2004, O.J. 2004 No. L 133/22

ANNEX II

SHORT FORM FOR THE NOTIFICATION OF A CONCENTRATION PURSUANT TO REGULATION (EC) No 139/2004

1. INTRODUCTION

1.1. The purpose of the Short Form

The Short Form specifies the information that must be provided by the notifying parties when submitting a notification to the European Commission of certain proposed mergers, acquisitions or other concentrations that are unlikely to raise competition concerns.

In completing this Form, your attention is drawn to Council Regulation (EC) No 139/2004 (hereinafter referred to as 'the EC Merger Regulation'), and Commission Regulation (EC) No xx/2004 (hereinafter referred to as 'the Implementing Regulation'), to which this Form is annexed ([1]). The text of these regulations, as well as other relevant documents, can be found on the Competition page of the Commission's Europa web site.

As a general rule, the Short Form may be used for the purpose of notifying concentrations, where one of the following conditions is met:

1. in the case of a joint venture, the joint venture has no, or negligible, actual or foreseen activities within the territory of the European Economic Area (EEA). Such cases occur where:
   (a) the turnover of the joint venture and/or the turnover of the contributed activities is less than EUR 100 million in the EEA territory; and
   (b) the total value of the assets transferred to the joint venture is less than EUR 100 million in the EEA territory;

2. none of the parties to the concentration are engaged in business activities in the same relevant product and geographic market (no horizontal overlap), or in a market which is upstream or downstream of a market in which another party to the concentration is engaged (no vertical relationship);

3. two or more of the parties to the concentration are engaged in business activities in the same relevant product and geographic market (horizontal relationships), provided that their combined market share is less than 15 %; and/or one or more of the parties to the concentration are engaged in business activities in a product market which is upstream or downstream of a product market in which any other party to the concentration is engaged (vertical relationships), and provided that none of their individual or combined market shares at either level is 25 % or more; or

4. a party is to acquire sole control of an undertaking over which it already has joint control.

The Commission may require a full form notification where it appears either that the conditions for using the Short Form are not met, or, exceptionally, where they are met, the Commission determines, nonetheless, that a notification under Form CO is necessary for an adequate investigation of possible competition concerns.

Examples of cases where a notification under Form CO may be necessary are concentrations where it is difficult to define the relevant markets (for example, in emerging markets or where there is no established case practice); where a party is a new or potential entrant, or an important patent holder; where it is not possible to adequately determine the parties' market shares; in markets with high entry barriers, with a high degree of concentration or known competition problems; where at least two parties to the concentration are present in closely related neighbouring markets ([2]); and in concentrations where an issue of coordination arises, as referred to in Article 2(4) of the EC Merger Regulation. Similarly, a Form CO notification may be required in the case of a party acquiring sole control of a joint venture in which it currently holds joint control, where the acquiring party and the joint venture, together, have a strong market position, or the joint venture and the acquiring party have strong positions in vertically related markets.

([1]) Council Regulation (EC) No 139/2004 of 20 January 2004, OJ L 24, 29.01.2004, p. 1. Your attention is drawn to the corresponding provisions of the Agreement on the European Economic Area (hereinafter referred to as 'the EEA Agreement'. See in particular Article 57 of the EEA Agreement, point 1 of Annex XIV to the EEA Agreement and Protocol 4 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice, as well as Protocols 21 and 24 to the EEA Agreement and Article 1, and the Agreed Minutes of the Protocol adjusting the EEA Agreement. Any reference to EFTA States shall be understood to mean those EFTA States which are Contracting Parties to the EEA Agreement. As of 1 May 2004, these States are Iceland, Liechtenstein and Norway.

([2]) Product markets are closely related neighbouring markets when the products are complementary to each other or when they belong to a range of products that is generally purchased by the same set of customers for the same end use.

1.2. **Reversion to the full Form CO notification**

In assessing whether a concentration may be notified under the Short Form, the Commission will ensure that all relevant circumstances are established with sufficient clarity. In this respect, the responsibility to provide correct and complete information rests with the notifying parties.

If, after the concentration has been notified, the Commission considers that the case is not appropriate for notification under the Short Form, the Commission may require full, or where appropriate partial, notification under Form CO. This may be the case where:

— it appears that the conditions for using the Short Form are not met;

— although the conditions for using the Short Form are met, a full or partial notification under Form CO appears to be necessary for an adequate investigation of possible competition concerns or to establish that the transaction is a concentration within the meaning of Article 3 of the EC Merger Regulation;

— the Short Form contains incorrect or misleading information;

— a Member State expresses substantiated competition concerns about the notified concentration within 15 working days of receipt of the copy of the notification; or

— a third party expresses substantiated competition concerns within the time-limit laid down by the Commission for such comments.

In such cases, the notification may be treated as being incomplete in a material respect pursuant to Article 5(2) of the Implementing Regulation. The Commission will inform the notifying parties or their representatives of this in writing and without delay. The notification will only become effective on the date on which all information required is received.

1.3. **Importance of pre-notification contacts**

Experience has shown that pre-notification contacts are extremely valuable to both the notifying parties and the Commission in determining the precise amount of information required in a notification. Also, in cases where the parties wish to submit a Short Form notification, they are advised to engage in pre-notification contacts with the Commission in order to discuss whether the case is one for which it is appropriate to use a Short Form. Notifying parties may refer to the Commission's Best Practices on the Conduct of EC Merger Control Proceedings, which provides guidance on pre-notification contacts and the preparation of notifications.

1.4. **Who must notify**

In the case of a merger within the meaning of Article 3(1)(a) of the EC Merger Regulation or the acquisition of joint control of an undertaking within the meaning of Article 3(1)(b) of the EC Merger Regulation, the notification shall be completed jointly by the parties to the merger or by those acquiring joint control, as the case may be ([1]).

In the case of the acquisition of a controlling interest in one undertaking by another, the acquirer must complete the notification.

In the case of a public bid to acquire an undertaking, the bidder must complete the notification.

Each party completing the notification is responsible for the accuracy of the information which it provides.

1.5. **The requirement for a correct and complete notification**

All information required by this Form must be correct and complete. The information required must be supplied in the appropriate Section of this Form.

In particular you should note that:

(a) In accordance with Article 10(1) of the EC Merger Regulation and Article 5(2) and (4) of the Implementing Regulation, the time-limits of the EC Merger Regulation linked to the notification will not begin to run until all the information that must be supplied with the notification has been received by the Commission. This requirement is to ensure that the Commission is able to assess the notified concentration within the strict time-limits provided by the EC Merger Regulation.

(b) The notifying parties should verify, in the course of preparing their notification, that contact names and numbers, and in particular fax numbers and e-mail addresses, provided to the Commission are accurate, relevant and up-to-date.

([1]) See Article 4(2) of the EC Merger Regulation.

(c) Incorrect or misleading information in the notification will be considered to be incomplete information (Article 5(4) of the Implementing Regulation).

(d) If a notification is incomplete, the Commission will inform the notifying parties or their representatives in writing and without delay. The notification will only become effective on the date on which the complete and accurate information is received by the Commission (Article 10(1) of the EC Merger Regulation, Article 5(2) and (4) of the Implementing Regulation).

(e) Under Article 14(1)(a) of the EC Merger Regulation, notifying parties who, either intentionally or negligently, supply incorrect or misleading information, may be liable to fines of up to 1 % of the aggregate turnover of the undertaking concerned. In addition, pursuant to Article 6(3)(a) and Article 8(6)(a) of the EC Merger Regulation the Commission may revoke its decision on the compatibility of a notified concentration where it is based on incorrect information for which one of the undertakings is responsible.

(f) You may request in writing that the Commission accept that the notification is complete notwithstanding the failure to provide information required by this Form, if such information is not reasonably available to you in part or in whole (for example, because of the unavailability of information on a target company during a contested bid).

The Commission will consider such a request, provided that you give reasons for the unavailability of that information, and provide your best estimates for missing data together with the sources for the estimates. Where possible, indications as to where any of the requested information that is unavailable to you could be obtained by the Commission should also be provided.

(g) You may request in writing that the Commission accept that the notification is complete notwithstanding the failure to provide information required by this Form, if you consider that any particular information required may not be necessary for the Commission's examination of the case.

The Commission will consider such a request, provided that you give adequate reasons why that information is not relevant and necessary to its inquiry into the notified operation. You should explain this during your pre-notification contacts with the Commission and submit a written request for a waiver, asking the Commission to dispense with the obligation to provide that information, pursuant to Article 4(2) of the Implementing Regulation.

1.6. **How to notify**

The notification must be completed in one of the official languages of the European Community. This language will thereafter be the language of the proceedings for all notifying parties. Where notifications are made in accordance with Article 12 of Protocol 24 to the EEA Agreement in an official language of an EFTA State which is not an official language of the Community, the notification must simultaneously be supplemented with a translation into an official language of the Community.

The information requested by this Form is to be set out using the sections and paragraph numbers of the Form, signing a declaration as provided in Section 9, and annexing supporting documentation. In completing Section 7 of this Form, the notifying parties are invited to consider whether, for purposes of clarity, this section is best presented in numerical order, or whether information can be grouped together for each individual reportable market (or group of reportable markets).

For the sake of clarity, certain information may be put in annexes. However, it is essential that all key substantive pieces of information, in particular, market share information for the parties and their largest competitors, are presented in the body of this Form. Annexes to this Form shall only be used to supplement the information supplied in the Form itself.

Contact details must be provided in a format provided by the Commission's Directorate-General for Competition (DG Competition). For a proper investigatory process, it is essential that the contact details are accurate. Multiple instances of incorrect contact details may be a ground for declaring a notification incomplete.

Supporting documents are to be submitted in their original language; where this is not an official language of the Community, they must be translated into the language of the proceeding (Article 3(4) of the Implementing Regulation).

Supporting documents may be originals or copies of the originals. In the latter case, the notifying party must confirm that they are true and complete.

One original and 35 copies of the Short Form and the supporting documents shall be submitted to the Commission's Directorate-General for Competition.

The notification shall be delivered to the address referred to in Article 23(1) of the Implementing Regulation and in the format specified by the Commission from time to time. This address is published in the *Official Journal of the European Union*. The notification must be delivered to the Commission on working days as defined by Article 24 of the Implementing Regulation. In order to enable it to be registered on the same day, it must be delivered before 17.00 hrs on Mondays to Thursdays and before 16.00 hrs on Fridays and workdays preceding public holidays and other holidays as determined by the Commission and published in the *Official Journal of the European Union*. The security instructions given on DG Competition's website must be adhered to.

1.7. **Confidentiality**

Article 287 of the Treaty and Article 17(2) of the EC Merger Regulation as well as the corresponding provisions of the EEA Agreement ([1]) require the Commission, the Member States, the EFTA Surveillance Authority and the EFTA States, their officials and other servants not to disclose information they have acquired through the application of the Regulation of the kind covered by the obligation of professional secrecy. The same principle must also apply to protect confidentiality between notifying parties.

If you believe that your interests would be harmed if any of the information you are asked to supply were to be published or otherwise divulged to other parties, submit this information separately with each page clearly marked 'Business Secrets'. You should also give reasons why this information should not be divulged or published.

In the case of mergers or joint acquisitions, or in other cases where the notification is completed by more than one of the parties, business secrets may be submitted under separate cover, and referred to in the notification as an annex. All such annexes must be included in the submission in order for a notification to be considered complete.

1.8. **Definitions and instructions for purposes of this Form**

Notifying party or parties: in cases where a notification is submitted by only one of the undertakings who is a party to an operation, 'notifying parties' is used to refer only to the undertaking actually submitting the notification.

Party(ies) to the concentration or parties: these terms relate to both the acquiring and acquired parties, or to the merging parties, including all undertakings in which a controlling interest is being acquired or which is the subject of a public bid.

Except where otherwise specified, the terms notifying party(ies) and party(ies) to the concentration include all the undertakings which belong to the same groups as those parties.

Year: all references to the word year in this Form should be read as meaning calendar year, unless otherwise stated. All information requested in this Form must, unless otherwise specified, relate to the year preceding that of the notification.

The financial data requested in Sections 3.3 to 3.5 must be provided in euros at the average exchange rates prevailing for the years or other periods in question.

All references contained in this Form are to the relevant articles and paragraphs of the EC Merger Regulation, unless otherwise stated.

1.9. **Provision of information to employees and their representatives**

The Commission would like to draw attention to the obligations to which the parties to a concentration may be subject under Community and/or national rules on information and consultation regarding transactions of a concentrative nature vis-à-vis employees and/or their representatives.

([1]) See, in particular, Article 122 of the EEA Agreement, Article 9 of Protocol 24 to the EEA Agreement and Article 17(2) of Chapter XIII of Protocol 4 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (ESA Agreement).

SECTION 1

Description of the concentration

1.1. Provide an executive summary of the concentration, specifying the parties to the concentration, the nature of the concentration (for example, merger, acquisition, joint venture), the areas of activity of the notifying parties, the markets on which the concentration will have an impact (including the main reportable markets ([1])), and the strategic and economic rationale for the concentration.

1.2. Provide a summary (up to 500 words) of the information provided under Section 1.1. It is intended that this summary will be published on the Commission's website at the date of notification. The summary must be drafted so that it contains no confidential information or business secrets.

SECTION 2

Information about the parties

2.1. Information on notifying party (or parties)

Give details of:

2.1.1. name and address of undertaking;

2.1.2. nature of the undertaking's business;

2.1.3. name, address, telephone number, fax number and e-mail address of, and position held by, the appropriate contact person; and

2.1.4. an address for service of the notifying party (or each of the notifying parties) to which documents and, in particular, Commission Decisions may be delivered. The name, e-mail address and telephone number of a person at this address who is authorised to accept service must be provided.

2.2. Information on other parties ([2]) to the concentration

For each party to the concentration (except the notifying party or parties) give details of:

2.2.1. name and address of undertaking;

2.2.2. nature of undertaking's business;

2.2.3. name, address, telephone number, fax number and e-mail address of, and position held by, the appropriate contact person; and

2.2.4. an address for service of the party (or each of the parties) to which documents and, in particular, Commission Decisions may be delivered. The name, e-mail address and telephone number of a person at this address who is authorised to accept service must be provided.

2.3. Appointment of representatives

Where notifications are signed by representatives of undertakings, such representatives must produce written proof that they are authorised to act. The written proof must contain the name and position of the persons granting such authority.

Provide the following contact details of information of any representatives who have been authorised to act for any of the parties to the concentration, indicating whom they represent:

2.3.1. name of representative;

2.3.2. address of representative;

2.3.3. name, address, telephone number, fax number and e-mail address of person to be contacted; and

2.3.4. an address of the representative for service (in Brussels if available) to which correspondence may be sent and documents delivered.

([1]) See Section 6.III for the definition of reportable markets.
([2]) This includes the target company in the case of a contested bid, in which case the details should be completed as far as is possible.

SECTION 3

Details of the concentration

3.1. Describe the nature of the concentration being notified. In doing so state:

(a) whether the proposed concentration is a full legal merger, an acquisition of sole or joint control, a full-function joint venture within the meaning of Article 3(4) of the EC Merger Regulation or a contract or other means of conferring direct or indirect control within the meaning of Article 3(2) of the EC Merger Regulation;

(b) whether the whole or parts of parties are subject to the concentration;

(c) a brief explanation of the economic and financial structure of the concentration;

(d) whether any public offer for the securities of one party by another party has the support of the former's supervisory boards of management or other bodies legally representing that party;

(e) the proposed or expected date of any major events designed to bring about the completion of the concentration;

(f) the proposed structure of ownership and control after the completion of the concentration;

(g) any financial or other support received from whatever source (including public authorities) by any of the parties and the nature and amount of this support; and

(h) the economic sectors involved in the concentration.

3.2. State the value of the transaction (the purchase price or the value of all the assets involved, as the case may be);

3.3. For each of the undertakings concerned by the concentration ([1]) provide the following data ([2]) for the last financial year:

3.3.1. world-wide turnover;

3.3.2. Community-wide turnover;

3.3.3. EFTA-wide turnover;

3.3.4. turnover in each Member State;

3.3.5. turnover in each EFTA State;

3.3.6. the Member State, if any, in which more than two-thirds of Community-wide turnover is achieved; and

3.3.7. the EFTA State, if any, in which more than two-thirds of EFTA-wide turnover is achieved.

3.4. For the purposes of Article 1(3) of the EC Merger Regulation, if the operation does not meet the thresholds set out in Article 1(2), provide the following data for the last financial year:

3.4.1. the Member States, if any, in which the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million; and

3.4.2. the Member States, if any, in which the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million.

3.5. For the purposes of determining whether the concentration qualifies as an EFTA cooperation case ([3]), provide the following information with respect to the last financial year:

([1]) See Commission Notice on the concept of undertakings concerned.

([2]) See, generally, the Commission Notice on calculation of turnover. Turnover of the acquiring party or parties to the concentration should include the aggregated turnover of all undertakings within the meaning of Article 5(4) of the EC Merger Regulation. Turnover of the acquired party or parties should include the turnover relating to the parts subject to the transaction within the meaning of Article 5(2) of the EC Merger Regulation. Special provisions are contained in Articles 5(3), (4) and 5(5) of the EC Merger Regulation for credit, insurance, other financial institutions and joint undertakings.

([3]) See Article 57 of the EEA Agreement and, in particular, Article 2(1) of Protocol 24 to the EEA Agreement. A case qualifies to be treated as a cooperation case if the combined turnover of the undertakings concerned in the territory of the EFTA States equals 25 % or more of their total turnover within the territory covered by the EEA Agreement; or each of at least two undertakings concerned has a turnover exceeding EUR 250 million in the territory of the EFTA States; or the concentration is liable to create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the territories of the EFTA States or a substantial part thereof.

3.5.1. does the combined turnover of the undertakings concerned in the territory of the EFTA States equal 25 % or more of their total turnover in the EEA territory?

3.5.2. does each of at least two undertakings concerned have a turnover exceeding EUR 250 million in the territory of the EFTA States?

3.6. In case the transaction concerns the acquisition of joint control of a joint venture, provide the following information:

3.6.1. the turnover of the joint venture and/or the turnover of the contributed activities to the joint venture; and/or

3.6.2. the total value of assets transferred to the joint venture.

3.7. Describe the economic rationale of the concentration.

SECTION 4

Ownership and control [1]

For each of the parties to the concentration provide a list of all undertakings belonging to the same group.

This list must include:

4.1. all undertakings or persons controlling these parties, directly or indirectly;

4.2. all undertakings active in any reportable market [2] that are controlled, directly or indirectly:

(a) by these parties;

(b) by any other undertaking identified in 4.1.

For each entry listed above, the nature and means of control should be specified.

The information sought in this section may be illustrated by the use of organisation charts or diagrams to show the structure of ownership and control of the undertakings.

SECTION 5

Supporting documentation

Notifying parties must provide the following:

5.1. copies of the final or most recent versions of all documents bringing about the concentration, whether by agreement between the parties to the concentration, acquisition of a controlling interest or a public bid; and

5.2. copies of the most recent annual reports and accounts of all the parties to the concentration.

SECTION 6

Market definitions

The relevant product and geographic markets determine the scope within which the market power of the new entity resulting from the concentration must be assessed. [3]

The notifying party or parties must provide the data requested having regard to the following definitions:

I. **Relevant product markets**

A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use. A relevant product market may in some cases be composed of a number of individual products and/or services which present largely identical physical or technical characteristics and are interchangeable.

Factors relevant to the assessment of the relevant product market include the analysis of why the products or services in these markets are included and why others are excluded by using the above definition, and having regard to, for example, substitutability, conditions of competition, prices, cross-price elasticity of demand or other factors relevant for the definition of the product markets (for example, supply-side substitutability in appropriate cases).

[1] See Articles 3(3), 3(4) and 3(5) and Article 5(4) of the EC Merger Regulation.
[2] See Section 6.III for the definition of reportable markets.
[3] See Commission Notice on the definition of the relevant market for the purposes of Community competition law.

II. **Relevant geographic markets**

The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of relevant products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring geographic areas because, in particular, conditions of competition are appreciably different in those areas.

Factors relevant to the assessment of the relevant geographic market include *inter alia* the nature and characteristics of the products or services concerned, the existence of entry barriers, consumer preferences, appreciable differences in the undertakings' market shares between neighbouring geographic areas, or substantial price differences.

III. **Reportable markets**

For purposes of information required in this Form, reportable markets consist of all relevant product and geographic markets, as well as plausible alternative relevant product and geographic market definitions, on the basis of which:

(a) two or more of the parties to the concentration are engaged in business activities in the same relevant market (horizontal relationships);

(b) one or more of the parties to the concentration are engaged in business activities in a product market, which is upstream or downstream of a market in which any other party to the concentration is engaged, regardless of whether there is or is not any existing supplier/customer relationship between the parties to the concentration (vertical relationships).

6.1. On the basis of the above market definitions, identify all reportable markets.

SECTION 7

Information on markets

For each reportable market described in Section 6, for the year preceding the operation, provide the following: [1]

7.1. an estimate of the total size of the market in terms of sales value (in euros) and volume (units) [2]. Indicate the basis and sources for the calculations and provide documents where available to confirm these calculations;

7.2. the sales in value and volume, as well as an estimate of the market shares, of each of the parties to the concentration. Indicate if there have been significant changes to the sales and market shares for the last three financial years; and

7.3. for horizontal and vertical relationships, an estimate of the market share in value (and where appropriate, volume) of the three largest competitors (indicating the basis for the estimates). Provide the name, address, telephone number, fax number and e-mail address of the head of the legal department (or other person exercising similar functions; and in cases where there is no such person, then the chief executive) for these competitors.

SECTION 8

Cooperative effects of a joint venture

8. For the purpose of Article 2(4) of the EC Merger Regulation, please answer the following questions:

(a) Do two or more parents retain to a significant extent activities in the same market as the joint venture or in a market which is upstream or downstream from that of the joint venture or in a neighbouring market closely related to this market? [3]

If the answer is affirmative, please indicate for each of the markets referred to here:

— the turnover of each parent company in the preceding financial year;

— the economic significance of the activities of the joint venture in relation to this turnover;

— the market share of each parent.

If the answer is negative, please justify your answer.

[1] In the context of pre-notification, you may want to discuss with the Commission to what extent dispensation (waivers) to provide the requested information would be appropriate for certain reportable markets.
[2] The value and volume of a market should reflect output less exports plus imports for the geographic areas under consideration.
[3] For market definitions refer to Section 6.

(b) If the answer to (a) is affirmative and in your view the creation of the joint venture does not lead to coordination between independent undertakings that restricts competition within the meaning of Article 81(1) of the EC Treaty, give your reasons.

(c) Without prejudice to the answers to (a) and (b) and in order to ensure that a complete assessment of the case can be made by the Commission, please explain how the criteria of Article 81(3) apply. Under Article 81(3), the provisions of Article 81(1) may be declared inapplicable if the operation:

(i) contributes to improving the production or distribution of goods, or to promoting technical or economic progress;

(ii) allows consumers a fair share of the resulting benefit;

(iii) does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; and

(iv) does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

SECTION 9

Declaration

Article 2(2) of the Implementing Regulation states that where notifications are signed by representatives of undertakings, such representatives must produce written proof that they are authorized to act. Such written authorization must accompany the notification.

The notification must conclude with the following declaration which is to be signed by or on behalf of all the notifying parties:

The notifying party or parties declare that, to the best of their knowledge and belief, the information given in this notification is true, correct, and complete, that true and complete copies of documents required by this Form have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere.

They are aware of the provisions of Article 14(1)(a) of the EC Merger Regulation.

Place and date:

Signatures:

Name/s and positions:

On behalf of:

ANNEX 5

FORM RS

Form RS relating to reasoned submissions pursuant to Articles 4(4) and 4(5) of Regulation (EC) No. 139/2004, O.J. 2004 No. L 133/31

ANNEX III:

FORM RS

(RS = reasoned submission pursuant to Article 4(4) and (5) of Council Regulation (EC) No 139/2004)

FORM RS RELATING TO REASONED SUBMISSIONS

PURSUANT TO ARTICLES 4(4) AND 4(5) OF REGULATION (EC) No 139/2004

INTRODUCTION

A. **The purpose of this Form**

This Form specifies the information that requesting parties should provide when making a reasoned submission for a pre-notification referral under Article 4(4) or (5) of Council Regulation (EC) No 139/2004 (hereinafter referred to as 'the EC Merger Regulation').

Your attention is drawn to the EC Merger Regulation and to Commission Regulation (EC) No […/2004] (hereinafter referred to as 'the EC Merger Implementing Regulation'). The text of these regulations, as well as other relevant documents, can be found on the Competition page of the Commission's Europa web site.

Experience has shown that prior contacts are extremely valuable to both the parties and the relevant authorities in determining the precise amount and type of information required. Accordingly, parties are encouraged to consult the Commission and the relevant Member State/s regarding the adequacy of the scope and type of information on which they intend to base their reasoned submission.

B. **The requirement for a reasoned submission to be correct and complete**

All information required by this Form must be correct and complete. The information required must be supplied in the appropriate section of this Form.

Incorrect or misleading information in the reasoned submission will be considered to be incomplete information (Article 5(4) of the EC Merger Implementing Regulation).

If parties submit incorrect information, the Commission will have the power to revoke any Article 6 or 8 decision it adopts following an Article 4(5) referral, pursuant to Article 6(3)(a) or 8(6)(a) of the EC Merger Regulation. Following revocation, national competition laws would once again be applicable to the transaction. In the case of referrals under Article 4(4) made on the basis of incorrect information, the Commission may require a notification pursuant to Article 4(1). In addition, the Commission will have the power to impose fines for submission of incorrect or misleading information pursuant to Article 14(1)(a) of the EC Merger Regulation. (See point d below). Finally, parties should also be aware that, if a referral is made on the basis of incorrect, misleading or incomplete information included in Form RS, the Commission and/or the Member States may consider making a post-notification referral rectifying any referral made at pre-notification.

In particular you should note that:

(a) In accordance with Articles 4(4) and (5) of the EC Merger Regulation, the Commission is obliged to transmit reasoned submissions to Member States without delay. The time-limits for considering a reasoned submission will begin upon receipt of the submission by the relevant Member State or States. The decision whether or not to accede to a reasoned submission will normally be taken on the basis of the information contained therein, without further investigation efforts being undertaken by the authorities involved.

(b) The submitting parties should therefore verify, in the course of preparing their reasoned submission, that all information and arguments relied upon are sufficiently supported by independent sources.

(c) Under Article 14(1)(a) of the EC Merger Regulation, parties making a reasoned submission who, either intentionally or negligently, provide incorrect or misleading information, may be liable to fines of up to 1 % of the aggregate turnover of the undertaking concerned.

(d) You may request in writing that the Commission accept that the reasoned submission is complete notwithstanding the failure to provide information required by this Form, if such information is not reasonably available to you in part or in whole (for example, because of the unavailability of information on a target company during a contested bid).

The Commission will consider such a request, provided that you give reasons for the non-availability of that information, and provide your best estimates for missing data together with the sources for the estimates. Where possible, indications as to where any of the requested information that is unavailable to you could be obtained by the Commission or the relevant Member State/s should also be provided.

(e) You may request that the Commission accept that the reasoned submission is complete notwithstanding the failure to provide information required by this Form, if you consider that any particular information requested by this Form may not be necessary for the Commission's or the relevant Member State/s' examination of the case.

The Commission will consider such a request, provided that you give adequate reasons why that information is not relevant and necessary to dealing with your request for a pre-notification referral. You should explain this during your prior contacts with the Commission and with the relevant Member State/s, and submit a written request for a waiver asking the Commission to dispense with the obligation to provide that information, pursuant to Article 4(2) of the EC Merger Implementing Regulation. The Commission may consult with the relevant Member State authority or authorities before deciding whether to accede to such a request.

C. **Persons entitled to submit a reasoned submission**

In the case of a merger within the meaning of Article 3(1)(a) of the EC Merger Regulation or the acquisition of joint control of an undertaking within the meaning of Article 3(1)(b) of the Merger Regulation, the reasoned submission must be completed jointly by the parties to the merger or by those acquiring joint control as the case may be.

In case of the acquisition of a controlling interest in one undertaking by another, the acquirer must complete the reasoned submission.

In the case of a public bid to acquire an undertaking, the bidder must complete the reasoned submission.

Each party completing a reasoned submission is responsible for the accuracy of the information which it provides.

D. **How to make a reasoned submission**

The reasoned submission must be completed in one of the official languages of the European Union. This language will thereafter be the language of the proceedings for all submitting parties.

In order to facilitate treatment of Form RS by Member State authorities, parties are strongly encouraged to provide the Commission with a translation of their reasoned submission in a language or languages which will be understood by all addressees of the information. As regards requests for referral to a Member State or States, the requesting parties are strongly encouraged to include a copy of the request in the language/s of the Member State/s to which referral is being requested.

The information requested by this Form is to be set out using the sections and paragraph numbers of the Form, signing the declaration at the end, and annexing supporting documentation. For the sake of clarity, certain information may be put in annexes. However, it is essential that all key substantive pieces of information are presented in the body of Form RS. Annexes to this Form shall only be used to supplement the information supplied in the Form itself.

Supporting documents are to be submitted in their original language; where this is not an official language of the Community, they must be translated into the language of the proceeding.

Supporting documents may be originals or copies of the originals. In the latter case, the submitting party must confirm that they are true and complete.

One original and 35 copies of the Form RS and of the supporting documents must be submitted to the Commission. The reasoned submission shall be delivered to the address referred to in Article 23 (1) of the EC Merger Implementing Regulation and in the format specified by the Commission services.

The submission must be delivered to the address of the Commission's Directorate-General for Competition (DG Competition). This address is published in the *Official Journal of the European Union*. The submission must be delivered to the Commission on working days as defined by Article 24 of the EC Merger Implementing Regulation. In order to enable it to be registered on the same day, it must be delivered before 17.00 hrs on Mondays to Thursdays and before 16.00 hrs on Fridays and workdays preceding public holidays and other holidays as determined by the Commission and published in the *Official Journal of the European Union*. The security instructions given on DG Competition's website must be adhered to.

E. **Confidentiality**

Article 287 of the Treaty and Article 17(2) of the EC Merger Regulation require the Commission and the competent authorities of the Member States, their officials and other servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the Member States, not to disclose information of the kind covered by the obligation of professional secrecy and which they have acquired through the application of the Regulation. The same principle must also apply to protect confidentiality between submitting parties.

If you believe that your interests would be harmed if any of the information supplied were to be published or otherwise divulged to other parties, submit this information separately with each page clearly marked 'Business Secrets'. You should also give reasons why this information should not be divulged or published.

In the case of mergers or joint acquisitions, or in other cases where the reasoned submission is completed by more than one of the parties, business secrets may be submitted in separate annexes, and referred to in the submission as an annex. All such annexes must be included in the reasoned submission.

F. Definitions and instructions for the purposes of this Form

Submitting party or parties: in cases where a reasoned submission is made by only one of the undertakings who is a party to an operation, 'submitting parties' is used to refer only to the undertaking actually making the submission.

Party(ies) to the concentration or parties: these terms relate to both the acquiring and acquired parties, or to the merging parties, including all undertakings in which a controlling interest is being acquired or which is the subject of a public bid.

Except where otherwise specified, the terms 'submitting party(ies)' and 'party(ies) to the concentration' include all the undertakings which belong to the same groups as those 'parties'.

Affected markets: Section 4 of this Form requires the submitting parties to define the relevant product markets, and further to identify which of those relevant markets are likely to be affected by the operation. This definition of affected market is used as the basis for requiring information for a number of other questions contained in this Form. The definitions thus submitted by the submitting parties are referred to in this Form as the affected market(s). This term can refer to a relevant market made up either of products or of services.

Year: all references to the word 'year' in this Form should be read as meaning calendar year, unless otherwise stated. All information requested in this Form relates, unless otherwise specified, to the year preceding that of the reasoned submission.

The financial data requested in this Form must be provided in Euros at the average exchange rates prevailing for the years or other periods in question.

All references contained in this Form are to the relevant Articles and paragraphs of the EC Merger Regulation, unless otherwise stated.

SECTION 1

Background information

1.0. Indicate whether the reasoned submission is made under Article 4(4) or (5).

— Article 4(4) referral

— Article 4(5) referral

1.1. Information on the submitting party (or parties)

Give details of:

1.1.1. the name and address of undertaking;

1.1.2. the nature of the undertaking's business;

1.1.3. the name, address, telephone number, fax number and electronic address of, and position held by, the appropriate contact person; and

1.1.4. an address for service of the submitting party (or each of the submitting parties) to which documents and, in particular, Commission decisions may be delivered. The name, telephone number and e-mail address of a person at this address who is authorised to accept service must be provided.

1.2. Information on the other parties [1] to the concentration

For each party to the concentration (except the submitting party or parties) give details of:

1.2.1. the name and address of undertaking;

[1] This includes the target company in the case of a contested bid, in which case the details should be completed as far as is possible.

1.2.2. the nature of undertaking's business;

1.2.3. the name, address, telephone number, fax number and electronic address of, and position held by the appropriate contact person;

1.2.4. an address for service of the party (or each of the parties) to which documents and, in particular, Commission Decisions may be delivered. The name, e-mail address and telephone number of a person at this address who is authorised to accept service must be provided.

1.3. Appointment of representatives

Where reasoned submissions are signed by representatives of undertakings, such representatives must produce written proof that they are authorized to act. The written proof must contain the name and position of the persons granting such authority.

Provide the following contact details of any representatives who have been authorized to act for any of the parties to the concentration, indicating whom they represent:

1.3.1. the name of the representative;

1.3.2. the address of the representative;

1.3.3. the name, address, telephone number, fax number and e-mail address of the person to be contacted; and

1.3.4. an address of the representative (in Brussels if available) to which correspondence may be sent and documents delivered.

SECTION 2

General background and details of the concentration

2.1. Describe the general background to the concentration. In particular, give an overview of the main reasons for the transaction, including its economic and strategic rationale.

Provide an executive summary of the concentration, specifying the parties to the concentration, the nature of the concentration (for example, merger, acquisition, or joint venture.), the areas of activity of the submitting parties, the markets on which the concentration will have an impact (including the main affected markets [1]), and the strategic and economic rationale for the concentration.

2.2. Describe the legal nature of the transaction which is the subject of the reasoned submission. In doing so, indicate:

(a) whether the whole or parts of the parties are subject to the concentration;

(b) the proposed or expected date of any major events designed to bring about the completion of the concentration;

(c) the proposed structure of ownership and control after the completion of the concentration; and

(d) whether the proposed transaction is a concentration within the meaning of Article 3 of the EC Merger Regulation.

2.3. List the economic sectors involved in the concentration.

2.3.1. State the value of the transaction (the purchase price or the value of all the assets involved, as the case may be).

2.4. Provide sufficient financial or other data to show that the concentration meets OR does not meet the jurisdictional thresholds under Article 1 of the EC Merger Regulation.

2.4.1. Provide a breakdown of the Community-wide turnover achieved by the undertakings concerned, indicating, where applicable, the Member State, if any, in which more than two-thirds of this turnover is achieved.

SECTION 3

Ownership and control [2]

For each of the parties to the concentration provide a list of all undertakings belonging to the same group.

[1] See Section 4 for the definition of affected markets.
[2] See Article 3(3), 3(4) and 3(5) and Article 5(4).

This list must include:

3.1. all undertakings or persons controlling these parties, directly or indirectly;

3.2. all undertakings active on any affected market [1] that are controlled, directly or indirectly:

(a) by these parties;

(b) by any other undertaking identified in 3.1.

For each entry listed above, the nature and means of control should be specified.

The information sought in this section may be illustrated by the use of organization charts or diagrams to show the structure of ownership and control of the undertakings.

SECTION 4

Market definitions

The relevant product and geographic markets determine the scope within which the market power of the new entity resulting from the concentration must be assessed [2].

The submitting party or parties must provide the data requested having regard to the following definitions:

I. **Relevant product markets**

A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use. A relevant product market may in some cases be composed of a number of individual products and/or services which present largely identical physical or technical characteristics and are interchangeable.

Factors relevant to the assessment of the relevant product market include the analysis of why the products or services in these markets are included and why others are excluded by using the above definition, and having regard to, for example, substitutability, conditions of competition, prices, cross-price elasticity of demand or other factors relevant for the definition of the product markets (for example, supply-side substitutability in appropriate cases).

II. **Relevant geographic markets**

The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of relevant products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring geographic areas because, in particular, conditions of competition are appreciably different in those areas.

Factors relevant to the assessment of the relevant geographic market include *inter alia* the nature and characteristics of the products or services concerned, the existence of entry barriers, consumer preferences, appreciable differences in the undertakings' market shares between neighbouring geographic areas, or substantial price differences.

III. **Affected markets**

For the purposes of the information required in this Form, affected markets consist of relevant product markets where, in the Community, or in any Member State:

(a) two or more of the parties to the concentration are engaged in business activities in the same product market and where the concentration will lead to a combined market share of 15 % or more. These are horizontal relationships;

(b) one or more of the parties to the concentration are engaged in business activities in a product market, which is upstream or downstream of a product market in which any other party to the concentration is engaged, and any of their individual or combined market shares at either level is 25 % or more, regardless of whether there is or is not any existing supplier/customer relationship between the parties to the concentration [3]. These are vertical relationships.

[1] See Section 4 for the definition of affected markets.

[2] See Commission Notice on the definition of the relevant market for the purposes of Community competition law.

[3] For example, if a party to the concentration holds a market share larger than 25 % in a market that is upstream to a market in which the other party is active, then both the upstream and the downstream markets are affected markets. Similarly, if a vertically integrated company merges with another party which is active at the downstream level, and the merger leads to a combined market share downstream of 25 % or more, then both the upstream and the downstream markets are affected markets.

On the basis of the above definitions and market share thresholds, provide the following information:

4.1. Identify each affected market within the meaning of Section III:

(a) at the Community level;

(b) in the case of a request for referral pursuant to Article 4(4), at the level of each individual Member State;

(c) in the case of a request for referral pursuant to Article 4(5), at the level of each Member State identified at Section 6.3.1 of this Form as capable of reviewing the concentration.

4.2. In addition, explain the submitting parties' view as to the scope of the relevant geographic market within the meaning of Section II in relation to each affected market identified at 4.1 above.

SECTION 5

Information on affected markets

For each affected relevant product market, for the last financial year,

(a) for the Community as a whole;

(b) in the case of a request for referral pursuant to Article 4(4), individually for each Member State where the parties to the concentration do business; and

(c) in the case of a request for referral pursuant to Article 4(5), individually for each Member State identified at Section 6.3.1 of this Form as capable of reviewing the concentration where the parties to the concentration do business; and

(d) where in the opinion of the submitting parties, the relevant geographic market is different;

provide the following information:

5.1. an estimate of the total size of the market in terms of sales value (in Euros) and volume (units) [1]. Indicate the basis and sources for the calculations and provide documents where available to confirm these calculations;

5.2. the sales in value and volume, as well as an estimate of the market shares, of each of the parties to the concentration;

5.3. an estimate of the market share in value (and where appropriate volume) of all competitors (including importers) having at least 5 % of the geographic market under consideration;

On this basis, provide an estimate of the HHI index [2] pre- and post-merger, and the difference between the two (the delta) [3].Indicate the proportion of market shares used as a basis to calculate the HHI; Identify the sources used to calculate these market shares and provide documents where available to confirm the calculation;

5.4. the five largest independent customers of the parties in each affected market and their individual share of total sales for such products accounted for by each of those customers;

[1] The value and volume of a market should reflect output less exports plus imports for the geographic areas under consideration.

[2] HHI stands for Herfindahl-Hirschman Index, a measure of market concentration. The HHI is calculated by summing the squares of the individual market shares of all the firms in the market. For example, a market containing five firms with market shares of 40 %, 20 %, 15 %, 15 %, and 10 %, respectively, has an HHI of 2550 ($40^2 + 20^2 + 15^2 + 15^2 + 10^2 = 2550$). The HHI ranges from close to zero (in an atomistic market) to 10000 (in the case of a pure monopoly). The post-merger HHI is calculated on the working assumption that the individual market shares of the companies do not change. Although it is best to include all firms in the calculation, lack of information about very small firms may not be important because such firms do not affect the HHI significantly.

[3] The increase in concentration as measured by the HHI can be calculated independently of the overall market concentration by doubling the product of the market shares of the merging firms. For example, a merger of two firms with market shares of 30 % and 15 % respectively would increase the HHI by 900 ($30 \times 15 \times 2 = 900$). The explanation for this technique is as follows: Before the merger, the market shares of the merging firms contribute to the HHI by their squares individually: $(a)^2 + (b)^2$. After the merger, the contribution is the square of their sum: $(a + b)^2$, which equals $(a)^2 + (b)^2 + 2ab$. The increase in the HHI is therefore represented by 2ab.

5.5. the nature and extent of vertical integration of each of the parties to the concentration compared with their largest competitors;

5.6. identify the five largest independent [1] suppliers to the parties;

5.7. Over the last five years, has there been any significant entry into any affected markets? In the opinion of the submitting parties are there undertakings (including those at present operating only in extra-Community markets) that are likely to enter the market? Please specify.

5.8. To what extent do cooperative agreements (horizontal or vertical) exist in the affected markets?

5.9. If the concentration is a joint venture, do two or more parents retain to a significant extent activities in the same market as the joint venture or in a market which is downstream or upstream from that of the joint venture or in a neighbouring market closely related to this market? [2]

5.10. Describe the likely impact of the proposed concentration on competition in the affected markets and how the proposed concentration is likely to affect the interests of intermediate and ultimate consumers and the development of technical and economic progress.

SECTION 6

Details of the referral request and reasons why the case should be referred

6.1. Indicate whether the reasoned submission is made pursuant to Article 4(4) or 4(5) of the EC Merger Regulation, and fill in only the relevant sub-section:

— Article 4.4. referral

— Article 4.5 referral

Sub-section 6.2

ARTICLE 4(4) REFERRAL

6.2.1. Identify the Member State or Member States which, pursuant to Article 4(4), you submit should examine the concentration, indicating whether or not you have made informal contact with this Member State/s.

6.2.2. Specify whether you are requesting referral of the whole or part of the case.

If you are requesting referral of part of the case, specify clearly the part or parts of the case for which you request the referral.

If you are requesting referral of the whole of the case, you must confirm that there are no affected markets outside the territory of the Member State/s to which you request the referral to be made.

6.2.3. Explain in what way each of the affected markets in the Member State or States to which referral is requested presents all the characteristics of a distinct market within the meaning of Article 4(4).

6.2.4. Explain in what way competition may be significantly affected in each of the above-mentioned distinct markets within the meaning of Article 4(4).

6.2.5. In the event of a Member State/s becoming competent to review the whole or part of the case following a referral pursuant to Article 4(4), do you consent to the information contained in this Form being relied upon by the Member State/s in question for the purpose of its/their national proceedings relating to that case or part thereof? YES or NO

[1] That is suppliers which are not subsidiaries, agents or undertakings forming part of the group of the party in question. In addition to those five independent suppliers the notifying parties can, if they consider it necessary for a proper assessment of the case, identify the intra-group suppliers. The same applies in relation to customers.

[2] For market definitions refer to Section 4.

Sub-section 6.3

ARTICLE 4(5) REFERRAL

6.3.1. For each Member State, specify whether the concentration is or is not capable of being reviewed under its national competition law. You must tick one box for each and every Member State.

Is the concentration capable of being reviewed under the national competition law of each of the following Member States? You must reply for each Member State. Only indicate YES or NO for each Member State. Failure to indicate YES or NO for any Member State shall be deemed to constitute an indication of YES for that Member State.

Austria:	YES	NO
Belgium:	YES	NO
Cyprus:	YES	NO
Czech Republic:	YES	NO
Denmark:	YES	NO
Estonia:	YES	NO
Finland:	YES	NO
France:	YES	NO
Germany:	YES	NO
Greece:	YES	NO
Hungary:	YES	NO
Ireland:	YES	NO
Italy:	YES	NO
Latvia:	YES	NO
Lithuania:	YES	NO
Luxembourg:	YES	NO
Malta:	YES	NO
Netherlands:	YES	NO
Poland:	YES	NO
Portugal:	YES	NO
Slovakia:	YES	NO
Slovenia:	YES	NO
Spain:	YES	NO
Sweden:	YES	NO
United Kingdom:	YES	NO

6.3.2. For each Member State, provide sufficient financial or other data to show that the concentration meets or does not meet the relevant jurisdictional criteria under the applicable national competition law.

6.3.4. Explain why the case should be examined by the Commission. Explain in particular whether the concentration might affect competition beyond the territory of one Member State.

SECTION 7

Declaration

It follows from Articles 2(2) and 6(2) of the EC Merger Implementing Regulation that where reasoned submissions are signed by representatives of undertakings, such representatives must produce written proof that they are authorized to act. Such written authorization must accompany the submission.

The reasoned submission must conclude with the following declaration which is to be signed by or on behalf of all the submitting parties:

The submitting party or parties declare that, following careful verification, the information given in this reasoned submission is to the best of their knowledge and belief true, correct, and complete, that true and complete copies of documents required by Form RS, have been supplied, and that all estimates are identified as such and are their best estimates of the underlying facts and that all the opinions expressed are sincere.

They are aware of the provisions of Article 14(1)(a) of the EC Merger Regulation.

Place and date:

Signatures:

Name/s and positions:

On behalf of:

ANNEX 6

CONCENTRATION NOTICE

Commission Notice on the concept of concentration,
O.J. 1998 No. C 66/5

COMMISSION NOTICE

on the concept of concentration under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings

(98/C 66/02)

(Text with EEA relevance)

I. INTRODUCTION

1. The purpose of this Notice is to provide guidance as to how the Commission interprets the term 'concentration' used in Article 3 of Council Regulation (EEC) No 4064/89 [1] as last amended by Regulation (EC) No 1310/97 [2] (hereinafter referred to as 'the Merger Regulation'). This formal guidance on the interpretation of Article 3 should enable firms to establish more quickly, in advance of any contact with the Commission, whether and to what extent their operations may be covered by Community merger control.

This Notice replaces the Notice on the notion of a concentration [3].

This Notice deals with paragraphs (1), (3), (4) and (5) of Article 3. The interpretation of Article 3 in relation to joint ventures, dealt with in particular under Article 3(2), is set out in the Commission's Notice on the concept of full-function joint ventures.

2. The guidance set out in this Notice reflects the Commission's experience in applying the Merger Regulation since it entered into force on 21 December 1990. The principles contained here will be applied and further developed by the Commission in individual cases.

3. According to recital 23 to Regulation (EEC) No 4064/89, the concept of concentration is defined as covering only operations which bring about a lasting change in the structure of the undertakings concerned. Article 3(1) provides that such a structural change is brought about either by a

(1) OJ L 395, 30.12.1989, p. 1, corrected version OJ L 257, 21.9.1990, p. 13.
(2) OJ L 180, 9.7.1997, p. 1.
(3) OJ C 385, 31.12.1994, p. 5.

merger between two previously independent undertakings or by the acquisition of control over the whole or part of another undertaking.

4. The determination of the existence of a concentration under the Merger Regulation is based upon qualitative rather than quantitative criteria, focusing on the concept of control. These criteria include considerations of both law and fact. It follows, therefore, that a concentration may occur on a legal or a *de facto* basis.

5. Article 3(1) of the Merger Regulation defines two categories of concentration:

— those arising from a merger between previously independent undertakings (point (a));

— those arising from an acquisition of control (point (b)).

These are treated respectively in Sections II and III below.

II. MERGERS BETWEEN PREVIOUSLY INDEPENDENT UNDERTAKINGS

6. A merger within the meaning of Article 3(1)(a) of the Merger Regulation occurs when two or more independent undertakings amalgamate into a new undertaking and cease to exist as separate legal entities. A merger may also occur when an undertaking is absorbed by another, the latter retaining its legal identity while the former ceases to exist as a legal entity.

7. A merger within the meaning of Article 3(1)(a) may also occur where, in the absence of a legal merger, the combining of the activities of previously independent undertakings results in the creation of a single economic unit [4]. This may arise in particular where two or more undertakings, while retaining their individual legal personalities, establish contractually a common economic management [5]. If this leads to a *de facto* amalgamation of the undertakings concerned into a genuine common economic unit, the operation is considered to be a merger. A prerequisite for the determination of a common economic unit is the existence of a permanent, single economic management. Other relevant factors may include internal profit and loss compensation as between the various undertakings within the group, and their joint liability externally. The *de facto* amalgamation may be reinforced by cross-shareholdings between the undertakings forming the economic unit.

III. ACQUISITION OF CONTROL

8. Article 3(1)(b) provides that a concentration occurs in the case of an acquisition of control. Such control may be acquired by one undertaking acting alone or by two or more undertakings acting jointly.

Control may also be acquired by a person in circumstances where that person already controls (whether solely or jointly) at least one other undertaking or, alternatively, by a combination of persons (which controls another undertaking) and/or undertakings. The term 'person' in this context extends to public bodies [6] and private entities, as well as individuals.

As defined, a concentration within the meaning of the Merger Regulation is limited to changes in control. Internal restructuring within a group of companies, therefore, cannot constitute a concentration.

An exceptional situation exists where both the acquiring and acquired undertakings are public companies owned by the same State (or by the same public body). In this case, whether the operation is to be regarded as an internal restructuring depends in turn on the question whether both undertakings were formerly part of the same economic unit within the meaning of recital 12 to Regulation (EEC) No 4064/89. Where the undertakings were formerly part of different economic units having an independent power of

[4] In determining the previous independence of undertakings, the issue of control may be relevant. Control is considered generally in paragraphs 12 *et seq.* below. For this specific issue, minority shareholders are deemed to have control if they have previously obtained a majority of votes on major decisions at shareholders meetings. The reference period in this context is normally three years.

[5] This could apply for example, in the case of a 'Gleichordnungskonzern' in German law, certain 'Groupements d'Intérêt Economique' in French law, and certain partnerships.

[6] Including the State itself, e. g. Case IV/M.157 — Air France/Sabena, of 5 October 1992 in relation to the Belgian State, or other public bodies such as the Treuhand in Case IV/M.308 — Kali und Salz/MDK/Treuhand, of 14 December 1993.

decision, the operation will be deemed to constitute a concentration and not an internal restructuring [7]. Such independent power of decision does not normally exist, however, where the undertakings are within the same holding company [8].

9. Whether an operation gives rise to an acquisition of control depends on a number of legal and/or factual elements. The acquisition of property rights and shareholders' agreements are important, but are not the only elements involved: purely economic relationships may also play a decisive role. Therefore, in exceptional circumstances, a situation of economic dependence may lead to control on a *de facto* basis where, for example, very important long-term supply agreements or credits provided by suppliers or customers, coupled with structural links, confer decisive influence [9].

There may also be acquisition of control even if it is not the declared intention of the parties [10]. Moreover, the Merger Regulation clearly defines control as having 'the possibility of exercising decisive influence' rather than the actual exercise of such influence.

10. Control is nevertheless normally acquired by persons or undertakings which are the holders of the rights or are entitled to rights conferring control (Article 3(4)(a)). There may be exceptional situations where the formal holder of a controlling interest differs from the person or undertaking having in fact the real power to exercise the rights resulting from this interest. This may be the case, for example, where an undertaking uses another person or undertaking for the acquisition of a controlling interest and exercises the rights through this person or undertaking, even though the latter is formally the holder of the rights. In such a situation, control is acquired by the undertaking which in reality is behind the operation and in fact enjoys the power to control the target undertaking (Article 3(4)(b)). The evidence needed to establish this type of indirect control may include factors such as the source of financing or family links.

11. The object of control can be one or more undertakings which constitute legal entities, or the assets of such entities, or only some of these assets [11]. The assets in question, which could be brands or licences, must constitute a business to which a market turnover can be clearly attributed.

12. The acquisition of control may be in the form of sole or joint control. In both cases, control is defined as the possibility of exercising decisive influence on an undertaking on the basis of rights, contracts or any other means (Article 3(3)).

1. **Sole control**

13. Sole control is normally acquired on a legal basis where an undertaking acquires a majority of the voting rights of a company. It is not in itself significant that the acquired shareholding is 50 % of the share capital plus one share [12] or that it is 100 % of the share capital [13]. In the absence of other elements, an acquisition which does not include a majority of the voting rights does not normally confer control even if it involves the acquisition of a majority of the share capital.

14. Sole control may also be acquired in the case of a 'qualified minority'. This can be established on a legal and/or *de facto* basis.

On a legal basis it can occur where specific rights are attached to the minority shareholding. These may be preferential shares leading to a majority of the voting rights or other rights enabling the minority shareholder to determine the strategic commercial behaviour of the target company, such as the power to appoint more than half of the members of the supervisory board or the administrative board.

(7) Case IV/M.097 — Péchiney/Usinor, of 24 June 1991; Case IV/M.216 — CEA Industrie/France Telecom/SGS-Thomson, of 22 February 1993.

(8) See paragraph 55 of the Notice on the concept of undertakings concerned.

(9) For example, in the Usinor/Bamesa decision adopted by the Commission under the ECSC Treaty. See also Case IV/M.258 — CCIE/GTE, of 25 September 1992, and Case IV/M.697 — Lockheed Martin Corporation/Loral Corporation, of 27 March 1996.

(10) Case IV/M.157 — Air France/Sabena, of 5 October 1992.

(11) Case IV/M.286 — Zürich/MMI, of 2 April 1993.

(12) Case IV/M.296 — Crédit Lyonnais/BFG Bank, of 11 January 1993.

(13) Case IV/M.299 — Sara Lee/BP Food Division, of 8 February 1993.

A minority shareholder may also be deemed to have sole control on a *de facto* basis. This is the case, for example, where the shareholder is highly likely to achieve a majority at the shareholders' meeting, given that the remaining shares are widely dispersed [14]. In such a situation it is unlikely that all the smaller shareholders will be present or represented at the shareholders' meeting. The determination of whether or not sole control exists in a particular case is based on the evidence resulting from the presence of shareholders in previous years. Where, on the basis of the number of shareholders attending the shareholders' meeting, a minority shareholder has a stable majority of the votes at this meeting, then the large minority shareholder is taken to have sole control [15].

Sole control can also be exercised by a minority shareholder who has the right to manage the activities of the company and to determine its business policy.

15. An option to purchase or convert shares cannot in itself confer sole control unless the option will be exercised in the near future according to legally binding agreements [16]. However, the likely exercise of such an option can be taken into account as an additional element which, together with other elements, may lead to the conclusion that there is sole control.

16. A change from joint to sole control of an undertaking is deemed to be a concentration within the meaning of the Merger Regulation because decisive influence exercised alone is substantially different from decisive influence exercised jointly [17]. For the same reason, an operation involving the acquisition of joint control of one part of an undertaking and sole control of another part is in principle regarded as two separate concentrations under the Merger Regulation [18].

17. The concept of control under the Merger Regulation may be different from that applied in specific areas of legislation concerning, for example, prudential rules, taxation, air transport or the media. In addition, national legislation within a Member State may provide specific rules on the structure of bodies representing the organisation of decision-making within an undertaking, in particular, in relation to the rights of representatives of employees. While such legislation may confer some power of control upon persons other than the shareholders, the concept of control under the Merger Regulation is related only to the means of influence normally enjoyed by the owners of an undertaking. Finally, the prerogatives exercised by a State acting as a public authority rather than as a shareholder, in so far as they are limited to the protection of the public interest, do not constitute control within the meaning of the Merger Regulation to the extent that they have neither the aim nor the effect of enabling the State to exercise a decisive influence over the activity of the undertaking [19].

2. **Joint control**

18. As in the case of sole control, the acquisition of joint control (which includes changes from sole control to joint control) can also be established on a legal or *de facto* basis. There is joint control if the shareholders (the parent companies) must reach agreement on major decisions concerning the controlled undertaking (the joint venture).

19. Joint control exists where two or more undertakings or persons have the possibility of exercising decisive influence over another undertaking. Decisive influence in this sense normally means the power to block actions which determine the strategic commercial behaviour of an undertaking. Unlike sole control, which confers the power upon a specific shareholder to determine the strategic decisions in an undertaking, joint control is characterized by the possibility of a deadlock situation resulting from the power of two or more parent companies to reject proposed strategic decisions. It follows, therefore, that these shareholders must reach a common understanding in determining the commercial policy of the joint venture.

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[14] Case IV/M.025 — Arjomari/Wiggins Teape, of 10 February 1990.

[15] Case IV/M.343 — Société Générale de Belgique/Générale de Banque, of 3 August 1993.

[16] Judgment in Case T 2/93, *Air France* v. *Commission* [1994] ECR II-323.

[17] This issue is dealt with in paragraphs 30, 31 and 32 of the Notice on the concept of undertakings concerned.

[18] Case IV/M.409 — ABB/Renault Automation, of 9 March 1994.

[19] Case IV/M.493 — Tractebel/Distrigaz II, of 1 September 1994.

2.1. *Equality in voting rights or appointment to decision-making bodies*

20. The clearest form of joint control exists where there are only two parent companies which share equally the voting rights in the joint venture. In this case, it is not necessary for a formal agreement to exist between them. However, where there is a formal agreement, it must be consistent with the principle of equality between the parent companies, by laying down, for example, that each is entitled to the same number of representatives in the management bodies and that none of the members has a casting vote ([20]). Equality may also be achieved where both parent companies have the right to appoint an equal number of members to the decision-making bodies of the joint venture.

2.2. *Veto rights*

21. Joint control may exist even where there is no equality between the two parent companies in votes or in representation in decision-making bodies or where there are more than two parent companies. This is the case where minority shareholders have additional rights which allow them to veto decisions which are essential for the strategic commercial behaviour of the joint venture ([21]). These veto rights may be set out in the statute of the joint venture or conferred by agreement between its parent companies. The veto rights themselves may operate by means of a specific quorum required for decisions taken at the shareholders' meeting or by the board of directors to the extent that the parent companies are represented on this board. It is also possible that strategic decisions are subject to approval by a body, e.g. supervisory board, where the minority shareholders are represented and form part of the quorum needed for such decisions.

22. These veto rights must be related to strategic decisions on the business policy of the joint venture. They must go beyond the veto rights normally accorded to minority shareholders in order to protect their financial interests as investors in the joint venture. This normal protection of the rights of minority shareholders is related to decisions on the essence of the joint venture, such as changes in the statute, an increase or decrease in the capital or liquidation. A veto right, for example, which prevents the sale or winding-up of the joint venture does not confer joint control on the minority shareholder concerned ([22]).

23. In contrast, veto rights which confer joint control typically include decisions and issues such as the budget, the business plan, major investments or the appointment of senior management. The acquisition of joint control, however, does not require that the acquirer has the power to exercise decisive influence on the day-to-day running of an undertaking. The crucial element is that the veto rights are sufficient to enable the parent companies to exercise such influence in relation to the strategic business behaviour of the joint venture. Moreover, it is not necessary to establish that an acquirer of joint control of the joint venture will actually make use of its decisive influence. The possibility of exercising such influence and, hence, the mere existence of the veto rights, is sufficient.

24. In order to acquire joint control, it is not necessary for a minority shareholder to have all the veto rights mentioned above. It may be sufficient that only some, or even one such right, exists. Whether or not this is the case depends upon the precise content of the veto right itself and also the importance of this right in the context of the specific business of the joint venture.

Appointment of management and determination of budget

25. Normally the most important veto rights are those concerning decisions on the appointment of the management and the budget. The power to co-determine the structure of the management confers upon the holder the power to exercise decisive influence on the commercial policy of an undertaking. The same is true with respect to decisions on the budget since the budget determines the precise framework of the activities of the joint venture and, in particular, the investments it may make.

Business plan

26. The business plan normally provides details of the aims of a company together with the measures to

([20]) Case IV/M.272 — Matra/CAP Gemini Sogeti, of 17 March 1993.

([21]) Case T 2/93 — Air France v Commission (ibid). Case IV/M.010 — Conagra/Idea, of 3 May 1991.

([22]) Case IV/M.062 — Eridania/ISI, of 30 July 1991.

be taken in order to achieve those aims. A veto right over this type of business plan may be sufficient to confer joint control even in the absence of any other veto right. In contrast, where the business plan contains merely general declarations concerning the business aims of the joint venture, the existence of a veto right will be only one element in the general assessment of joint control but will not, on its own, be sufficient to confer joint control.

Investments

27. In the case of a veto right on investments, the importance of this right depends, first, on the level of investments which are subject to the approval of the parent companies and, secondly, on the extent to which investments constitute an essential feature of the market in which the joint venture is active. In relation to the first criterion, where the level of investments necessitating approval of the parent companies is extremely high, this veto right may be closer to the normal protection of the interests of a minority shareholder than to a right conferring a power of co-determination over the commercial policy of the joint venture. With regard to the second, the investment policy of an undertaking is normally an important element in assessing whether or not there is joint control. However, there may be some markets where investment does not play a significant role in the market behaviour of an undertaking.

Market-specific rights

28. Apart from the typical veto rights mentioned above, there exist a number of other veto rights related to specific decisions which are important in the context of the particular market of the joint venture. One example is the decision on the technology to be used by the joint venture where technology is a key feature of the joint venture's activities. Another example relates to markets characterised by product differentiation and a significant degree of innovation. In such markets, a veto right over decisions relating to new product lines to be developed by the joint venture may also be an important element in establishing the existence of joint control.

Overall context

29. In assessing the relative importance of veto rights, where there are a number of them, these rights should not be evaluated in isolation. On the contrary, the determination of whether or not joint control exists is based upon an assessment of these rights as a whole. However, a veto right which does not relate either to commercial policy and strategy or to the budget or business plan cannot be regarded as giving joint control to its owner ([23]).

2.3. *Joint exercise of voting rights*

30. Even in the absence of specific veto rights, two or more undertakings acquiring minority shareholdings in another undertaking may obtain joint control. This may be the case where the minority shareholdings together provide the means for controlling the target undertaking. This means that the minority shareholders, together, will have a majority of the voting rights; and they will act together in exercising these voting rights. This can result from a legally binding agreement to this effect, or it may be established on a *de facto* basis.

31. The legal means to ensure the joint exercise of voting rights can be in the form of a holding company to which the minority shareholders transfer their rights, or an agreement by which they undertake to act in the same way (pooling agreement).

32. Very exceptionally, collective action can occur on a *de facto* basis where strong common interests exist between the minority shareholders to the effect that they would not act against each other in exercising their rights in relation to the joint venture.

33. In the case of acquisitions of minority shareholdings, the prior existence of links between the minority shareholders or the acquisition of the shareholdings by means of concerted action will be factors indicating such a common interest.

34. In the case where a new joint venture is established, as opposed to the acquisition of minority shareholdings in a pre-existing company, there is a higher probability that the parent

([23]) Case IV/M.295 — SITA-RPC/SCORI, of 19 March 1993.

companies are carrying out a deliberate common policy. This is true, in particular, where each parent company provides a contribution to the joint venture which is vital for its operation (e. g. specific technologies, local know-how or supply agreements). In these circumstances, the parent companies may be able to operate the joint venture with full cooperation only with each other's agreement on the most important strategic decisions even if there is no express provision for any veto rights. The greater the number of parent companies involved in such a joint venture, however, the more remote is the likelihood of this situation occurring.

35. In the absence of strong common interests such as those outlined above, the possibility of changing coalitions between minority shareholders will normally exclude the assumption of joint control. Where there is no stable majority in the decision-making procedure and the majority can on each occasion be any of the various combinations possible amongst the minority shareholders, it cannot be assumed that the minority shareholders will jointly control the undertaking. In this context, it is not sufficient that there are agreements between two or more parties having an equal shareholding in the capital of an undertaking which establish identical rights and powers between the parties. For example, in the case of an undertaking where three shareholders each own one-third of the share capital and each elect one-third of the members of the Board of Directors, the shareholders do not have joint control since decisions are required to be taken on the basis of a simple majority. The same considerations also apply in more complex structures, for example, where the capital of an undertaking is equally divided between three shareholders and where the Board of Directors is composed of twelve members, each of the shareholders A, B and C electing two, another two being elected by A, B and C jointly, whilst the remaining four are chosen by the other eight members jointly. In this case also there is no joint control, and hence no control at all within the meaning of the Merger Regulation.

2.4. *Other considerations related to joint control*

36. Joint control is not incompatible with the fact that one of the parent companies enjoys specific knowledge of and experience in the business of the joint venture. In such a case, the other parent company can play a modest or even non-existent role in the daily management of the joint venture where its presence is motivated by considerations of a financial, long-term-strategy, brand image or general policy nature. Nevertheless, it must always retain the real possibility of contesting the decisions taken by the other parent company, without which there would be sole control.

37. For joint control to exist, there should not be a casting vote for one parent company only. However, there can be joint control when this casting vote can be exercised only after a series of stages of arbitration and attempts at reconciliation or in a very limited field ([24]).

2.5. *Joint control for a limited period*

38. Where an operation leads to joint control for a starting-up period ([25]) but, according to legally binding agreements, this joint control will be converted to sole control by one of the shareholders, the whole operation will normally be considered to be an acquisition of sole control.

3. **Control by a single shareholder on the basis of veto rights**

39. An exceptional situation exists where only one shareholder is able to veto strategic decisions in an undertaking, but this shareholder does not have the power, on his own, to impose such decisions. This situation occurs either where one shareholder holds 50 % in an undertaking whilst the remaining 50 % is held by two or more minority shareholders, or where there is a quorum required for strategic decisions which in fact confers a veto right upon only one minority shareholder ([26]). In these circumstances, a single shareholder possesses the same level of influence as that normally enjoyed by several jointly-controlling shareholders, i. e. the power to block the adoption of strategic

([24]) Case IV/M.425 — British Telecom/Banco Santander, of 28 March 1994.

([25]) This starting-up period must not exceed three years. Case IV/M.425 — British Telecom/Banco Santander, *ibid*.

([26]) Case IV/M.258 — CCIE/GTE, of 25 September 1992, where the veto rights of only one shareholder were exercisable through a member of the board appointed by this shareholder.

decisions. However, this shareholder does not enjoy the powers which are normally conferred on an undertaking with sole control, i. e. the power to impose strategic decisions. Since this shareholder can produce a deadlock situation comparable to that in normal cases of joint control, he acquires decisive influence and therefore control within the meaning of the Merger Regulation ([27]).

4. **Changes in the structure of control**

40. A concentration may also occur where an operation leads to a change in the structure of control. This includes the change from joint control to sole control as well as an increase in the number of shareholders exercising joint control. The principles for determining the existence of a concentration in these circumstances are set out in detail in the Notice on the concept of undertakings concerned ([28]).

IV. EXCEPTIONS

41. Article 3(5) sets out three exceptional situations where the acquisition of a controlling interest does not constitute a concentration under the Merger Regulation.

42. First, the acquisition of securities by companies whose normal activities include transactions and dealing in securities for their own account or for the account of others is not deemed to constitute a concentration if such an acquisition is made in the framework of these businesses and if the securities are held on only a temporary basis (Article 3(5)(a)). In order to fall within this exception, the following requirements must be fulfilled:

— the acquiring undertaking must be a credit or other financial institution or insurance company the normal activities of which are described above,

— the securities must be acquired with a view to their resale,

— the acquiring undertaking must not exercise the voting rights with a view to determining the strategic commercial behaviour of the target company or must exercise these rights only with a view to preparing the total or partial disposal of the undertaking, its assets or securities,

— the acquiring undertaking must dispose of its controlling interest within one year of the date of the acquisition, that is, it must reduce its shareholding within this one-year period at least to a level which no longer confers control. This period, however, may be extended by the Commission where the acquiring undertaking can show that the disposal was not reasonably possible within the one-year period.

43. Secondly, there is no change of control, and hence no concentration within the meaning of the Merger Regulation, where control is acquired by an office-holder according to the law of a Member State relating to liquidation, winding-up, insolvency, cessation of payments, compositions or analogous proceedings (Article 3(5)(b));

44. Thirdly, a concentration does not arise where a financial holding company within the meaning of the Fourth Council Directive 78/660/EEC ([29]) acquires control, provided that this company exercises its voting rights only to maintain the full value of its investment and does not otherwise determine directly or indirectly the strategic commercial conduct of the controlled undertaking.

45. In the context of the exceptions under Article 3(5), the question may arise whether a rescue operation constitutes a concentration under the Merger Regulation. A rescue operation typically involves the conversion of existing debt into a new company, through which a syndicate of banks may acquire joint control of the company concerned.

([27]) Since this shareholder is the only undertaking acquiring a controlling influence, only this shareholder is obliged to submit a notification under the Merger Regulation.

([28]) Paragraphs 30 to 48.

([29]) OJ L 222, 14.8.1978, p. 11, as last amended by the Act of Accession of Austria, Finland and Sweden. Article 5(3) of this Directive defines financial holding companies as 'those companies the sole objective of which is to acquire holdings in other undertakings, and to manage such holdings and turn them to profit, without involving themselves directly or indirectly in the management of those undertakings, the foregoing without prejudice to their rights as shareholders'.

Where such an operation meets the criteria for joint control, as outlined above, it will normally be considered to be a concentration [30]. Although the primary intention of the banks is to restructure the financing of the undertaking concerned for its subsequent resale, the exception set out in Article 3(5)(a) is normally not applicable to such an operation. This is because the restructuring programme normally requires the controlling banks to determine the strategic commercial behaviour of the rescued undertaking. Furthermore, it is not normally a realistic proposition to transform a rescued company into a commercially viable entity and to resell it within the permitted one-year period. Moreover, the length of time needed to achieve this aim may be so uncertain that it would be difficult to grant an extension of the disposal period.

V. FINAL

46. The Commission's interpretation of Article 3 as set out in this Notice is without prejudice to the interpretation which may be given by the Court of Justice or the Court of First Instance of the European Communities.

[30] Case IV/M.116 — Kelt/American Express, of 28 August 1991.

ANNEX 7

FULL-FUNCTION NOTICE

Commission Notice on the concept of full-function joint ventures,
O.J. 1998 No. C 66/1

I

(Information)

COMMISSION

COMMISSION NOTICE

on the concept of full-function joint ventures under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings

(98/C 66/01)

(Text with EEA relevance)

I. INTRODUCTION

1. The purpose of this notice is to provide guidance as to how the Commission interprets Article 3 of Council Regulation (EEC) No 4064/89 ([1]) as last amended by Regulation (EC) No 1310/97 ([2]) (hereinafter referred to as the Merger Regulation) in relation to joint ventures ([3]).

2. This Notice replaces the Notice on the distinction between concentrative and cooperative joint ventures. Changes made in this Notice reflect the amendments made to the Merger Regulation as well as the experience gained by the Commission in applying the Merger Regulation since its entry into force on 21 September 1990. The principles set out in this Notice will be followed and further developed by the Commission's practice in individual cases.

3. Under the Community competition rules, joint ventures are undertakings which are jointly controlled by two or more other undertakings ([4]). In practice joint ventures encompass a broad range

([1]) OJ L 395, 30.12.1989, p. 1, corrected version No L 257, 21.9.1990, p. 13.

([2]) OJ L 180, 9.7.1997, p. 1.

([3]) The Commission intends, in due course, to provide guidance on the application of Article 2(4) of the Merger Regulation. Pending the adoption of such guidance, interested parties are referred to the principles set out in paragraphs 17 to 20 of Commission Notice on the distinction between concentrative and cooperative joint ventures, OJ C 385, 31.12.1994, p. 1.

([4]) The concept of joint control is set out in the Notice on the concept of concentration.

of operations, from merger-like operations to cooperation for particular functions such as R & D, production or distribution.

4. Joint ventures fall within the scope of the Merger Regulation if they meet the requirements of a concentration set out in Article 3 thereof.

5. According to recital 23 to Council Regulation (EEC) No 4064/89 it is appropriate to define the concept of concentration in such a manner as to cover only operations bringing about a lasting change in the structure of the undertakings concerned.

6. The structural changes brought about by concentrations frequently reflect a dynamic process of restructuring in the markets concerned. They are permitted under the Merger Regulation unless they result in serious damage to the structure of competition by creating or strengthening a dominant position.

7. The Merger Regulation deals with the concept of full-function joint ventures in Article 3(2) as follows:

'The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1(b).'

II. JOINT VENTURES UNDER ARTICLE 3 OF THE MERGER REGULATION

8. In order to be a concentration within the meaning of Article 3 of the Merger Regulation, an operation must fulfil the following requirements:

1. Joint control

9. A joint venture may fall within the scope of the Merger Regulation where there is an acquisition of joint control by two or more undertakings, that is, its parent companies (Article 3(1)(b)). The concept of control is set out in Article 3(3). This provides that control is based on the possibility of exercising decisive influence over an undertaking, which is determined by both legal and factual considerations.

10. The principles for determining joint control are set out in detail in the Commission's Notice on the concept of concentration ([5]).

([5]) Paragraphs 18 to 39.

2. Structural change of the undertakings

11. Article 3(2) provides that the joint venture must perform, on a lasting basis, all the functions of an autonomous economic entity. Joint ventures which satisfy this requirement bring about a lasting change in the structure of the undertakings concerned. They are referred to in this Notice as 'full-function' joint ventures.

12. Essentially this means that a joint venture must operate on a market, performing the functions normally carried out by undertakings operating on the same market. In order to do so the joint venture must have a management dedicated to its day-to-day operations and access to sufficient resources including finance, staff, and assets (tangible and intangible) in order to conduct on a lasting basis its business activities within the area provided for in the joint-venture agreement ([6]).

13. A joint venture is not full-function if it only takes over one specific function within the parent companies' business activities without access to the market. This is the case, for example, for joint ventures limited to R & D or production. Such joint ventures are auxiliary to their parent companies' business activities. This is also the case where a joint venture is essentially limited to the distribution or sales of its parent companies' products and, therefore, acts principally as a sales agency. However, the fact that a joint venture makes use of the distribution network or outlet of one or more of its parent companies normally will not disqualify it as 'full-function' as long as the parent companies are acting only as agents of the joint venture ([7]).

([6]) Case IV/M.527 — Thomson CSF/Deutsche Aerospace, of 2 December 1994 (paragraph 10) — intellectual rights, Case IV/M.560 EDS/Lufthansa of 11 May 1995 (paragraph 11) — outsourcing, Case IV/M.585 — Voest Alpine Industrieanlagenbau GmbH/Davy International Ltd, of 7 September 1995 (paragraph 8) — joint venture's right to demand additional expertise and staff from its parent companies, Case IV/M.686 — Nokia/Autoliv, of 5 February 1996 (paragraph 7), joint venture able to terminate 'service agreements' with parent company and to move from site retained by parent company, Case IV/M.791 — British Gas Trading Ltd/Group 4 Utility Services Ltd, of 7 October 1996, (paragraph 9) joint venture's intended assets will be transferred to leasing company and leased by joint venture.

([7]) Case IV/M.102 — TNT/Canada Post etc. of 2 December 1991 (paragraph 14).

14. The strong presence of the parent companies in upstream or downstream markets is a factor to be taken into consideration in assessing the full-function character of a joint venture where this presence leads to substantial sales or purchases between the parent companies and the joint venture. The fact that the joint venture relies almost entirely on sales to its parent companies or purchases from them only for an initial start-up period does not normally affect the full-function character of the joint venture. Such a start-up period may be necessary in order to establish the joint venture on a market. It will normally not exceed a period of three years, depending on the specific conditions of the market in question ([8]).

Where sales from the joint venture to the parent companies are intended to be made on a lasting basis, the essential question is whether, regardless of these sales, the joint venture is geared to play an active role on the market. In this respect the relative proportion of these sales compared with the total production of the joint venture is an important factor. Another factor is whether sales to the parent companies are made on the basis of normal commercial conditions ([9]).

In relation to purchases made by the joint venture from its parent companies, the full-function character of the joint venture is questionable in particular where little value is added to the products or services concerned at the level of the joint venture itself. In such a situation, the joint venture may be closer to a joint sales agency. However, in contrast to this situation where a joint venture is active in a trade market and performs the normal functions of a trading company in such a market, it normally will not be an auxiliary sales agency but a full-function joint venture. A trade market is characterised by the existence of companies which specialise in the selling and distribution of products without being vertically integrated in addition to those which are integrated, and where different sources of supply are available for the products in question. In addition, many trade markets may require operators to invest in specific facilities such as outlets, stockholding, warehouses, depots, transport fleets and sales personnel. In order to constitute a full-function joint venture in a trade market, an undertaking must have the necessary facilities and be likely to obtain a substantial proportion of its supplies not only from its parent companies but also from other competing sources ([10]).

15. Furthermore, the joint venture must be intended to operate on a lasting basis. The fact that the parent companies commit to the joint venture the resources described above normally demonstrates that this is the case. In addition, agreements setting up a joint venture often provide for certain contingencies, for example, the failure of the joint venture or fundamental disagreement as between the parent companies ([11]). This may be achieved by the incorporation of provisions for the eventual dissolution of the joint venture itself or the possibility for one or more parent companies to withdraw from the joint venture. This kind of provision does not prevent the joint venture from being considered as operating on a lasting basis. The same is normally true where the agreement specifies a period for the duration of the joint venture where this period is sufficiently long in order to bring about a lasting change in the structure of the undertakings concerned ([12]), or where the agreement provides for the possible continuation of the joint venture beyond this period. By contrast, the joint venture will not be considered to operate on a lasting basis where it is established for a short finite duration. This would be the case, for example, where a joint venture is established in order to construct a specific project such as a power plant, but it will not be involved in the operation of the plant once its construction has been completed.

([8]) Case IV/M.560 — EDS/Lufthansa of 11 May 1995 (paragraph 11); Case IV/M.686 Nokia/Autoliv of 5 February 1996 (paragraph 6); to be contrasted with Case IV/M.904 — RSB/Tenex/Fuel Logistics of 2 April 1997 (paragraph 15-17) and Case IV/M.979 — Preussag/Voest-Alpine of 1 October 1997 (paragraph 9-12). A special case exists where sales by the joint venture to its parent are caused by a legal monopoly downstream of the joint venture (Case IV/M.468 — Siemens/Italtel of 17 February 1995 (paragraph 12), or where the sales to a parent company consist of by-products, which are of minor importance to the joint venture (Case IV/M.550 — Union Carbide/Enichem of 13 March 1995 (paragraph 14).

([9]) Case IV/M.556 — Zeneca/Vanderhave of 9 April 1996 (paragraph 8); Case IV/M.751 — Bayer/Hüls of 3 July 1996 (paragraph 10).

([10]) Case IV/M.788 — AgrEVO/Marubeni of 3 September 1996 (paragraphs 9 and 10).

([11]) Case IV/M.891 — Deutsche Bank/Commerzbank/J.M. Voith of 23 April 1997 (paragraph 7).

([12]) Case IV/M.791 — British Gas Trading Ltd/Group 4 Utility Services Ltd of 7 October 1996, (paragraph 10); to be contrasted with Case IV/M.722 — Teneo/Merill Lynch/Bankers Trust of 15 April 1996 (paragraph 15).

III. FINAL

16. The creation of a full-function joint venture constitutes a concentration within the meaning of Article 3 of the Merger Regulation. Restrictions accepted by the parent companies of the joint venture that are directly related and necessary for the implementation of the concentration ('ancillary restrictions'), will be assessed together with the concentration itself ([13]).

Further, the creation of a full-function joint venture may as a direct consequence lead to the coordination of the competitive behaviour of undertakings that remain independent. In such cases Article 2(4) of the Merger Regulation provides that those cooperative effects will be assessed within the same procedure as the concentration. This assessment will be made in accordance with the criteria of Article 85(1) and (3) of the Treaty with a view to establishing whether or not the operation is compatible with the common market.

The applicability of Article 85 of the Treaty to other restrictions of competition, that are neither ancillary to the concentration, nor a direct consequence of the creation of the joint venture, will normally have to be examined by means of Regulation No 17.

17. The Commission's interpretation of Article 3 of the Merger Regulation with respect to joint ventures is without prejudice to the interpretation which may be given by the Court of Justice or the Court of First Instance of the European Communities.

([13]) See Commission Notice regarding restrictions ancillary to concentrations, OJ No C 203, 14.8.1990, p. 5.

ANNEX 8

UNDERTAKINGS CONCERNED NOTICE

Commission Notice on the concept of undertakings concerned,
O.J. 1998 No. C 66/14

COMMISSION NOTICE

on the concept of undertakings concerned under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings

(98/C 66/03)

(Text with EEC relevance)

I. INTRODUCTION

1. The purpose of this notice is to clarify the Commission's interpretation of the term 'undertakings concerned' used in Articles 1 and 5 of Council Regulation (EEC) No 4064/89 [1] as last amended by Regulation (EC) No 1310/97 [2] (hereinafter referred to as 'the Merger Regulation') and to help identify the undertakings concerned in the most typical situations which have arisen in cases dealt with by the Commission to date. The principles set out in this notice will be followed and further developed by the Commission's practice in individual cases.

This Notice replaces the Notice on the notion of undertakings concerned [3].

2. According to Article 1 of the Merger Regulation, the Regulation only applies to operations that satisfy two conditions. First, several undertakings must merge, or one or more undertakings must acquire control of the whole or part of other undertakings through the proposed operation, which must qualify as a concentration within the meaning of Article 3 of the Regulation. Secondly, those undertakings must meet the turnover thresholds set out in Article 1.

3. From the point of view of determining jurisdiction, the undertakings concerned are, broadly speaking, the actors in the transaction in so far as they are the merging, or acquiring and acquired parties; in addition, their total aggregate economic size in terms of turnover will be decisive in determining whether the thresholds are met.

4. The Commission's interpretation of Articles 1 and 5 with respect to the concept of undertakings concerned is without prejudice to the interpretation which may be given by the Court of Justice or by the Court of First Instance of the European Communities.

[1] OJ L 395, 30.12.1989, p. 1; corrected version L 257, 21.9.1990, p. 13.
[2] OJ L 180, 9.7.1997, p. 1.
[3] OJ C 385, 31.12.1994, p. 12.

II. THE CONCEPT OF UNDERTAKING CONCERNED

5. Undertakings concerned are the direct participants in a merger or acquisition of control. In this respect, Article 3(1) of the Merger Regulation provides that:

'A concentration shall be deemed to arise where:

(a) two or more previously independent undertakings merge, or

(b) — one or more persons already controlling at least one undertaking, or

— one or more undertakings

acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings'.

6. In the case of a merger, the undertakings concerned will be the undertakings that are merging.

7. In the remaining cases, it is the concept of 'acquiring control' that will determine which are the undertakings concerned. On the acquiring side, there can be one or more companies acquiring sole or joint control. On the acquired side, there can be one or more companies as a whole or parts thereof, when only one of their subsidiaries or some of their assets are the subject of the transaction. As a general rule, each of these companies will be an undertaking concerned within the meaning of the Merger Regulation. However, the particular features of specific transactions require some refinement of this principle, as will be seen below when analysing different possible scenarios.

8. In concentrations other than mergers or the setting-up of new joint ventures, i. e. in cases of sole or joint acquisition of pre-existing companies or parts of them, there is an important party to the agreement that gives rise to the operation who is to be ignored when identifying the undertakings concerned: the seller. Although it is clear that the operation cannot proceed without his consent, his role ends when the transaction is completed since, by definition, from the moment the seller has relinquished all control over the company, his links with it disappear. Where the seller retains joint control with the acquiring company (or

companies), it will be considered to be one of the undertakings concerned.

9. Once the undertakings concerned have been identified in a given transaction, their turnover for the purposes of determining jurisdiction should be calculated according to the rules set out in Article 5 of the Merger Regulation ([4]). One of the main provisions of Article 5 is that where the undertaking concerned belongs to a group, the turnover of the whole group should be included in the calculation. All references to the turnover of the undertakings concerned in Article 1 should therefore be understood as the turnover of their entire respective groups.

10. The same can be said with respect to the substantive appraisal of the impact of a concentration in the market place. When Article 2 of the Merger Regulation provides that the Commission is to take into account 'the market position of the undertakings concerned and their economic and financial power', that includes the groups to which they belong.

11. It is important, when referring to the various undertakings which may be involved in a procedure, not to confuse the concept of 'undertakings concerned' under Articles 1 and 5 with the terminology used in the Merger Regulation and in Commission Regulation (EC) No 447/98 of 1 March 1998 on the notifications, time-limits and hearings provided for in Council Regulation (EEC) No 4064/89 (hereinafter referred to as the 'Implementing Regulation') ([5]) referring to the various undertakings which may be involved in a procedure. This terminology refers to the notifying parties, other involved parties, third parties and parties who may be subject to fines or periodic penalty payments, and they are defined in Chapter III of the Implementing Regulation, along with their respective rights and duties.

III. IDENTIFYING THE UNDERTAKINGS CONCERNED IN DIFFERENT TYPES OF OPERATIONS

1. Mergers

12. In a merger, several previously independent companies come together to create a new company or, while remaining separate legal entities, to create a single economic unit. As mentioned earlier, the undertakings concerned are each of the merging entities.

2. Acquisition of sole control

2.1. *Acquisition of sole control of the whole company*

13. Acquisition of sole control of the whole company is the most straightforward case of acquisition of control; the undertakings concerned will be the acquiring company and the acquired or target company.

2.2. *Acquisition of sole control of part of a company*

14. The first subparagraph of Article 5(2) of the Merger Regulation provides that when the operation concerns the acquisition of parts of one or more undertakings, only those parts which are the subject of the transaction shall be taken into account with regard to the seller. The concept of 'parts' is to be understood as one or more separate legal entities (such as subsidiaries), internal subdivisions within the seller (such as a division or unit), or specific assets which in themselves could constitute a business (e. g. in certain cases brands or licences) to which a market turnover can be clearly attributed. In this case, the undertakings concerned will be the acquirer and the acquired part(s) of the target company.

15. The second subparagraph of Article 5(2) includes a special provision on staggered operations or follow-up deals, whereby if several acquisitions of parts by the same purchaser from the same seller occur within a two-year period, these transactions are to be treated as one and the same operation arising on the date of the last transaction. In this case, the undertakings concerned are the acquirer and the different acquired part(s) of the target company taken as a whole.

2.3. *Acquisition of sole control after reduction or enlargement of the target company*

16. The undertakings concerned are the acquiring company and the target company or companies, in their configuration at the date of the operation.

([4]) The rules for calculating turnover in accordance with Article 5 are detailed in the Commission Notice on calculation of turnover.

([5]) OJ L 61, 2.3.1998, p. 1.

17. The Commission bases itself on the configuration of the undertakings concerned at the date of the event triggering the obligation to notify under Article 4(1) of the Merger Regulation, namely the conclusion of the agreement, the announcement of the public bid or the acquisition of a controlling interest. If the target company has divested an entity or closed a business prior to the date of the event triggering notification or where such a divestment or closure is a pre-condition for the operation [6], then sales of the divested entity or closed business are not to be included when calculating turnover. Conversely, if the target company has acquired an entity prior to the date of the event triggering notification, the sales of the latter are to be added [7].

2.4. *Acquisition of sole control through a subsidiary of a group*

18. Where the target company is acquired by a group through one of its subsidiaries, the undertakings concerned for the purpose of calculating turnover are the target company and the acquiring subsidiary. However, regarding the actual notification, this can be made by the subsidiary concerned or by its parent company.

19. All the companies within a group (parent companies, subsidiaries, etc.) constitute a single economic entity, and therefore there can only be one undertaking concerned within the one group - i. e. the subsidiary and the parent company cannot each be considered as separate undertakings concerned, either for the purposes of ensuring that the threshold requirements are fulfilled (for example, if the target company does not meet the ECU 250 million Community-turnover threshold), or that they are not (for example, if a group was split into two companies each with a Community turnover below ECU 250 million).

20. However, even though there can only be one undertaking concerned within a group, Article 5(4) of the Merger Regulation provides that it is the turnover of the whole group to which the undertaking concerned belongs that shall be included in the threshold calculations [8].

3. **Acquisition of joint control**

3.1. *Acquisition of joint control of a newly-created company*

21. In the case of acquisition of joint control of a newly-created company, the undertakings concerned are each of the companies acquiring control of the newly set-up joint venture (which, as it does not yet exist, cannot be considered to be an undertaking concerned and moreover, as yet, has no turnover of its own).

3.2. *Acquisition of joint control of a pre-existing company*

22. In the case of acquisition of joint control of a pre-existing company or business [9], the undertakings concerned are each of the companies acquiring joint control on the one hand, and the pre-existing acquired company or business on the other.

23. However, where the pre-existing company was under the sole control of one company and one or several new shareholders acquire joint control while the initial parent company remains, the undertakings concerned are each of the jointly-controlling companies (including this initial shareholder). The target company in this case is not an undertaking concerned, and its turnover is part of the turnover of the initial parent company.

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(6) See judgment of the Court of First Instance of 24 March 1994 in Case T-3/93 — Air France v Commission [1994] ECR II-21.

(7) The calculation of turnover in the case of acquisitions or divestments subsequent to the date of the last audited accounts is dealt with in the Commission Notice on calculation of turnover, paragraph 27.

(8) The calculation of turnover in the case of company groups is dealt with in the Commission Notice on calculation of turnover, paragraphs 36 to 42.

(9) i. e. two or more companies (companies A, B, etc.) acquire a pre-existing company (company X). For changes in the shareholding in cases of joint control of an existing joint venture, see Section III.6.

3.3. *Acquisition of joint control with a view to immediate partition of assets*

24. Where several undertakings come together solely for the purpose of acquiring another company and agree to divide up the acquired assets according to a pre-existing plan immediately upon completion of the transaction, there is no effective concentration of economic power between the acquirers and the target company since the assets acquired are jointly held and controlled for only a 'legal instant'. This type of acquisition with a view to immediate partition of assets will in fact be considered to be several operations, whereby each of the acquiring companies acquires its relevant part of the target company. For each of these operations, the undertakings concerned will therefore be the acquiring company and that part of the target which it is acquiring (just as if there was an acquisition of sole control of part of a company).

25. This scenario is referred to in recital 24 of Regulation (EEC) No 4064/89, which states that the Regulation applies to agreements whose sole object is to divide up the assets acquired immediately after the acquisition.

4. **Acquisition of control by a joint venture**

26. In transactions where a joint venture acquires control of another company, the question arises whether or not, from the point of view of the acquiring party, the joint venture should be regarded as a single undertaking concerned (the turnover of which would include the turnover of its parent companies), or whether each of its parent companies should individually be regarded as undertakings concerned. In other words, the issue is whether or not to 'lift the corporate veil' of the intermediate undertaking (the vehicle). In principle, the undertaking concerned is the direct participant in the acquisition of control. However, there may be circumstances where companies set up 'shell' companies, which have little or no turnover of their own, or use an existing joint venture which is operating on a different market from that of the target company in order to carry out acquisitions on behalf of the parent companies. Where the acquired or target company has a Community turnover of less than ECU 250 million, the question of determining the undertakings concerned may be decisive for jurisdictional purposes [10]. In this type of situation, the Commission will look at the economic reality of the operation to determine which are the undertakings concerned.

27. Where the acquisition is carried out by a full-function joint venture, i. e. a joint venture which has sufficient financial and other resources to operate a business activity on a lasting basis [11] and is already operating on a market, the Commission will normally consider the joint venture itself and the target company to be the undertakings concerned (and not the joint venture's parent companies).

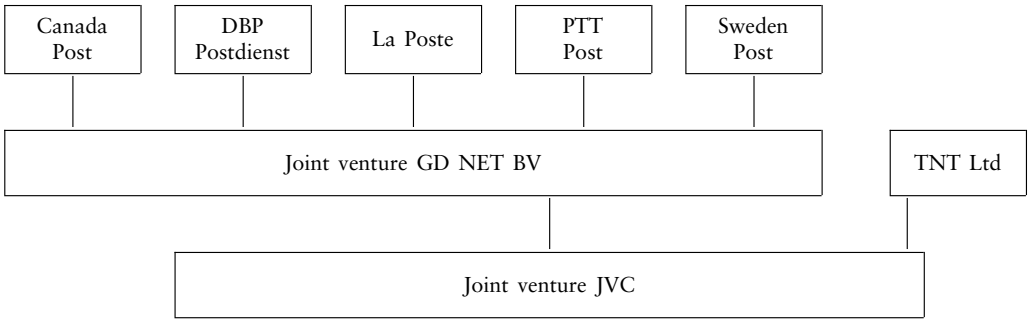
28. Conversely, where the joint venture can be regarded as a vehicle for an acquisition by the parent companies, the Commission will consider each of the parent companies themselves to be the undertakings concerned, rather than the joint venture, together with the target company. This is the case in particular where the joint venture is set up especially for the purpose of acquiring the target company, where the joint venture has not yet started to operate, where an existing joint venture has no legal personality or full-function character as referred to above or where the joint venture is an association of undertakings. The same applies where there are elements which demonstrate that the parent companies are in fact the real players behind the operation. These elements may include a significant involvement by the parent companies themselves in the initiation, organisation and financing of the operation. Moreover, where the acquisition leads to a substantial diversification in the nature of the joint venture's activities, this may also indicate that the

[10] The target company hypothetically has an aggregate Community turnover of less than ECU 250 million, and the acquiring parties are two (or more) undertakings, each with a Community turnover exceeding ECU 250 million. If the target is acquired by a 'shell' company set up between the acquiring undertakings, there would only be one company (the 'shell' company) with a Community turnover exceeding ECU 250 million, and thus one of the cumulative threshold conditions for Community jurisdiction would not be fulfilled (namely, the existence of at least two undertakings with a Community turnover exceeding ECU 250 million). Conversely, if instead of acting through a 'shell' company, the acquiring undertakings acquire the target company themselves, then the turnover threshold would be met and the Merger Regulation would apply to this transaction. The same considerations apply to the national turnover thresholds referred to in Article 1(3).

[11] The criteria determining the full-function nature of a joint venture are contained in the Commission Notice on the concept of full-function joint ventures.

parent companies are the real players in the operation. This will normally be the case when the joint venture acquires a target company operating on a different product market. In those cases, the parent companies are regarded as undertakings concerned.

29. In the TNT case [12], joint control over a joint venture (JVC) was to be acquired by a joint venture (GD NET BV) between five postal administrations and another acquiring company (TNT Ltd). In this case, the Commission considered that the joint venture GD NET BV was simply a vehicle set up to enable the parent companies (the five postal administrations) to participate in the resulting JVC joint venture in order to facilitate decision-making amongst themselves and to ensure that the parent companies spoke and acted as one; this configuration would ensure that the parent companies could exercise a decisive influence with the other acquiring company, TNT, over the resulting joint venture JVC and would avoid the situation where that other acquirer could exercise sole control because of the postal administrations' inability to reach a unified position on any decision.



5. **Change from joint control to sole control**

30. In the case of a change from joint control to sole control, one shareholder acquires the stake previously held by the other shareholder(s). In the case of two shareholders, each of them has joint control over the entire joint venture, and not sole control over 50 % of it; hence the sale of all of his shares by one shareholder to the other does not lead the sole remaining shareholder to move from sole control over 50 % to sole control over 100 % of the joint venture, but rather to move from joint control to sole control of the entire company (which, subsequent to the operation, ceases to be a 'joint' venture).

31. In this situation, the undertakings concerned are the remaining (acquiring) shareholder and the joint venture. As is the case for any other seller, the 'exiting' shareholder is not an undertaking concerned.

32. The ICI/Tioxide case [13] involved such a change from joint (50/50) control to sole control. The Commission considered that '.. decisive influence exercised solely is substantially different to decisive influence exercised jointly, since the latter has to take into account the potentially different interests of the other party or parties concerned ... By changing the quality of decisive influence exercised by ICI on Tioxide, the transaction will bring about a durable change of the structure of the concerned parties ...'. In this case, the undertakings concerned were held to be ICI (as acquirer) and Tioxide as a whole (as acquiree), but not the seller Cookson.

6. **Change in the shareholding in cases of joint control of an existing joint venture**

33. The decisive element in assessing changes in the shareholding of a company is whether the operation leads to a change in the quality of control. The Commission assesses each operation

[12] Case IV/M.102 — TNT/Canada Post, DBP Postdienst, La Poste, PTT Post and Sweden Post, of 2 December 1991.

[13] Case IV/M.023 — ICI/Tioxide, of 28 November 1990.

on a case-by-case basis, but under certain hypotheses, there will be a presumption that the given operation leads, or does not lead, to such a change in the quality of control, and thus constitutes, or does not constitute, a notifiable concentration.

34. A distinction must be made according to the circumstances of the change in the shareholding; firstly, one or more existing shareholders can exit; secondly, one or more new additional shareholders can enter; and thirdly, one or more existing shareholders can be replaced by one or more new shareholders.

6.1. *Reduction in the number of shareholders leading to a change from joint to sole control*

35. It is not the reduction in the number of shareholders *per se* which is important, but rather the fact that if some shareholders sell their stakes in a given joint venture, these stakes are then acquired by other (new or existing) shareholders, and thus the acquisition of these stakes or additional contractual rights may lead to the acquisition of control or may strengthen an already existing position of control (e.g. additional voting rights or veto rights, additional board members, etc.).

36. Where the number of shareholders is reduced, there may be a change from joint control to sole control (see also Section III.5.), in which case the remaining shareholder acquires sole control of the company. The undertakings concerned will be the remaining (acquiring) shareholder and the acquired company (previously the joint venture).

37. In addition to the shareholder with sole control of the company, there may be other shareholders, for example with minority stakes, but who do not have a controlling interest in the company; these shareholders are not undertakings concerned as they do not exercise control.

6.2. *Reduction in the number of shareholders not leading to a change from joint to sole control*

38. Where the operation involves a reduction in the number of shareholders having joint control, without leading to a change from joint to sole control and without any new entry or substitution of shareholders acquiring control (see Section III.6.3.), the proposed transaction will normally be presumed not to lead to a change in the quality of control and will therefore not be a notifiable concentration. This would be the case where, for example, five shareholders initially have equal stakes of 20 % each and where, after the operation, one shareholder exits and the remaining four shareholders each have equal stakes of 25 %.

39. However, this situation would be different where there is a significant change in the quality of control, notably where the reduction in the number of shareholders gives the remaining shareholders additional veto rights or additional board members, resulting in a new acquisition of control by at least one of the shareholders, through the application of either the existing or a new shareholders' agreement. In this case, the undertakings concerned will be each of the remaining shareholders which exercise joint control and the joint venture. In Avesta II ([14]), the fact that the number of major shareholders decreased from four to three led to one of the remaining shareholders acquiring negative veto rights (which it had not previously enjoyed) because of the provisions of the shareholders' agreement which remained in force ([15]). This acquisition of full veto rights was considered by the Commission to represent a change in the quality of control.

6.3. *Any other changes in the composition of the shareholding*

40. Finally, in the case where, following changes in the shareholding, one or more shareholders acquire control, the operation will constitute a notifiable operation as there is a presumption that it will normally lead to a change in the quality of control.

41. Irrespective of whether the number of shareholders decreases, increases or remains the same subsequent to the operation, this acquisition of control can take any of the following forms:

([14]) Case IV/M.452 — Avesta II, of 9 June 1994.

([15]) In this case, a shareholder who was a party to the shareholders' agreement sold its stake of approximately 7 %. As the exiting shareholder had shared veto rights with another shareholder who remained, and as the shareholders' agreement remained unchanged, the remaining shareholder now acquired full veto rights.

— entry of one or more new shareholders (change from sole to joint control, or situation of joint control both before and after the operation),

— acquisition of a controlling interest by one or more minority shareholders (change from sole to joint control, or situation of joint control both before and after the operation),

— substitution of one or more shareholders (situation of joint control both before and after the operation).

42. The question is whether the undertakings concerned are the joint venture and the new shareholder(s) who would together acquire control of a pre-existing company, or whether all of the shareholders (existing and new) are to be regarded as undertakings concerned acquiring control of a new joint venture. This question is particularly relevant when there is no express agreement between one (or more) of the existing shareholders and the new shareholder(s), who might only have had an agreement with the 'exiting' shareholder(s), i.e. the seller(s).

43. A change in the shareholding through the entry or substitution of shareholders is considered to lead to a change in the quality of control. This is because the entry of a new parent company, or the substitution of one parent company for another, is not comparable to the simple acquisition of part of a business as it implies a change in the nature and quality of control of the whole joint venture, even when, both before and after the operation, joint control is exercised by a given number of shareholders.

44. The Commission therefore considers that the undertakings concerned in cases where there are changes in the shareholding are the shareholders (both existing and new) who exercise joint control and the joint venture itself. As mentioned earlier, non-controlling shareholders are not undertakings concerned.

45. An example of such a change in the shareholding is the Synthomer/Yule Catto case [16], in which one of two parent companies with joint control over the pre-existing joint venture was replaced by a new parent company. Both parent companies with joint control (the existing one and the new one) and the joint venture were considered to be undertakings concerned.

7. 'Demergers' and the break-up of companies

46. When two undertakings merge or set up a joint venture, then subsequently demerge or break up their joint venture, and in particular the assets [17] are split between the 'demerging' parties, particularly in a configuration different from the original, there will normally be more than one acquisition of control (see the Annex).

47. For example, undertakings A and B merge and then subsequently demerge with a new asset configuration. There will be the acquisition by undertaking A of various assets (assets which may previously have been owned by itself or by undertaking B and assets jointly acquired by the entity resulting from the merger), with similar acquisitions by undertaking B. Similarly, a break-up of a joint venture can be deemed to involve a change from joint control over the joint venture's entire assets to sole control over the divided assets [18].

48. A break-up of a company in this way is 'asymmetrical'. For such a demerger, the undertakings concerned (for each break-up operation) will be, on the one hand, the original parties to the merger and, on the other, the assets that each original party is acquiring. For the break-up of a joint venture, the undertakings concerned (for each break-up operation) will be, on the one hand, the original parties to the joint venture, each as acquirer, and, on the other, that part of the joint venture that each original party is acquiring.

8. Exchange of assets

49. In those transactions where two (or more) companies exchange assets, regardless of whether these constitute legal entities or not, each

[16] Case IV/M.376 — Synthomer/Yule Catto, of 22 October 1993.

[17] The term 'assets' as used here means specific assets which in themselves could constitute a business (e.g. a subsidiary, a division of a company or, in some cases, brands or licences) to which a market turnover can be clearly attributed.

[18] Case IV/M.197 — Solvay-Laporte/Interox, of 30 April 1997.

acquisition of control constitutes an independent concentration. Although it is true that both transfers of assets in a swap are usually considered by the parties to be interdependent, that they are often agreed in a single document and that they may even take place simultaneously, the purpose of the Merger Regulation is to assess the impact of the operation resulting from the acquisition of control by each of the companies. The legal or even economic link between those operations is not sufficient for them to qualify as a single concentration.

50. Hence the undertakings concerned will be, for each property transfer, the acquiring companies and the acquired companies or assets.

9. Acquisitions of control by individual persons

51. Article 3(1) of the Merger Regulation specifically provides that a concentration is deemed to arise, *inter alia*, where 'one or more persons already controlling at least one undertaking' acquire control of the whole or parts of one or more undertakings. This provision indicates that acquisitions of control by individuals will bring about a lasting change in the structure of the companies concerned only if those individuals carry out economic activities of their own. The Commission considers that the undertakings concerned are the target company and the individual acquirer (with the turnover of the undertaking(s) controlled by that individual being included in the calculation of the individual's turnover).

52. This was the view taken in the Commission decision in the Asko/Jacobs/Adia case [19], where Asko, a German holding company with substantial retailing assets, and Mr Jacobs, a private Swiss investor, acquired joint control of Adia, a Swiss company active mainly in personnel services. Mr Jacobs was considered to be an undertaking concerned because of the economic interests he held in the chocolate, confectionery and coffee sectors.

[19] Case IV/M.082 — Asko/Jacobs/Adia, of 16 May 1991.

10. Management buy-outs

53. An acquisition of control of a company by its own managers is also an acquisition by individuals, and what has been said above is therefore also applicable here. However, the management of the company may pool its interests through a 'vehicle company', so that it acts with a single voice and also to facilitate decision-making. Such a vehicle company may be, but is not necessarily, an undertaking concerned. The general rule on acquisitions of control by a joint venture applies here (see Section III.4.).

54. With or without a vehicle company, the management may also look for investors in order to finance the operation. Very often, the rights granted to these investors according to their shareholding may be such that control within the meaning of Article 3 of the Merger Regulation will be conferred on them and not on the management itself, which may simply enjoy minority rights. In the CWB/Goldman Sachs/Tarkett decision [20], the two companies managing the investment funds taking part in the transaction were those acquiring joint control, and not the managers.

11. Acquisition of control by a State-owned company

55. In those situations where a State-owned company merges with or acquires control of another company controlled by the same State [21], the question arises as to whether these transactions really constitute concentrations within the meaning of Article 3 of the Merger Regulation or rather internal restructuring operations of the 'public sector group of companies' [22]. In this respect, recital 12 of Regulation (EEC) No 4064/89 sets out the principle of non-discrimination between public and private sectors and declares that 'in the public sector, calculation of the turnover of an undertaking concerned in a concentration needs, therefore, to take account of undertakings making

[20] Case IV/M.395 — CWB/Goldman Sachs/Tarkett, of 21 February 1994.

[21] The term 'State' as used here means any legal public entity, i.e. not only Member States, but also regional or local public entities such as provinces, departments, Länder, etc.

[22] See also Commission Notice on the concept of concentration, paragraph 8.

up an economic unit with an independent power of decision, irrespective of the way in which their capital is held or of the rules of administrative supervision applicable to them'.

56. A merger or acquisition of control arising between two companies owned by the same State may constitute a concentration and, if so, both of them will qualify as undertakings concerned, since the mere fact that two companies are both owned by the same State does not necessarily mean that they belong to the same 'group'. Indeed, the decisive issue will be whether or not these companies are both part of the same industrial holding and are subject to a coordinated strategy. This was the approach taken in the SGS/Thomson decision ([23]).

([23]) Case IV/M.216 — CEA Industrie/France Telecom/Finmeccanica/SGS-Thomson, of 22 February 1993.

ANNEX

'DEMERGERS' AND BREAK-UP OF COMPANIES ([24])

Merger scenario

Before merger

Company A	Company B

After merger

Merged company
Combined assets

After breaking up the merger

Company A:	Company B:
Divided assets of merged company: — some (initial) assets of A — some (initial) assets of B — some (subsequent) assets of the merged-company	Divided assets of merged company: — some (initial) assets of A — some (initial) assets of B — some (subsequent) assets of the merged-company

Joint venture scenario (JV)

Before JV

Company A	Assets of A for the JV	Assets of B for the JV	Company B

After JV

Company A	Joint venture	Company B
	Combined assets	

After breaking up the JV

Company A	Divided assets of joint venture: — some initial (assets) of A — some initial (assets) of B — some (subsequent) assets of the JV	Divided assets of joint venture: — some initial (assets) of A — some initial (assets) of B — some (subsequent) assets of the JV	Company B

([24]) The term 'assets' as used here means specific assets which in themselves could constitute a business (e.g. a subsidiary, a division of a company or, in some cases, brands or licences) to which a market turnover can be clearly attributed.

ANNEX 9

TURNOVER CALCULATION NOTICE

Commission Notice on calculation of turnover,
O.J. 1998 No. C 66/25

COMMISSION NOTICE

on calculation of turnover under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings

(98/C 66/04)

(Text with EEA relevance)

1. The purpose of this Notice is to expand upon the text of Articles 1 and 5 of Council Regulation (EEC) No 4064/89 [1] as last amended by Council Regulation (EC) No 1310/97 [2] (hereinafter referred to as 'the Merger Regulation') and in so doing to elucidate certain procedural and practical questions which have caused doubt or difficulty.

2. This Notice is based on the experience gained by the Commission in applying the Merger Regulation to date. The principles it sets out will be followed and further developed by the Commission's practice in individual cases.

This Notice replaces the Notice on calculation of turnover [3].

3. The Merger Regulation has a two fold test for Commission jurisdiction. One test is that the transaction must be a concentration within the meaning of Article 3 [4]. The second comprises the turnover thresholds contained in Article 1 and designed to identify those transactions which have an impact upon the Community and can be

[1] OJ L 395, 30.12.1989, p. 1; corrected version OJ L 257, 21.9.1990, p. 13.
[2] OJ L 180, 9.7.1997, p. 1.
[3] OJ C 385, 31.12.1994, p. 21.
[4] See the Notice on the concept of concentration.

deemed to be of 'Community interest'. Turnover is used as a proxy for the economic resources being combined in a concentration, and is allocated geographically in order to reflect the geographic distribution of those resources.

Two sets of thresholds are set out in Article 1, in paragraph 2 and paragraph 3 respectively. Article 1(2) sets out the thresholds which must first be checked in order to establish whether the transaction has a Community dimension. In this respect, the worldwide turnover threshold is intended to measure the overall dimension of the undertakings concerned; the Community turnover threshold seek to determine whether the concentration involves a minimum level of activities in the Community; and the two-thirds rule aims to exclude purely domestic transactions from Community jurisdiction.

Article 1(3) must only be applied in the event that the thresholds set out in Article 1(2) are not met. This second set of thresholds is designed to tackle those transactions which fall short of achieving Community dimension under Article 1(2), but would need to be notified under national competition rules in at least three Member States (so called 'multiple notifications'). For this purpose, Article 1(3) provides for lower turnover thresholds, both worldwide and Community-wide, to be achieved by the undertakings concerned. A concentration has a Community dimension if these lower thresholds are fulfilled and the undertakings concerned achieve jointly and individually a minimum level of activities in at least three Member States. Article 1(3) also contains a two-thirds rule similar to that of Article 1(2), which aims to identify purely domestic transactions.

4. The thresholds as such are designed to establish jurisdiction and not to assess the market position of the parties to the concentration nor the impact of the operation. In so doing they include turnover derived from, and thus the resources devoted to, all areas of activity of the parties, and not just those directly involved in the concentration. Article 1 of the Merger Regulation sets out the thresholds to be used to determine a concentration with a 'Community dimension' while Article 5 explains how turnover should be calculated.

5. The fact that the thresholds of Article 1 of the Merger Regulation are purely quantitative, since they are only based on turnover calculation instead of market share or other criteria, shows that their aim is to provide a simple and objective mechanism that can be easily handled by the companies involved in a merger in order to determine if their transaction has a Community dimension and is therefore notifiable.

6. The decisive issue for Article 1 of the Merger Regulation is to measure the economic strength of the undertakings concerned as reflected in their respective turnover figures, regardless of the sector where such turnover was achieved and of whether those sectors will be at all affected by the transaction in question. The Merger Regulation has thereby given priority to the determination of the overall economic and financial resources that are being combined through the merger in order to decide whether the latter is of Community interest.

7. In this context, it is clear that turnover should reflect as accurately as possible the economic strength of the undertakings involved in a transaction. This is the purpose of the set of rules contained in Article 5 of the Merger Regulation which are designed to ensure that the resulting figures are a true representation of economic reality.

8. The Commission's interpretation of Articles 1 and 5 with respect to calculation of turnover is without prejudice to the interpretation which may be given by the Court of Justice or the Court of First Instance of the European Communities.

I. 'ACCOUNTING' CALCULATION OF TURNOVER

1. **Turnover as a reflection of activity**

1.1. *the concept of turnover*

9. The concept of turnover as used in Article 5 of the Merger Regulation refers explicitly to 'the amounts derived from the sale of products and the provision of services'. Sale, as a reflection of the undertaking's activity, is thus the essential criterion for calculating turnover, whether for products or

the provision of services. 'Amounts derived from sale' generally appear in company accounts under the heading 'sales'.

10. In the case of products, turnover can be determined without difficulty, namely by identifying each commercial act involving a transfer of ownership.

11. In the case of services, the factors to be taken into account in calculating turnover are much more complex, since the commercial act involves a transfer of 'value'.

12. Generally speaking, the method of calculating turnover in the case of services does not differ from that used in the case of products: the Commission takes into consideration the total amount of sales. Where the service provided is sold directly by the provider to the customer, the turnover of the undertaking concerned consists of the total amount of sales for the provision of services in the last financial year.

13. Because of the complexity of the service sector, this general principle may have to be adapted to the specific conditions of the service provided. Thus, in certain sectors of activity (such as tourism and advertising), the service may be sold through the intermediary of other suppliers. Because of the diversity of such sectors, many different situations may arise. For example, the turnover of a service undertaking which acts as an intermediary may consist solely of the amount of commissions which it receives.

14. Similarly, in a number of areas such as credit, financial services and insurance, technical problems in calculating turnover arise which will be dealt with in Section III.

1.2. *Ordinary activities*

15. Article 5(1) states that the amounts to be included in the calculation of turnover must correspond to the 'ordinary activities' of the undertakings concerned.

16. With regard to aid granted to undertakings by public bodies, any aid relating to one of the ordinary activities of an undertaking concerned is liable to be included in the calculation of turnover if the undertaking is itself the recipient of the aid and if the aid is directly linked to the sale of products and the provision of services by the undertaking and is therefore reflected in the price [5]. For example, aid towards the consumption of a product allows the manufacturer to sell at a higher price than that actually paid by consumers.

17. With regard to services, the Commission looks at the undertaking's ordinary activities involved in establishing the resources required for providing the service. In its Decision in the Accor/Wagons-Lits case [6], the Commission decided to take into account the item 'other operating proceeds' included in Wagons-Lits's profit and loss account. The Commission considered that the components of this item which included certain income from its car-hire activities were derived from the sale of products and the provision of services by Wagons-Lits and were part of its ordinary activities.

2. **'Net' turnover**

18. The turnover to be taken into account is 'net' turnover, after deduction of a number of components specified in the Regulation. The Commission's aim is to adjust turnover in such a way as to enable it to decide on the real economic weight of the undertaking.

2.1. *The deduction of rebates and taxes*

19. Article 5(1) provides for the 'deduction of sales rebates and of value added tax and other taxes directly related to turnover'. The deductions thus relate to business components (sales rebates) and tax components (value added tax and other taxes directly related to turnover).

20. 'Sales rebates' should be taken to mean all rebates or discounts which are granted by the undertakings during their business negotiations with their customers and which have a direct influence on the amounts of sales.

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[5] See Case IV/M.156 — Cereol/Continentale Italiana of 27 November 1991. In this case, the Commission excluded Community aid from the calculation of turnover because the aid was not intended to support the sale of products manufactured by one of the undertakings involved in the merger, but the producers of the raw materials (grain) used by the undertaking, which specialized in the crushing of grain.

[6] Case IV/M.126 — Accor/Wagons-Lits, of 28 April 1992.

21. As regards the deduction of taxes, the Merger Regulation refers to VAT and 'other taxes directly related to turnover'. As far as VAT is concerned, its deduction does not in general pose any problem. The concept of 'taxes directly related to turnover' is a clear reference to indirect taxation since it is directly linked to turnover, such as, for example, taxes on alcoholic beverages.

2.2. *The deduction of 'internal' turnover*

22. The first subparagraph of Article 5(1) states that 'the aggregate turnover of an undertaking concerned shall not include the sale of products or the provision of services between any of the undertakings referred to in paragraph 4', i.e. those which have links with the undertaking concerned (essentially parent companies or subsidiaries).

23. The aim is to exclude the proceeds of business dealings within a group so as to take account of the real economic weight of each entity. Thus, the 'amounts' taken into account by the Merger Regulation reflect only the transactions which take place between the group of undertakings on the one hand and third parties on the other.

3. **Adjustment of turnover calculation rules for the different types of operations**

3.1. *The general rule*

24. According to Article 5(1) of the Merger Regulation, aggregate turnover comprises the amounts derived by the undertakings concerned in the preceding financial year from the sale of products and the provision of services. The basic principle is thus that for each undertaking concerned the turnover to be taken into account is the turnover of the closest financial year to the date of the transaction.

25. This provision shows that since there are usually no audited accounts of the year ending the day before the transaction, the closest representation of a whole year of activity of the company in question is the one given by the turnover figures of the most recent financial year.

26. The Commission seeks to base itself upon the most accurate and reliable figures available. As a general rule therefore, the Commission will refer to audited or other definitive accounts. However, in cases where major differences between the Community's accounting standards and those of a non-member country are observed, the Commission may consider it necessary to restate these accounts in accordance with Community standards in respect of turnover. The Commission is, in any case, reluctant to rely on management or any other form of provisional accounts in any but exceptional circumstances (see the next paragraph). Where a concentration takes place within the first months of the year and audited accounts are not yet available for the most recent financial year, the figures to be taken into account are those relating to the previous year. Where there is a major divergence between the two sets of accounts, and in particular, when the final draft figures for the most recent years are available, the Commission may decide to take those draft figures into account.

27. Notwithstanding paragraph 26, an adjustment must always be made to account for acquisitions or divestments subsequent to the date of the audited accounts. This is necessary if the true resources being concentrated are to be identified. Thus if a company disposes of part of its business at any time before the signature of the final agreement or the announcement of the public bid or the acquisition of a controlling interest bringing about a concentration, or where such a divestment or closure is a pre-condition for the operation [7] the part of the turnover to be attributed to that part of the business must be subtracted from the turnover of the notifying party as shown in its last audited accounts. Conversely, the turnover to be attributed to assets of which control has been acquired subsequent to the preparation of the most recent audited accounts must be added to a company's turnover for notification purposes.

28. Other factors that may affect turnover on a temporary basis such as a decrease in orders for the product or a slow-down in the production process within the period prior to the transaction will be ignored for the purposes of calculating turnover. No adjustment to the definitive accounts will be made to incorporate them.

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[7] See Judgment of the Court of First Instance in Case T-3/93, Air France v Commission, [1994] ECR II-21.

29. Regarding the geographical allocation of turnover, since audited accounts often do not provide a geographical breakdown of the sort required by the Merger Regulation, the Commission will rely on the best figures available provided by the companies in accordance with the rule laid down in Article 5(1) of the Merger Regulation (see Section II.1).

3.2. *Acquisitions of parts of companies*

30. Article 5(2) of the Merger Regulation provides that 'where the concentration consists in the acquisition of parts, whether or not constituted as legal entities, of one or more undertakings, only the turnover relating to the parts which are the subject of the transaction shall be taken into account with regard to the seller or sellers'.

31. This provision states that when the acquirer does not purchase an entire group, but only one, or part, of its businesses, whether or not constituted as a subsidiary, only the turnover of the part acquired should be included in the turnover calculation. In fact, although in legal terms the seller as a whole (with all its subsidiaries) is an essential party to the transaction, since the sale-purchase agreement cannot be concluded without him, he plays no role once the agreement has been implemented. The possible impact of the transaction on the market will depend only on the combination of the economic and financial resources that are the subject of a property transfer with those of the acquirer and not on the remaining business of the seller who remains independent.

3.3. *Staggered operations*

32. Sometimes certain successive transactions are only individual steps within a wider strategy between the same parties. Considering each transaction alone, even if only for determining jurisdiction, would imply ignoring economic reality. At the same time, whereas some of these staggered operations may be designed in this fashion because they will better meet the needs of the parties, others could be structured like this in order to circumvent the application of the Merger Regulation.

33. The Merger Regulation has foreseen these scenarios in Article 5(2), second subparagraph, which provides that 'two or more transactions within the meaning of the first subparagraph which take place within a two-year period between the same persons or undertakings shall be treated as one and the same concentration arising on the date of the last transaction'.

34. In practical terms, this provision means that if company A buys a subsidiary of company B that represents 50 % of the overall activity of B and one year later it acquires the other subsidiary (the remaining 50 % of B), both transactions will be taken as one. Assuming that each of the subsidiaries attained a turnover in the Community of only ECU 200 million, the first transaction would not be notifiable unless the operation fulfilled the conditions set out in Article 1(3). However, since the second transaction takes place within the two-year period, both have to be notified as a single transaction when the second occurs.

35. The importance of the provision is that previous transactions (within two years) become notifiable with the most recent transaction once the thresholds are cumulatively met.

3.4. *Turnover of groups*

36. When an undertaking concerned in a concentration within the meaning of Article 1 of the Merger Regulation [8] belongs to a group, the turnover of the group as a whole is to be taken into account in order to determine whether the thresholds are met. The aim is again to capture the total volume of the economic resources that are being combined through the operation.

37. The Merger Regulation does not define the concept of group in abstract terms but focuses on whether the companies have the right to manage the undertaking's affairs as the yardstick to determine which of the companies that have some direct or indirect links with an undertaking concerned should be regarded as part of its group.

38. Article 5(4) of the Merger Regulation provides the following:

'Without prejudice to paragraph 2 [acquisitions of parts], the aggregate turnover of an undertaking concerned within the meaning of Article 1(2) and (3) shall be calculated by adding together the respective turnovers of the following:

[8] See the Commission Notice on the concept of undertakings concerned.

(a) the undertaking concerned;

(b) those undertakings in which the undertaking concerned directly or indirectly:

— owns more than half the capital or business assets, or

— has the power to exercise more than half the voting rights, or

— has the power to appoint more than half the members of the supervisory board, the administrative board or bodies legally representing the undertakings, or

— has the right to manage the undertaking's affairs;

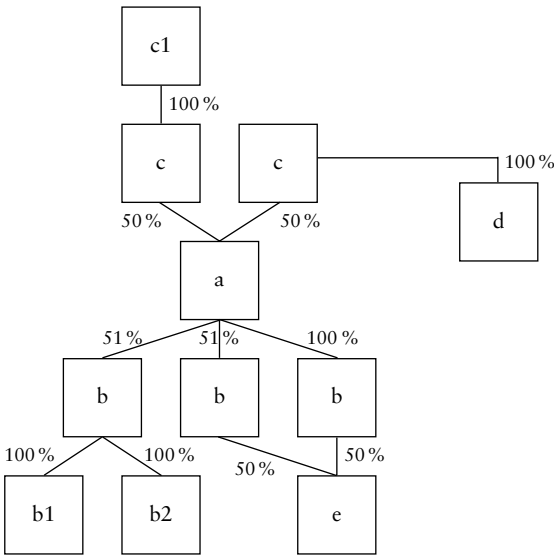
(c) those undertakings which have in an undertaking concerned the rights or powers listed in (b);

(d) those undertakings in which an undertaking as referred to in (c) has the rights or powers listed in (b);

(e) those undertakings in which two or more undertakings as referred to in (a) to (d) jointly have the rights or powers listed in (b).'

This means that the turnover of the company directly involved in the transaction (point (a)) should include its subsidiaries (point (b)), its parent companies (point (c)), the other subsidiaries of its parent companies (point (d)) and any other undertaking jointly controlled by two or more of the companies belonging to the group (point (e)). A graphic example is as follows:

The undertaking concerned and its group:



a: The undertaking concerned

b: Its subsidiaries and their own subsidiaries (b1 and b2)

c: Its parent companies and their own parent companies (c1)

d: Other subsidiaries of the parent companies of the undertaking concerned

e: Companies jointly controlled by two (or more) companies of the group

Note: these letters correspond to the relevant points of Article 5(4).

Several remarks can be made from this chart:

1. As long as the test of control of point (b) is fulfilled, the whole turnover of the subsidiary in question will be taken into account regardless of the actual shareholding of the controlling company. In the example, the whole turnover of the three subsidiaries (called b) of the undertaking concerned (a) will be included.

2. When any of the companies identified as belonging to the group also controls others, these should also be incorporated into the calculation. In the example, one of the subsidiaries of a (called b) has in turn its own subsidiaries b1 and b2.

3. When two or more companies jointly control the undertaking concerned (a) in the sense that the agreement of each and all of them is needed in order to manage the undertaking affairs, the turnover of all of them should be included [9]. In the example, the two parent companies (c) of the undertaking concerned (a) would be taken into account as well as their own parent companies (c1 in the example). Although the Merger Regulation does not explicitly mention this rule for those cases where the undertaking concerned is in fact a joint venture, it is inferred from the text of Article 5(4)(c), which uses the plural when referring to the parent companies. This interpretation has been consistently applied by the Commission.

4. Any intra-group sale should be subtracted from the turnover of the group (see paragraph 22).

[9] See Commission Notice on the concept of undertakings concerned (paragraphs 26-29).

39. The Merger Regulation also deals with the specific scenario that arises when two or more undertakings concerned in a transaction exercise joint control of another company. Pursuant to point (a) of Article 5(5), the turnover resulting from the sale of products or the provision of services between the joint venture and each of the undertakings concerned or any other company connected with any one of them in the sense of Article 5(4) should be excluded. The purpose of such a rule is to avoid double counting. With regard to the turnover of the joint venture generated from activities with third parties, point (b) of Article 5(5) provides that it should be apportioned equally amongst the undertakings concerned, to reflect the joint control ([10]).

40. Following the principle of point (b) of Article 5(5) by analogy, in the case of joint ventures between undertakings concerned and third parties, the Commission's practice has been to allocate to each of the undertakings concerned the turnover shared equally by all the controlling companies in the joint venture. In all these cases, however, joint control has to be demonstrated.

The practice shows that it is impossible to cover in the present Notice the whole range of scenarios which could arise in respect of turnover calculation of joint venture companies or joint control cases. Whenever ambiguities arise, an assessment should always give priority to the general principles of avoiding double counting and of reflecting as accurately as possible the economic strength of the undertakings involved in the transaction ([11]).

41. It should be noted that Article 5(4) refers only to the groups that already exist at the time of the transaction, i.e. the group of each of the undertakings concerned in an operation, and not to the new structures created as a result of the concentration. For example, if companies A and B, together with their respective subsidiaries, are going to merge, it is A and B, and not the new entity, that qualify as undertakings concerned, which implies that the turnover of each of the two groups should be calculated independently.

42. Since the aim of this provision is simply to identify the companies belonging to the existing groups for the purposes of turnover calculation, the test of having the right to manage the undertaking's affairs in Article 5(4) ([12]) is somewhat different from the test of control set out in Article 3(3), which refers to the acquisition of control carried out by means of the transaction subject to examination. Whereas the former is simpler and easier to prove on the basis of factual evidence, the latter is more demanding because in the absence of an acquisition of control no concentration arises.

3.5. *Turnover of State-owned companies*

43. While Article 5(4) sets out the method for determining the economic grouping to which an undertaking concerned belongs for the purpose of calculating turnover, it should be read in conjunction with recital 12 to Regulation (EEC) No 4064/89 in respect of State-owned enterprises. This recital states that in order to avoid discrimination between the public and private sector, account should be taken 'of undertakings making up an economic unit with an independent power of decision, irrespective of the way in which their capital is held or of the rules of administrative supervision applicable to them'. Thus the mere fact that two companies are both State-owned should not automatically lead to the conclusion that they are part of a group for the purposes of Article 5. Rather, it should be considered whether there are grounds to consider that each company constitutes an independent economic unit.

44. Thus where a State-owned company is not part of an overall industrial holding company and is not subject to any coordination with other State-controlled holdings, it should be treated as an independent group for the purposes of Article 5, and the turnover of other companies owned by that State should not be taken into account. Where, however, a Member State's interests are grouped together in holding companies, or are

([10]) For example, company A and company B set up a joint venture C. These two parent companies exercise at the same time joint control of company D, although A has 60 % and B 40 % of the capital. When calculating the turnover of A and B at the time they set up the new joint venture C, the turnover of D with third parties is attributed in equal parts to A and B.

([11]) See for example Case IV/M.806 — BA/TAT, of 26 August 1996.

([12]) See for example Case IV/M.126 — Accor/Wagons-Lits, of 28 April 1992, and Case IV/M.940 — UBS/Mister Minit, of 9 July 1997.

managed together, or where for other reasons it is clear that State-owned companies form part of an 'economic unit with an independent power of decision', then the turnover of those businesses should be considered part of the group of the undertaking concerned's for the purposes of Article 5.

II. GEOGRAPHICAL ALLOCATION OF TURNOVER

1. General rule

45. The thresholds other than those set by Article 1(2)(a) and Article 1(3)(a) select cases which have sufficient turnover within the Community in order to be of Community interest and which are primarily cross-border in nature. They require turnover to be allocated geographically to achieve this. The second subparagraph of Article 5(1) provides that the location of turnover is determined by the location of the customer at the time of the transaction:

'Turnover, in the Community or in a Member State, shall comprise products sold and services provided to undertakings or consumers, in the Community or in that Member State as the case may be.'

46. The reference to 'products sold' and 'services provided' is not intended to discriminate between goods and services by focusing on where the sale takes place in the case of goods but the place where a service is provided (which might be different from where the service was sold) in the case of services. In both cases, turnover should be attributed to the place where the customer is located because that is, in most circumstances, where a deal was made, where the turnover for the supplier in question was generated and where competition with alternative suppliers took place ([13]). The second subparagraph of Article 5(1) does not focus on where a good or service is enjoyed or the benefit of the good or service derived. In the case of a mobile good, a motor car may well be driven across Europe by its purchaser but it was purchased at only one place — Paris, Berlin or Madrid say. This is also true in the case of those services where it is possible to separate the purchase of a service from its delivery. Thus in the case of package holidays, competition for the sale of holidays through travel agents takes place locally, as with retail shopping, even though the service may be provided in a number of distant locations. This turnover is, however, earned locally and not at the site of an eventual holiday.

47. This applies even where a multinational corporation has a Community buying strategy and sources all its requirements for a good or service from one location. The fact that the components are subsequently used in ten different plants in a variety of Member States does not alter the fact that the transaction with a company outside the group occurred in only one country. The subsequent distribution to other sites is purely an internal question for the company concerned.

48. Certain sectors do, however, pose very particular problems with regard to the geographical allocation of turnover (see Section III).

2. Conversion of turnover into ecu

49. When converting turnover figures into ecu great care should be taken with the exchange rate used. The annual turnover of a company should be converted at the average rate for the twelve months concerned. This average can be obtained from the Commission. The audited annual turnover figures should not be broken down into component quarterly, monthly, or weekly sales figures which are converted individually at the corresponding average quarterly, monthly or weekly rates, with the ecu figures then added to give a total for the year.

50. When a company has sales in a range of currencies, the procedure is no different. The total turnover given in the consolidated audited accounts and in that company's reporting currency is converted into ecu at the average rate for the twelve months. Local currency sales should not be converted directly into ecu since these figures are not from the consolidated audited accounts of the company.

([13]) If the place where the customer was located when purchasing the goods or service and the place where the billing was subsequently made are different, turnover should be allocated to the former.

III. CREDIT AND OTHER FINANCIAL INSTITUTIONS AND INSURANCE UNDERTAKINGS

1. Definitions

51. The specific nature of banking and insurance activities is formally recognized by the Merger Regulation which includes specific provisions dealing with the calculation of turnover for these sectors [14]. Although the Merger Regulation does not provide a definition of the terms, 'credit institutions and other financial institutions' within the meaning of point (a) of Article 5(3), the Commission in its practice has consistently adopted the definitions provided in the First and Second Banking Directives:

— 'Credit institution means an undertaking whose business is to receive deposits or other repayable funds from the public and to grant credits for its own account [15]'.

— 'Financial institution shall mean an undertaking other than a credit institution, the principal activity of which is to acquire holdings or to carry one or more of the activities listed in points 2 to 12 in the Annex [16]'.

52. From the definition of 'financial institution' given above, it is clear that on the one hand holding companies must be regarded as financial institutions and, on the other hand, that undertakings which perform on a regular basis as a principal activity one or more activities expressly mentioned in points 2 to 12 of the abovementioned Annex must also be regarded as financial institutions within the meaning of point (a) of Article 5(3) of the Merger Regulation. These activities include:

— lending (*inter alia*, consumer credit, mortgage credit, factoring,. . .),

— financial leasing,

— money transmission services,

— issuing and managing instruments of payment (credit cards, travellers' cheques and bankers' drafts),

— guarantees and commitments,

— trading on own account or on account of customers in money market instruments, foreign exchange, financial futures and options, exchange and interest rate instruments, and transferable securities,

— participation in share issues and the provision of services related to such issues,

— advice to undertakings on capital structure, industrial strategy and related questions and advice and services relating to mergers and the purchase of undertakings,

— money broking,

— portfolio management and advice,

— safekeeping and administration of securities.

2. Calculation of turnover

53. The methods of calculation of turnover for credit and other financial institutions and for insurance undertakings are described in Article 5(3) of the Merger Regulation. The purpose of this Section is to provide an answer to supplementary questions related to turnover calculation for the abovementioned types of undertakings which were raised during the first years of the application of the Merger Regulation.

2.1. *Credit and financial institutions (other than financial holding companies)*

2.1.1. General

54. There are normally no particular difficulties in applying the banking income criterion for the definition of the worldwide turnover to credit institutions and other kinds of financial institutions. Difficulties may arise for determining turnover within the Community and also within individual Member States. For this purpose, the appropriate criterion is that of the residence of the branch or division, as provided by Article 5(3)(a)(v), second subparagraph, of the Merger Regulation.

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[14] See Article 5(3) of the Merger Regulation.

[15] Article 1 of First Council Directive 77/780/EEC of 12 December 1977 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions (OJ L 322, 17.12.1977, p. 30).

[16] Article 1(6) of Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions (OJ L 386, 30.12.1989, p. 1).

2.1.2. Turnover of leasing companies

55. There is a fundamental distinction to be made between financial leases and operating leases. Basically, financial leases are made for longer periods than operating leases and ownership is generally transferred to the lessee at the end of the lease term by means of a purchase option included in the lease contract. Under an operating lease, on the contrary, ownership is not transferred to the lessee at the end of the lease term and the costs of maintenance, repair and insurance of the leased equipment are included in the lease payments. A financial lease therefore functions as a loan by the lessor to enable the lessee to purchase a given asset. A financial leasing company is thus a financial institution within the meaning of point (a) of Article 5(3) and its turnover has to be calculated by applying the specific rules related to the calculation of turnover for credit and other financial institutions. Given that operational leasing activities do not have this lending function, they are not considered as carried out by financial institutions, at least as primary activities, and therefore the general turnover calculation rules of Article 5(1) should apply ([17]).

2.2. *Insurance undertakings*

2.2.1. Gross premiums written

56. The application of the concept of gross premiums written as a measure of turnover for insurance undertakings has raised supplementary questions notwithstanding the definition provided in point (b) of Article 5(3) of the Merger Regulation. The following clarifications are appropriate:

— 'gross' premiums written are the sum of received premiums (which may include received reinsurance premiums if the undertaking concerned has activities in the field of reinsurance). Outgoing or outward reinsurance premiums, i.e. all amounts paid and payable by the undertaking concerned to get reinsurance cover, are already included in the gross premiums written within the meaning of the Merger Regulation,

— wherever the word 'premiums' is used (gross premiums, net (earned) premiums, outgoing reinsurance premiums, etc.), these premiums are related not only to new insurance contracts made during the accounting year being considered but also to all premiums related to contracts made in previous years which remain in force during the period taken into consideration.

2.2.2. Investments of insurance undertakings

57. In order to constitute appropriate reserves allowing for the payment of claims, insurance undertakings, which are also considered as institutional investors, usually hold a huge portfolio of investments in shares, interest-bearing securities, land and property and other assets which provide an annual revenue which is not considered as turnover for insurance undertakings.

58. With regard to the application of the Merger Regulation, a major distinction should be made between pure financial investments, in which the insurance undertaking is not involved in the management of the undertakings where the investments have been made, and those investments leading to the acquisition of an interest giving control in a given undertaking thus allowing the insurance undertaking to exert a decisive influence on the business conduct of the subsidiary or affiliated company concerned. In such cases Article 5(4) of the Merger Regulation would apply, and the turnover of the subsidiary or affiliated company should be added to the turnover of the insurance undertaking for the determination of the thresholds laid down in the Merger Regulation ([18]).

([17]) See Case IV/M.234 — GECC/Avis Lease, 15 July 1992.

([18]) See Case IV/M.018 — AG/AMEV, of 21 November 1990.

2.3. *Financial holding companies* [19]

59. A financial holding company is a financial institution and therefore the calculation of its turnover should follow the criteria established in point (a) of Article 5(3) for the calculation of turnover for credit and other financial institutions. However, since the main purpose of a financial holding is to acquire and manage participation in other undertakings, Article 5(4) also applies, (as for insurance undertakings), with regard to those participations allowing the financial holding company to exercise a decisive influence on the business conduct of the undertakings in question. Thus, the turnover of a financial holding is basically to be calculated according to Article 5(3), but it may be necessary to add turnover of undertakings falling within the categories set out in Article 5(4) ('Article 5(4) companies').

In practice, the turnover of the financial holding company (non-consolidated) must first be taken into account. Then the turnover of the Article 5(4) companies must be added, whilst taking care to deduct dividends and other income distributed by those companies to the financial holdings. The following provides an example for this kind of calculation:

		ECU million
1.	Turnover related to financial activities (from non-consolidated P&L)	3 000
2.	Turnover related to insurance Article 5(4) companies (gross premiums written)	300
3.	Turnover of industrial Article 5(4) companies	2 000
4.	Deduct dividends and other income derived from Article 5(4) companies 2 and 3	(200)
5.	Total turnover financial holding and its group	5 100

60. In such calculations different accounting rules, in particular those related to the preparation of consolidated accounts, which are to some extent harmonised but not identical within the Community, may need to be taken into consideration. Whilst this consideration applies to any type of undertaking concerned by the Merger Regulation, it is particularly important in the case of financial holding companies [20] where the number and the diversity of enterprises controlled and the degree of control the holding holds on its subsidiaries, affiliated companies and other companies in which it has shareholding requires careful examination.

61. Turnover calculation for financial holding companies as described above may in practice prove onerous. Therefore a strict and detailed application of this method will be necessary only in cases where it seems that the turnover of a financial holding company is likely to be close to the Merger Regulation thresholds; in other cases it may well be obvious that the turnover is far from the thresholds of the Merger Regulation, and therefore the published accounts are adequate for the establishment of jurisdiction.

[19] The principles set out in this paragraph for financial holdings may to a certain extent be applied to fund management companies.

[20] See for example Case IV/M.166 — Torras/Sarrió, of 24 February 1992, Case IV/M.213 — Hong Kong and Shanghai Bank/Midland, of 21 May 1992, IV/M.192 — Banesto/Totta, of 14 April 1992.

ANNEX 10

MARKET DEFINITION NOTICE

Commission Notice on the definition of the relevant market for
the purposes of Community competition law,
O.J. 1997 No. C 372/5

COMMISSION NOTICE

on the definition of relevant market for the purposes of Community competition law

(97/C 372/03)

(Text with EEA relevance)

I. INTRODUCTION

1. The purpose of this notice is to provide guidance as to how the Commission applies the concept of relevant product and geographic market in its ongoing enforcement of Community competition law, in particular the application of Council Regulation No 17 and (EEC) No 4064/89, their equivalents in other sectoral applications such as transport, coal and steel, and agriculture, and the relevant provisions of the EEA Agreement [1]. Throughout this notice, references to Articles 85 and 86 of the Treaty and to merger control are to be understood as referring to the equivalent provisions in the EEA Agreement and the ECSC Treaty.

2. Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved [2] face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure. It is from this perspective that the market definition makes it possible *inter alia* to calculate market shares that would convey meaningful information regarding market power for the purposes of assessing dominance or for the purposes of applying Article 85.

3. It follows from point 2 that the concept of 'relevant market' is different from other definitions of market often used in other contexts. For instance, companies often use the term 'market' to refer to the area where it sells its products or to refer broadly to the industry or sector where it belongs.

4. The definition of the relevant market in both its product and its geographic dimensions often has a decisive influence on the assessment of a competition case. By rendering public the procedures which the Commission follows when considering market definition and by indicating the criteria and evidence on which it relies to reach a decision, the Commission expects to increase the transparency of its policy and decision-making in the area of competition policy.

5. Increased transparency will also result in companies and their advisers being able to better anticipate the possibility that the Commission may raise competition concerns in an individual case. Companies could, therefore, take such a possibility into account in their own internal decision-making when contemplating, for instance, acquisitions, the creation of joint ventures, or the establishment of certain agreements. It is also intended that companies should be in a better position to understand what sort of information the Commission considers relevant for the purposes of market definition.

6. The Commission's interpretation of 'relevant market' is without prejudice to the interpretation which may be given by the Court of Justice or the Court of First Instance of the European Communities.

II. DEFINITION OF RELEVANT MARKET

Definition of relevant product market and relevant geographic market

7. The Regulations based on Article 85 and 86 of the Treaty, in particular in section 6 of Form A/B with respect to Regulation No 17, as well as in section 6 of Form CO with respect to Regulation (EEC) No 4064/89 on the control of concentrations having a Community dimension have laid down the following definitions, 'Relevant product markets' are defined as follows:

[1] The focus of assessment in State aid cases is the aid recipient and the industry/sector concerned rather than identification of competitive constraints faced by the aid recipient. When consideration of market power and therefore of the relevant market are raised in any particular case, elements of the approach outlined here might serve as a basis for the assessment of State aid cases.

[2] For the purposes of this notice, the undertakings involved will be, in the case of a concentration, the parties to the concentration; in investigations within the meaning of Article 86 of the Treaty, the undertaking being investigated or the complainants; for investigations within the meaning of Article 85, the parties to the Agreement.

'A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use'.

8. 'Relevant geographic markets' are defined as follows:

'The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area'.

9. The relevant market within which to assess a given competition issue is therefore established by the combination of the product and geographic markets. The Commission interprets the definitions in paragraphs 7 an 8 (which reflect the case-law of the Court of Justice and the Court of First Instance as well as its own decision-making practice) according to the orientations defined in this notice.

Concept of relevant market and objectives of Community competition policy

10. The concept of relevant market is closely related to the objectives pursued under Community competition policy. For example, under the Community's merger control, the objective in controlling structural changes in the supply of a product/service is to prevent the creation or reinforcement of a dominant position as a result of which effective competition would be significantly impeded in a substantial part of the common market. Under the Community's competition rules, a dominant position is such that a firm or group of firms would be in a position to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers ([3]). Such a position would usually arise when a firm or group of firms accounted for a large share of the supply in any given market, provided that other factors analysed in the assessment (such as entry barriers, customers' capacity to react, etc.) point in the same direction.

11. The same approach is followed by the Commission in its application of Article 86 of the Treaty to firms that enjoy a single or collective dominant position. Within the meaning of Regulation No 17, the Commission has the power to investigate and bring to an end abuses of such a dominant position, which must also be defined by reference to the relevant market. Markets may also need to be defined in the application of Article 85 of the Treaty, in particular, in determining whether an appreciable restriction of competition exists or in establishing if the condition pursuant to Article 85 (3) (b) for an exemption from the application of Article 85 (1) is met.

12. The criteria for defining the relevant market are applied generally for the analysis of certain types of behaviour in the market and for the analysis of structural changes in the supply of products. This methodology, though, might lead to different results depending on the nature of the competition issue being examined. For instance, the scope of the geographic market might be different when analysing a concentration, where the analysis is essentially prospective, from an analysis of past behaviour. The different time horizon considered in each case might lead to the result that different geographic markets are defined for the same products depending on whether the Commission is examining a change in the structure of supply, such as a concentration or a cooperative joint venture, or examining issues relating to certain past behaviour.

Basic principles for market definition

Competitive constraints

13. Firms are subject to three main sources or competitive constraints: demand substitutability, supply substitutability and potential competition. From an economic point of view, for the definition of the relevant market, demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in particular in relation to their pricing decisions. A firm or a group of firms cannot have a significant impact on the prevailing conditions of sale, such as prices, if its customers are in a position to switch easily to available substitute products or to suppliers located elsewhere. Basically, the exercise of market definition consists in identifying the effective alternative sources of supply for the customers of the undertakings involved, in terms both of products/services and of geographic location of suppliers.

([3]) Definition given by the Court of Justice in its judgment of 13 February 1979 in Case 85/76, Hoffmann-La Roche [1979] ECR 461, and confirmed in subsequent judgments.

14. The competitive constraints arising from supply side substitutability other then those described in paragraphs 20 to 23 and from potential competition are in general less immediate and in any case require an analysis of additional factors. As a result such constraints are taken into account at the assessment stage of competition analysis.

Demand substitution

15. The assessment of demand substitution entails a determination of the range of products which are viewed as substitutes by the consumer. One way of making this determination can be viewed as a speculative experiment, postulating a hypothetical small, lasting change in relative prices and evaluating the likely reactions of customers to that increase. The exercise of market definition focuses on prices for operational and practical purposes, and more precisely on demand substitution arising from small, permanent changes in relative prices. This concept can provide clear indications as to the evidence that is relevant in defining markets.

16. Conceptually, this approach means that, starting from the type of products that the undertakings involved sell and the area in which they sell them, additional products and areas will be included in, or excluded from, the market definition depending on whether competition from these other products and areas affect or restrain sufficiently the pricing of the parties' products in the short term.

17. The question to be answered is whether the parties' customers would switch to readily available substitutes or to suppliers located elsewhere in response to a hypothetical small (in the range 5 % to 10 %) but permanent relative price increase in the products and areas being considered. If substitution were enough to make the price increase unprofitable because of the resulting loss of sales, additional substitutes and areas are included in the relevant market. This would be done until the set of products and geographical areas is such that small, permanent increases in relative prices would be profitable. The equivalent analysis is applicable in cases concerning the concentraiton of buying power, where the starting point would then be the supplier and the price test serves to identify the alternative distribution channels or outlets for the supplier's products. In the application of these principles, careful account should be taken of certain particular situations as described within paragraphs 56 and 58.

18. A practical example of this test can be provided by its application to a merger of, for instance, soft-drink bottlers. An issue to examine in such a case would be to decide whether different flavours of soft drinks belong to the same market. In practice, the question to address would be whether consumers of flavour A would switch to other flavours when confronted with a permanent price increase of 5 % to 10 % for flavour A. If a sufficient number of consumers would switch to, say, flavour B, to such an extent that the price increase for flavour A would not be profitable owing to the resulting loss of sales, then the market would comprise at least flavours A and B. The process would have to be extended in addition to other available flavours until a set of products is identified for which a price rise would not induce a sufficient substitution in demand.

19. Generally, and in particular for the analysis of merger cases, the price to take into account will be the prevailing market price. This may not be the case where the prevailing price has been determined in the absence of sufficient competition. In particular for the investigation of abuses of dominant positions, the fact that the prevailing price might already have been substantially increased will be taken into account.

Supply substitution

20. Supply-side substitutability may also be taken into account when defining markets in those situaitons in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy. This means that suppliers are able to switch production to the relevant products and market them in the short term [4] without incurring significant additional costs or risks in response to small and permanent changes in relative prices. When these conditions are met, the additional production that is put on the market will have a disciplinary effect on the competitive behaviour of the companies involved. Such an impact in terms of effectiveness and immediacy is equivalent to the demand substitution effect.

21. These situations typically arise when companies market a wide range of qualities or grades of one product; even if, for a given final customer or group of consumers, the different qualities are not substitutable, the different qualities will be grouped

[4] That is such a period that does not entail a significant adjustment of existing tangible and intangible assets (see paragraph 23).

into one product market, provided that most of the suppliers are able to offer and sell the various qualities immediately and without the significant increases in costs described above. In such cases, the relevant product market will encompass all products that are substitutable in demand and supply, and the current sales of those products will be aggregated so as to give the total value or volume of the market. The same reasoning may lead to group different geographic areas.

22. A practical example of the approach to supply-side substitutability when defining product markets is to be found in the case of paper. Paer is usually supplied in a range of different qualities, from standard writing paper to high quality papers to be used, for instance, to publish art books. From a demand point of view, different qualities of paper cannot be used for any given use, i.e. an art book or a high quality publication cannot be based on lower quality papers. However, paper plants are prepared to manufacture the different qualities, and production can be adjusted with negligible costs and in a short time-frame. In the absence of particular difficulties in distribution, paper manufacturers are able therefore, to compete for orders of the various qualities, in particular if orders are placed with sufficient lead time to allow for modification of production plans. Under such circumstances, the Commission would not define a separate market for each quality of paper and its respective use. The various qualities of paper are included in the relevant market, and their sales added up to estimate total market galue and volume.

23. When supply-side substitutability would entail the need to adjust significantly existing tangible and intangible assets, additional investments, strategic decisions or time delays, it will not be considered at the stage of market definition. Examples where supply-side substitution did not induce the Commission to enlarge the market are offered in the area of consumer products, in particular for branded beverages. Although bottling plants may in principle bottle different beverages, there are costs and lead times involved (in terms of advertising, product testing and distribution) before the products can actually be sold. In these cases, the effects of supply-side substitutability and other forms of potential competition would then be examined at a later stage.

Potential competition

24. The third source of competitive constraint, potential competition, is not taken into account when defining markets, since the conditions under which potential competition will actually represent an effective competitive constraint depend on the analysis of specific factors and circumstances related to the conditions of entry. If required, this analysis is only carried out at a subsequent stage, in general once the position of the companies involved in the relevant market has already been ascertained, and when such position gives rise to concerns from a competition point of view.

III. EVIDENCE RELIED ON TO DEFINE RELEVANT MARKETS

The process of defining the relevant market in practice

Product dimension

25. There is a range of evidence permitting an assessment of the extent to which substitution would take place. In individual cases, certain types of evidence will be determinant, depending very much on the characteristics and specificity of the industry and products or services that are being examined. The same type of evidence may be of no importance in other cases. In most cases, a decision will have to be based on the consideration of a number of criteria and different items of evidence. The Commission follows an open approach to empirical evidence, aimed at making an effective use of all available information which may be relevant in individual cases. The Commission does not follow a rigid hierarchy of different sources of information or types of evidence.

26. The process of defining relevant markets may be summarized as follows: on the basis of the preliminary information available or information submitted by the undertakings involved, the Commission will usually be in a position to broadly establish the possible relevant markets within which, for instance, a concentration or a restriction of competition has to be assessed. In general, and for all practical purposes when handling individual cases, the question will usually be to decide on a few alternative possible relevant markets. For instance, with respect to the product market, the issue will often be to establish whether product A and product B belong or do not belong to the same product market. it is often the case that the inclusion of product B would be enough to remove any competition concerns.

27. In such situations it is not necessary to consider whether the market includes additional products, or to reach a definitive conclusion on the precise product market. If under the conceivable alternative market definitions the operation in question does not raise competition concerns, the question of market definition will be left open, reducing thereby the burden on companies to supply information.

Geographic dimension

28. The Commission's approach to geographic market definition might be summarized as follows: it will take a preliminary view of the scope of the geographic market on the basis of broad indications as to the distribution of market shares between the parties and their competitors, as well as a preliminary analysis of pricing and price differences at national and Community or EEA level. This initial view is used basically as a working hypothesis to focus the Commission's enquiries for the purposes of arriving at a precise geographic market definition.

29. The reasons behind any particular configuration of prices and market shares need to be explored. Companies might enjoy high market shares in their domestic markets just because of the weight of the past, and conversely, a homogeneous presence of companies throughout the EEA might be consistent with national or regional geographic markets. The initial working hypothesis will therefore be checked against an analysis of demand characteristics (importance of national or local preferences, current patterns of purchases of customers, product differentiation/brands, other) in order to establish whether companies in different areas do indeed constitute a real alternative source of supply for consumers. The theoretical experiment is again based on substitution arising from changes in relative prices, and the question to answer is again whether the customers of the parties would switch their orders to companies located elsewhere in the short term and at a negligible cost.

30. If necessary, a further check on supply factors will be carried out to ensure that those companies located in differing areas do not face impediments in developing their sales on competitive terms throughout the whole geographic market. This analysis will include an examination of requirements for a local presence in order to sell in that area the conditions of access to distribution channels, costs associated with setting up a distribution network, and the presence or absence of regulatory barriers arising from public procurement, price regulations, quotas and tariffs limiting trade or production, technical standards, monopolies, freedom of establishment, requirements for administrative authorizations, packaging regulations, etc. In short, the Commission will identify possible obstacles and barriers isolating companies located in a given area from the competitive pressure of companies located outside that area, so as to determine the precise degree of market interpenetration at national, European or global level.

31. The actual pattern and evolution of trade flows offers useful supplementary indications as to the economic importance of each demand or supply factor mentioned above, and the extent to which they may or may not constitute actual barriers creating different geographic markets. The analysis of trade flows will generally address the question of transport costs and the extent to which these may hinder trade between different areas, having regard to plant location, costs of production and relative price levels.

Market integration in the Community

32. Finally, the Commission also takes into account the continuing process of market integration, in particular in the Community, when defining geographic markets, especially in the area of concentrations and structural joint ventures. The measures adopted and implemented in the internal market programme to remove barriers to trade and further integrate the Community markets cannot be ignored when assessing the effects on competition of a concentration or a structural joint venture. A situation where national markets have been artifically isolated from each other because of the existence of legislative barriers that have now been removed will generally lead to a cautious assessment of past evidence regarding prices, market shares or trade patterns. A process of market integration that would, in the short term, lead to wider geographic markets may therefore be taken into consideration when defining the geographic market for the purposes of assessing concentrations and joint ventures.

The process of gathering evidence

33. When a precise market definition is deemed necessary, the Commission will often contact the main customers and the main companies in the industry to enquire into their views about the boudaries of product and geographic markets and to obtain the necessary factual evidence to reach a conclusion. The Commission might also contact the relevant professional associations, and companies active in upstream markets, so as to be able to define, in so far as necessary, separate product and geographic markets, for different levels of production or distribution of the products/services in question. It might also request additional information to the undertakings involved.

34. Where appropriate, the Commission will address written requests for information to the market players mentioned above. These requests will usually include questions relating to the perceptions of companies about reactions to hypothetical price increases and their views of the boundaries of the relevant market. They will also ask for provision of the factual information the Commission deems necessary to reach a conclusion on the extent of the relevant market. The Commission might also discuss with marketing directors or other officers of those companies to gain a better understanding on how negotiations between suppliers and customers take place and better understand issues relating to the definition of the relevant market. Where appropriate, they might also carry out visits or inspections to the premises of the parties, their customers and/or their competitors, in order to better understand how products are manufactured and sold.

35. The type of evidence relevant to reach a conclusion as to the product market can be categorized as follows:

Evidence to define markets — product dimension

36. An analysis of the product characteristics and its intended use allows the Commission, as a first step, to limit the field of investigation of possible substitutes. However, product characteristics and intended use are insufficient to show whether two products are demand substitutes. Functional interchangeability or similarity in characteristics may not, in themselves, provide sufficient criteria, because the responsiveness of customers to relative price changes may be determinded by other considerations as well. For example, there may be different competitive contraints in the original equipment market for car components and in spare parts, thereby leading to a separate delineation of two relevant markets. Conversely, differences in product characteristics are not in themselves sufficient to exclude demand substitutability, since this will depend to a large extent on how customers value different characteristics.

37. The type of evidence the Commission considers relevant to assess whether two products are demand substitutes can be categorized as follows:

38. *Evidence of substitution in the recent past.* In certain cases, it is possible to analyse evidence relating to recent past events or shocks in the market that offer actual examples of substituion between two products. When available, this sort of information will normally be fundamental for market definition. If there have been changes in relative prices in the past (all else being equal), the reactions in terms of quantities demanded will be determinant in establishing substitutability. Launches of new products in the past can also offer useful information, when it is possible to precisely analyse which products have lost sales to the new product.

39. There are a number of *quantitative tests* that have specifically been designed for the purpose of delineating markets. These tests consist of various econometric and statistical approaches estimates of elasticities and cross-price elasticities ([5]) for the demand of a product, tests based on similarity of price movements over time, the analysis of causality between price series and similarity of price levels and/or their convergence. The Commission takes into account the available quantitative evidence capable of withstanding rigorous scrutiny for the purposes of establishing patterns of substitution in the past.

40. *Views of customers and competitors.* The Commission often contacts the main customers and competitors of the companies involved in its enquiries, to gather their views on the boundaries of the product market as well as most of the factual information it

([5]) Own-price elasticity of demand for product X is a measure of the responsiveness of demand for X to percentage change in its own price. Cross-prise elasticity between products X and Y is the responsiveness of demand for product X to percentage change in the price of product Y.

requires to reach a conclusion on the scope of the market. Reasoned answers of customers and competitors as to what would happen if relative prices for the candidate products were to increase in the candidate geographic area by a small amount (for instance of 5 % to 10 %) are taken into account when they are sufficiently backed by factual evidence.

41. *Consumer preferences.* In the case of consumer goods, it may be difficult for the Commission to gather the direct views of end consumers about substitute products. *Marketing studies* that companies have commissioned in the past and that are used by companies in their own decision-making as to pricing of their products and/or marketing actions may provide useful information for the Commission's delineation of the relevant market. Consumer surveys on usage patterns and attitudes, data from consumer's purchasing patterns, the views expressed by retailers and more generally, market research studies submitted by the parties and their competitors are taken into account to establish whether an economically significant proportion of consumers consider two products as substitutable, also taking into account the importance of brands for the products in question. The methodology followed in consumer surveys carried out *ad hoc* by the undertakings involved or their competitors for the purposes of a merger procedure or a procedure pursuant to Regulation No 17 will usually be scrutinized with utmost care. Unlike pre-existing studies, they have not been prepared in the normal course of business for the adoption of business decisions.

42. *Barriers and costs associated with switching demand to potential substitutes.* There are a number of barriers and costs that might prevent the Commission from considering two *prima facie* demand substitutes as belonging to one single product market. It is not possible to provide an exhaustive list of all the possible barriers to substitution and of switching costs. These barriers or obstacles might have a wide range of origins, and in its decisions, the Commission has been confronted with regulatory barriers or other forms of State intervention, constraints arising in downstream markets, need to incur specific capital investment or loss in current output in order to switch to alternative inputs, the location of customers, specific investment in production process, learning and human capital investment, retooling costs or other investments, uncertainty about quality and reputation of unknown suppliers, and others.

43. *Different categories of customers and price discrimination.* The extent of the product market might be narrowed in the presence of distinct groups of customers. A distinct group of customers for the relevant product may constitute a narrower, distinct market when such ha group could be subject to price discrimination. This will usually be the case when two conditions are met: (a) it is possible to identify clearly which group an individual customer belongs to at the moment of selling the relevant products to him, and (b) trade among customers or arbitrage by third parties should not be feasible.

Evidence for defining markets — geographic dimension

44. The type of evidence the Commission considers relevant to reach a conclusion as to the geographic market can be categorized as follows:

45. *Past evidence of diversion of orders to other areas.* In certain cases, evidence on changes in prices between different areas and consequent reactions by customers might be available. Generally, the same quantitative tests used for product market definition might as well be used in geographic market definition, bearing in mind that international comparisons of prices might be more complex due to a number of factors such as exchange rate movements, taxation and product differentiation.

46. *Basic demand characteristics.* The nature of demand for the relevant product may in itself determine the scope of the geographical market. Factors such as national preferences or preferences for national brands, language, culture and life style, and the need for a local presence have a strong potential to limit the geographic scope of competition.

47. *Views of customers and competitors.* Where appropriate, the Commission will contact the main customers and competitors of the parties in its enquiries, to gather their views on the boundaries of the geographic market as well as most of the factual information it requires to reach a conclusion on the scope of the market when they are sufficiently backed by factual evidence.

48. *Current geographic pattern of purchases.* An examination of the customers' current geographic pattern of purchases provides useful evidence as to the possible scope of the geographic market. When customers purchase from companies located anywhere in the Community or the EEA on similar terms, or they procure their supplies through effective tendering procedures in which companies from anywhere in the Community or the EEA submit bids, usually the geographic market will be considered to be Community-wide.

49. *Trade flows/pattern of shipments.* When the number of customers is so large that it is not possible to obtain through them a clear picture of geographic purchasing patterns, information on trade flows might be used alternatively, provided that the trade statistics are available with a sufficient degree of detail for the relevant products. Trade flows, and above all, the rationale behind trade flows provide useful insights and information for the purpose of establishing the scope of the geographic market but are not in themselves conclusive.

50. *Barriers and switching costs associated to divert orders to companies located in other areas.* The absence of trans-border purchases or trade flows, for instance, does not necessarily mean that the market is at most national in scope. Still, barriers isolating the national market have to identified before it is concluded that the relevant geographic market in such a case is national. Perhaps the clearest obstacle for a customer to divert its orders to other areas is the impact of transport costs and transport restrictions arising from legislation or from the nature of the relevant products. The impact of transport costs will usually limit the scope of the geographic market for bulky, low-value products, bearing in mind that a transport disadvantage might also be compensated by a comparative advantage in other costs (labour costs or raw materials). Access to distribution in a given area, regulatory barriers still existing in certain sectors, quotas and custom tariffs might also constitute barriers isolating a geographic area from the competitive pressure of companies located outside that area. Significant switching costs in procuring supplies from companies located in other countries constitute additional sources of such barriers.

51. On the basis of the evidence gathered, the Commission will then define a geographic market that could range from a local dimension to a global one, and there are examples of both local and global markets in past decisions of the Commission.

52. The paragraphs above describe the different factors which might be relevant to define markets. This does not imply that in each individual case it will be necessary to obtain evidence and assess each of these factors. Often in practice the evidence provided by a susbset of these factors will be sufficient to reach a conclusion, as shown in the past decisional practice of the Commission.

IV. CALCULATION OF MARKET SHARE

53. The definition of the relevant market in both its product and geograhic dimensions allows the identification the suppliers and the customers/consumers active on that market. On that basis, a total market size and market shares for each supplier can be calculated on the basis of their sales of the relevant products in the relevant area. In practice, the total market size and market shares are often available from market sources, i.e. companies' estimates, studies commissioned from industry consultants and/or trade associations. When this is not the case, or when available estimates are not reliable, the Commission will usually ask each supplier in the relevant market to provide its own sales in order to calculate total market size and market shares.

54. If sales are usually the reference to calculate market shares, there are nevertheless other indications that, depending on the specific products or industry in question, can offer useful information such as, in particular, capacity, the number of players in bidding markets, units of fleet as in aerospace, or the reserves held in the case of sectors such as mining.

55. As a rule of thumb, both volume sales and value sales provide useful information. In cases of differentiated products, sales in value and their associated market share will usually be considered to better reflect the relative position and strength of each supplier.

V. ADDITIONAL CONSIDERATIONS

56. There are certain areas where the application of the principles above has to be undertaken with care. This is the case when considering primary and secondary markets, in particular, when the behaviour of undertakings at a point in time has to be analysed pursuant to Article 86. The method of defining markets in these cases is the same, i.e. assessing the responses of customers based on their purchasing decisions to relative price changes, but taking into account as well, constraints on substitution imposed

by conditions in the connected markets. A narrow definition of market for secondary products, for instance, spare parts, may result when compatibility with the primary product is important. Problems of finding compatible secondary products together with the existence of high prices and a long lifetime of the primary products may render relative price increases of secondary products profitable. A different market definition may result if significant substitution between secondary products is possible or if the characteristics of the primary products make quick and direct consumer responses to relative price increases of the secondary products feasible.

57. In certain cases, the existence of chains of substitution might lead to the definition of a relevant market where products or areas at the extreme of the market are not directly substitutable. An example might be provided by the geographic dimension of a product with significant transport costs. In such cases, deliveries from a given plant are limited to a certain area around each plant by the impact of transport costs. In principle, such an area could constitute the relevant geographic market. However, if the distribution of plants is such that there are considerable overlaps between the areas around different plants, it is possible that the pricing of those products will be constrained by a chain substitution effect, and lead to the definition of a broader geographic market. The same reasoning may apply if product B is a demand substitute for products A and C. Even if products A and C are not direct demand substitutes, they might be found to be in the same relevant product market since their respective pricing might be constrained by substitution to B.

58. From a practical perspective, the concept of chains of substitution has to be corroborated by actual evidence, for instance related to price interdependence at the extremes of the chains of substitution, in order to lead to an extension of the relevant market in an individual case. Price levels at the extremes of the chains would have to be of the same magnitude as well.

ANNEX 11

ANCILLARY RESTRAINTS NOTICE

Commission Notice on restrictions directly related and necessary to concentrations
(not yet published in the O.J.)

COMMISSION NOTICE

on restrictions directly related and necessary to concentrations

(Text with EEA relevance)

I. INTRODUCTION

1. Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings[1] (hereinafter: 'the Merger Regulation') provides in Article 6(1)(b), second subparagraph, and in Article 8(1), second subparagraph and (2), third subparagraph that a decision declaring a concentration compatible with the Common Market *"shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration"*.

2. The amendment of the rules governing the assessment of restrictions directly related and necessary to the implementation of the concentration (hereinafter also referred to as: 'ancillary restraints') introduces a principle of self-assessment of such restrictions. This reflects the intention of the legislator not to oblige the Commission to assess and individually address ancillary restraints. The treatment of ancillary restraints under the Merger Regulation is further explained in the 21st recital of the Merger Regulation, which states that *"Commission decisions declaring concentrations compatible with the common market in application of this Regulation should automatically cover such restrictions, without the Commission having to assess such restrictions in individual cases"*. While the recital envisages that the Commission will exercise a residual function with regard to specific novel or unresolved issues giving rise to genuine uncertainty, it is in all other scenarios for the undertakings concerned to self-assess whether and to what extent their agreements can be regarded as ancillary to a transaction. Disputes as to whether restrictions are directly related and necessary to the implementation of the concentration and thus automatically covered by the Commission's clearance decision may be resolved before national courts.

3. The Commission's residual function is addressed in recital 21 of the Merger Regulation, where it is stated that the Commission should, at the request of the undertakings concerned, expressly assess the ancillary character of restrictions if a case presents *"novel and unresolved questions giving rise to genuine uncertainty"*. The recital subsequently defines a 'novel or unresolved question giving rise to genuine uncertainty' as a question that is *"not covered by the relevant Commission notice in force or a published Commission decision."*

4. In order to provide legal certainty to the undertakings concerned, the present Notice provides guidance on the interpretation of the notion of ancillary restraints. The guidance given in the following sections reflects the essence of the Commission's practice, and sets out principles for assessing whether and to what extent the most common types of agreements are deemed to be ancillary restraints.

5. However, cases involving exceptional circumstances that are not covered by the present Notice may justify departing from these principles. Parties may find further guidance in

[1] OJ L 24, 29.01.2004, p 1.

published Commission decisions[2] as to whether their agreements can be regarded as ancillary restraints or not. To the extent that cases involving exceptional circumstances have been previously addressed by the Commission in its published decisions[3], they do not constitute 'novel or unresolved questions' within the meaning of recital 21 of the Merger Regulation.

6. Accordingly, a case presents a 'novel and unresolved question giving rise to genuine uncertainty' if those restrictions are not covered by the present Notice and have not been previously addressed by the Commission in its published decisions. As envisaged in Recital 21 of the Merger Regulation, the Commission will, at the request of the parties, expressly assess such restrictions in these cases. Subject to confidentiality requirements, the Commission will provide adequate publicity as regards such assessments that further develop the principles set out in this Notice.

7. To the extent that restrictions are directly related and necessary to the implementation of the concentration, Article 21(1) of the Merger Regulation provides that this Regulation alone applies, to the exclusion of Council Regulations No 1/2003[4], (EEC) No 1017/68[5] and (EEC) No 4056/86[6]. By contrast, for restrictions that cannot be regarded as directly related and necessary to the implementation of the concentration, Articles 81 and 82 of the EC Treaty remain potentially applicable. However, the mere fact that an agreement or arrangement is not deemed to be ancillary to a concentration is not, as such, prejudicial to the legal status thereof. Such agreements or arrangements are to be assessed in accordance with Article 81 and 82 of the EC Treaty and the related regulatory texts and notices[7]. They may also be subject to any applicable national competition rules. Hence, agreements which contain a restriction on competition, but are not considered directly related and necessary to the implementation of the concentration pursuant to this notice, may nevertheless be covered by these provisions.

8. The Commission's interpretation of Article 6(1)(b), second subparagraph, and Article 8(1), second subparagraph, and (2), third subparagraph, of the Merger Regulation is without prejudice to the interpretation which may be given by the Court of Justice or the Court of First Instance of the European Communities.

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2 For the purpose of this Notice, a decision is considered to be published when it is published in the Official Journal of the European Union or when it is made available to the public on the Commission's web site.

3 See for example Commission Decision of 1 September 2000 (COMP/M.1980 – *Volvo/Renault*, paragraph 56) - *high degree of customer loyalty*; Commission Decision of 23 October 1998 (IV/M.1298 – *Kodak/Imation*, paragraph 73) - *long product life cycle*; Commission Decision of 13 March 1995 (IV/M.550 – *Union Carbide/Enichem*, paragraph 99) – *limited number of alternative producers*; Commission Decision of 30 April 1992 (IV/M.197 – *Solvay-Laporte/Interox*, paragraph 50) – *longer protection of know-how required*.

4 Council Regulation of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 04.01.2003, p 1; Regulation as last amended by Council Regulation 411/2004 of 26 February 2004, OJ L 68, 06.03.2004, p. 1.

5 Council Regulation of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway, OJ L 175, 23.7.1968, p. 1; Regulation as last amended by Council Regulation 1/2003 of 16 December 2002, OJ L 1, 04.01.2003, p 1.

6 Council Regulation of 22 December 1986 laying down detailed rules for the application of Articles 81 and 82 of the Treaty to maritime transport, OJ L 378, 31.12.1986, p. 4; Regulation as last amended by Council Regulation 1/2003 of 16 December 2002, OJ L 1, 04.01.2003, p 1.

7 See e.g. for licence agreements Commission Regulation (EC) 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, OJ L 123, 27.04.2004, p. 11; see for supply and purchase agreements e.g. Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ L 336, 29.12.1999, p. 21.

9. This Notice replaces the Commission's previous Notice regarding restrictions directly related and necessary to concentrations[8].

II. GENERAL PRINCIPLES

10. A concentration consists of contractual arrangements and agreements establishing control within the meaning of Article 3(2) of the Merger Regulation. All agreements which carry out the main object of the concentration[9], such as those relating to the sale of shares or assets of an undertaking, are integral parts of the concentration. In addition to these arrangements and agreements, the parties to the concentration may enter into other agreements which do not form an integral part of the concentration but can restrict the parties' freedom of action in the market. If such agreements contain ancillary restraints, these are automatically covered by the decision declaring the concentration compatible with the Common Market.

11. The criteria of direct relation and necessity are objective in nature. Restrictions are not directly related and necessary to the implementation of a concentration simply because the parties regard them as such.

12. For restrictions to be considered 'directly related to the implementation of the concentration', they must be closely linked to the concentration itself. It is not sufficient that an agreement has been entered into in the same context or at the same time as the concentration[10]. Restrictions which are directly related to the concentration are economically related to the main transaction and intended to allow a smooth transition to the changed company structure after the concentration.

13. Agreements must be 'necessary to the implementation of the concentration[11]', which means that in the absence of those agreements, the concentration could not be implemented or could only be implemented under considerably more uncertain conditions, at substantially higher cost, over an appreciably longer period or with considerably greater difficulty[12]. Agreements necessary to the implementation of a concentration are typically aimed at protecting the value transferred[13], maintaining the continuity of supply after the break-up of a former economic entity[14], or enabling the start-up of a new entity[15]. In determining whether a restriction is necessary, it is appropriate not only to take account of its nature, but also to ensure that its duration, subject matter and geographical field of application does not exceed

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8 Commission Notice on restrictions directly related and necessary to concentrations, OJ C 188, 4.7.2001, p. 5.

9 See e.g. Commission Decision of 10 August 1992 (IV/M.206 – *Rhône-Poulenc/SNIA*, paragraph 8.3); Commission Decision of 19 December 1991 (IV/M.113 – *Courtaulds/SNIA*, paragraph 35); Commission Decision of 2 December 1991 (IV/M.102 – *TNT/Canada Post/DBP Postdienst/La Poste/PTT Poste & Sweden Post*, paragraph 46).

10 Likewise, a restriction could, if all other requirements are fulfilled, be 'directly related' even if it has not been entered into at the same time as the agreement carrying out the main object of the concentration.

11 See European Court of Justice, Case 42/84 (*Remia*), [1985] ECR 2545, paragraph 20; Court of First Instance, Case T-112/99 (*Métropole Télévision – M6*), [2001] ECR II-2459, paragraph 106.

12 Commission Decision of 18 December 2000 (COMP/M.1863 – *Vodafone/BT/Airtel JV*, paragraph 20).

13 Commission Decision of 30 July 1998 (IV/M.1245 – *VALEO/ITT Industries,* paragraph 59); Commission Decision of 3 March 1999 (IV/M.1442 – *MMP/AFP*, paragraph 17); Commission Decision of 9 March 2001 (COMP/M.2330 – *Cargill/Banks*, paragraph 30); Commission Decision of 20 March 2001 (COMP/M.2227 – *Goldman Sachs/Messer Griesheim*, paragraph 11).

14 Commission Decision of 25 February 2000 (COMP/M.1841 – *Celestica/IBM*, paragraph 21).

15 Commission Decision of 30 March 1999 (IV/JV.15 – *BT/AT&T*, paragraphs 207-214); Commission Decision of 22 December 2000 (COMP/M.2243 – *Stora Enso Assidoman/JV*, paragraphs 49, 56 and 57).

what the implementation of the concentration reasonably requires. If equally effective alternatives are available for attaining the legitimate aim pursued, the undertakings must choose the one which is objectively the least restrictive of competition.

14. For concentrations which are carried out in stages, the contractual arrangements relating to the stages before the establishment of control within the meaning of Article 3(1) and (2) of the Merger Regulation cannot normally be considered directly related and necessary to the implementation of the concentration. However, an agreement to abstain from material changes in the target's business until completion is considered directly related and necessary to the implementation of the joint bid[16]. The same applies, in the context of a joint bid, to an agreement by the joint acquirers of an undertaking to abstain from making separate competing offers for the same undertaking, or otherwise acquiring control.

15. Agreements which serve to facilitate the joint acquisition of control are to be considered directly related and necessary to the implementation of the concentration. This will apply to arrangements between the parties for the joint acquisition of control aimed at implementing the division of assets in order to divide the production facilities or distribution networks among themselves, together with the existing trademarks of the undertaking acquired jointly.

16. To the extent that such a division involves the break-up of a pre-existing economic entity, arrangements that make the break-up possible under reasonable conditions are to be considered directly related and necessary to the implementation of the concentration under the principles set out below.

III. PRINCIPLES APPLICABLE TO COMMONLY-ENCOUNTERED RESTRICTIONS IN CASES OF ACQUISITION OF AN UNDERTAKING

17. Restrictions agreed between the parties in the context of a transfer of an undertaking may be to the benefit of the acquirer or of the vendor. In general terms, the need for the acquirer to benefit from certain protection is more compelling than the corresponding need for the vendor. It is the acquirer who needs to be assured that she/he will be able to acquire the full value of the acquired business. Thus, as a general rule, restrictions which benefit the vendor are either not directly related and necessary to the implementation of the concentration at all[17], or their scope and/or duration need to be more limited than that of clauses which benefit the acquirer[18].

A. Non-competition clauses

18. Non-competition obligations which are imposed on the vendor in the context of the transfer of an undertaking or of part of it can be directly related and necessary to the implementation of the concentration. In order to obtain the full value of the assets transferred, the acquirer must be able to benefit from some protection against competition from the vendor in order to gain the loyalty of customers and to assimilate and exploit the know-how. Such non-competition clauses guarantee the transfer to the acquirer of the full value of the assets

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16 Commission Decision of 27 July 1998 (IV/M.1226 – *GEC/GPTH,* paragraph 22); Commission Decision of 2 October 1997 (IV/M.984 – *Dupont/ICI,* paragraph 55); Commission Decision of 19 December 1997 (IV/M.1057 – *Terra Industries/ICI,* paragraph 16*)*; Commission Decision of 18 December 1996 (IV/M.861 – *Textron/Kautex*, paragraphs 19 and 22*);* Commission Decision of 7 August 1996 (IV/M.727 - *BP/Mobil*, paragraph 50).

17 Commission Decision of 27 July 1998 (IV/M.1226 – *GEC/GPTH,* paragraph 24).

18 See e.g. for a clause aiming at the protection of a part of the business remaining with the vendor: Commission Decision of 30 August 1993 (IV/M.319 - *BHF/CCF/Charterhouse,* paragraph 16).

transferred, which in general include both physical assets and intangible assets, such as the goodwill accumulated or the know-how[19] developed by the vendor. These are not only directly related to the concentration, but are also necessary to its implementation because, without them, there would be reasonable grounds to expect that the sale of the undertaking or of part of it could not be accomplished.

19. However, such non-competition clauses are only justified by the legitimate objective of implementing the concentration when their duration, their geographical field of application, their subject matter and the persons subject to them do not exceed what is reasonably necessary to achieve that end[20].

20. Non-competition clauses are justified for periods of up to three years[21], when the transfer of the undertaking includes the transfer of customer loyalty in the form of both goodwill and know-how[22]. When only goodwill is included, they are justified for periods of up to two years[23].

21. By contrast, non-competition clauses cannot be considered necessary when the transfer is in fact limited to physical assets (such as land, buildings or machinery) or to exclusive industrial and commercial property rights (the holders of which could immediately take action against infringements by the transferor of such rights).

22. The geographical scope of a non-competition clause must be limited to the area in which the vendor has offered the relevant products or services before the transfer, since the acquirer does not need to be protected against competition from the vendor in territories not previously penetrated by the vendor[24]. That geographical scope can be extended to territories which the vendor was planning to enter at the time of the transaction, provided that he had already invested in preparing this move.

23. Similarly, non-competition clauses must remain limited to products (including improved versions or updates of products as well as successor models) and services forming the economic activity of the undertaking transferred. This can include products and services at an advanced stage of development at the time of the transaction, or products which are fully developed but not yet marketed. Protection against competition from the vendor in product or

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19 As defined in Article 1(1)(i) of Commission Regulation (EC) 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, OJ L 123, 27.04.2004, p. 11.

20 See European Court of Justice, Case 42/84 (*Remia*), [1985] ECR 2545, paragraph 20; Court of First Instance, Case T-112/99 (*Métropole Télévision – M6*), [2001] ECR II-2459, paragraph 106.

21 See for exceptional cases in which longer periods may be justified e.g. Commission Decision of 1 September 2000 (COMP/M.1980 – *Volvo/Renault V.I.*, paragraph 56); Commission Decision of 27 July 1995 (IV/M.612 – *RWE-DEA/Enichem Augusta,* paragraph 37); Commission decision of 23 October 1998 (IV/M.1298 – *Kodak/Imation*, paragraph 74).

22 Commission Decision of 2 April 1998 (IV/M.1127 – *Nestlé/Dalgety*, paragraph 33); Commission Decision of 1 September 2000 (COMP/M.2077 – *Clayton Dubilier & Rice/Iteltel*, paragraph 15); Commission Decision of 2 March 2001 (COMP/M.2305 – *Vodafone Group PLC/EIRCELL*, paragraphs 21 and 22).

23 Commission Decision of 12 April 1999 (IV/M.1482 – *KingFisher/Grosslabor*, paragraph 26); Commission Decision of 14 December 1997 (IV/M.884 – *KNP BT/Bunzl/Wilhelm Seiler*, paragraph 17).

24 Commission Decision of 14 December 1997 (IV/M.884 – *KNP BT/Bunzl/Wilhelm Seiler*, paragraph 17); Commission Decision of 12 April 1999 (IV/M.1482 – *KingFisher/Grosslabor*, paragraph 27); Commission Decision of 6 April 2001 (COMP/M.2355 – *Dow/Enichem Polyurethane*, paragraph 28); Commission Decision of 4 August 2000 (COMP/M.1979 – *CDC/Banco Urquijo/JV*, paragraph 18).

service markets in which the transferred undertaking was not active before the transfer is not considered necessary[25].

24. The vendor may bind herself/himself, her/his subsidiaries and commercial agents. However, an obligation to impose similar restrictions on others would not be regarded as directly related and necessary to the implementation of the concentration. This applies, in particular, to clauses which would restrict the freedom of resellers or users to import or export.

25. Clauses which limit the vendor's right to purchase or hold shares in a company competing with the business transferred shall be considered directly related and necessary to the implementation of the concentration under the same conditions as outlined above for non-competition clauses, unless they prevent the vendor from purchasing or holding shares purely for financial investment purposes, without granting him/her, directly or indirectly, management functions or any material influence in the competing company[26].

26. Non-solicitation and confidentiality clauses have a comparable effect and are therefore evaluated in a similar way to non-competition clauses[27].

B. Licence agreements

27. The transfer of an undertaking or of part of it can include the transfer to the acquirer, with a view to the full exploitation of the assets transferred, of intellectual property rights or know-how. However, the vendor may remain the owner of the rights in order to exploit them for activities other than those transferred. In these cases, the usual means for ensuring that the acquirer will have the full use of the assets transferred is to conclude licensing agreements in his/her favour. Likewise, where the vendor has transferred intellectual property rights with the business, she/he may still want to continue using some or all of these rights for activities other than those transferred; in such a case the acquirer will grant a licence to the vendor.

28. Licences of patents[28], of similar rights, or of know-how[29], can be considered necessary to the implementation of the concentration. They may equally be considered an integral part of the concentration and, in any event, need not be limited in time. These licences can be simple

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25 Commission Decision of 14 December 1997 (IV/M.884 – *KNP BT/Bunzl/Wilhelm Seiler*, paragraph 17); Commission Decision of 2 March 2001 (COMP/M.2305 – *Vodafone Group PLC/EIRCELL*, paragraph 22); Commission Decision of 6 April 2001 (COMP/M.2355 – *Dow/Enichem Polyurethane*, paragraph 28); Commission Decision of 4 August 2000 (COMP/M.1979 – *CDC/Banco Urquijo/JV*, paragraph 18).

26 Commission Decision of 4 February 1993 (IV/M.301 – *Tesco/Catteau*, paragraph 14); Commission Decision of 14 December 1997 (IV/M.884 – *KNP BT/Bunzl/Wilhelm Seiler*, paragraph 19); Commission Decision of 12 April 1999 (IV/M.1482 – *Kingfisher/Grosslabor*, paragraph 27); Commission Decision of 6 April 2000 (COMP/M.1832 – *Ahold/ICA Förbundet/Canica*, paragraph 26).

27 Accordingly, confidentiality clauses on customer details, prices and quantities cannot be extended. By contrast, confidentiality clauses concerning technical know-how may exceptionally be justified for longer periods, see Commission Decision of 29 April 1998 (IV/M.1167 – *ICI/Williams*, paragraph 22); Commission Decision of 30 April 1992 (IV/M.197 – *Solvay-Laporte/Interox*, paragraph 50).

28 Including patent applications, utility models, applications for registration of utility models, designs, topographies of semiconductor products, supplementary protection certificates for medicinal products or other products for which such supplementary protection certificates may be obtained and plant breeder's certificates (as referred to in Article 1(1)(h) of Commission Regulation (EC) 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, OJ L 123, 27.04.2004, p. 11.).

29 As defined in Article 1(1)(i) of Commission Regulation (EC) 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, OJ L 123, 27.04.2004, p. 11.

or exclusive and may be limited to certain fields of use, to the extent that they correspond to the activities of the undertaking transferred.

29. However, territorial limitations on manufacture reflecting the territory of the transferred activity are not necessary to the implementation of the operation. As regards licences granted by the seller of a business to the buyer, the seller can be made subject to territorial restrictions in the licence agreement under the same conditions as laid down for non-competition clauses in the context of the sale of a business.

30. Restrictions in licence agreements going beyond the above provisions, such as those which protect the licensor rather than the licensee, are not necessary to the implementation of the concentration[30].

31. Similarly, in the case of licences of trademarks, business names, design rights, copyrights or similar rights, there may be situations in which the vendor wishes to remain the owner of such rights in relation to activities retained, but the acquirer needs those rights in order to market the goods or services produced by the undertaking or part of the undertaking transferred. Here, the same considerations as above apply[31].

C. Purchase and supply obligations

32. In many cases, the transfer of an undertaking or of part of it can entail the disruption of traditional lines of purchase and supply which have existed as a result of the previous integration of activities within the economic unity of the vendor. In order to enable the break-up of the economic unity of the vendor and the partial transfer of the assets to the acquirer under reasonable conditions, it is often necessary to maintain, for a transitional period, the existing or similar links between the vendor and the acquirer. This objective is normally attained by purchase and supply obligations for the vendor and/or the acquirer of the undertaking or of part of it. Taking into account the particular situation resulting from the break-up of the economic unity of the vendor, such obligations can be recognised as directly related and necessary to the implementation of the concentration. They may be in favour of the vendor as well as the acquirer, depending on the particular circumstances of the case.

33. The aim of such obligations may be to ensure the continuity of supply to either of the parties of products necessary for carrying out the activities retained by the vendor or taken over by the acquirer. However, the duration of purchase and supply obligations must be limited to a period necessary for the replacement of the relationship of dependency by autonomy in the market. Thus, purchase or supply obligations aimed at guaranteeing the quantities previously supplied can be justified for a transitional period of up to five years[32].

34. Both supply and purchase obligations providing for fixed quantities, possibly with a variation clause, are recognised as directly related and necessary to the implementation of the

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[30] To the extent that they fall within Article 81(1) of the EC Treaty, such agreements may nevertheless fall under Commission Regulation (EC) 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, OJ L 123, 27.04.2004, p. 11, or other Community legislation.

[31] Commission Decision of 1 September 2000 (COMP/M.1980 – *Volvo/Renault V.I.*, paragraph 54)

[32] Commission Decision of 5 February 1996 (IV/M.651 – *AT&T/Philips,* VII.); Commission Decision of 30 March 1999 (IV/JV.15 – *BT/AT&T*, paragraph 209; see for exceptional cases Commission Decision of 13 March 1995 (IV/M.550 – *Union Carbide/Enichem,* paragraph 99); Commission Decision of 27 July 1995 (IV/M.612 – *RWE-DEA/Enichem Augusta,* paragraph 45).

concentration. However, obligations providing for unlimited quantities[33], exclusivity or conferring preferred supplier or purchaser status[34], are not necessary to the implementation of the concentration.

35. Service and distribution agreements are equivalent in their effect to supply arrangements; consequently the same considerations as above shall apply.

IV. PRINCIPLES APPLICABLE TO COMMONLY-ENCOUNTERED RESTRICTIONS IN CASES OF JOINT VENTURES WITHIN THE MEANING OF ARTICLE 3 (4) OF THE MERGER REGULATION

A. Non-competition obligations

36. A non-competition obligation between the parent undertakings and a joint venture may be considered directly related and necessary to the implementation of the concentration where such obligations correspond to the products, services and territories covered by the joint venture agreement or its by-laws. Such non-competition clauses reflect, inter alia, the need to ensure good faith during negotiations; they may also reflect the need to fully utilise the joint venture's assets or to enable the joint venture to assimilate know-how and goodwill provided by its parents; or the need to protect the parents' interests in the joint venture against competitive acts facilitated, inter alia, by the parents' privileged access to the know-how and goodwill transferred to or developed by the joint venture. Such non-competition obligations between the parent undertakings and a joint venture can be regarded as directly related and necessary to the implementation of the concentration for the lifetime of the joint venture[35].

37. The geographical scope of a non-competition clause must be limited to the area in which the parents offered the relevant products or services before establishing the joint venture[36]. That geographical scope can be extended to territories which the parent companies were planning to enter at the time of the transaction, provided that they had already invested in preparing this move.

38. Similarly, non-competition clauses must be limited to products and services constituting the economic activity of the joint venture. This may include products and services at an advanced stage of development at the time of the transaction, as well as products and services which are fully developed but not yet marketed.

39. If the joint venture is set up to enter a new market, reference will be made to the products, services and territories in which it is to operate under the joint venture agreement or by-laws. However, the presumption is that one parent's interest in the joint venture does not need to be

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33 In line with the principle of proportionality, obligations providing for fixed quantities with a variation clause are, in these cases, less restrictive on competition, see e.g. Commission Decision of 18 September 1998 (IV/M.1292 – *Continental/ITT,* paragraph 19).

34 Commission Decision of 30 July 1998 (IV/M.1245 – *VALEO/ITT Industries,* paragraph 64); see for exceptional cases (e.g. absence of a market) Commission Decision of 13 March 1995 (IV/M.550 – *Union Carbide/Enichem,* paragraphs 92 to 96); Commission Decision of 27 July 1995 (IV/M.612 – *RWE-DEA/Enichem Augusta,* paragraphs 38 et seq.).

35 Commission Decision of 15 January 1998 (IV/M.1042 - *Eastman Kodak/Sun Chemical*, paragraph 40) 43; Commission Decision of 7 August 1996 (IV/M.727 - *BP/Mobil*, paragraph 51); Commission Decision of 3 July 1996 (IV/M.751 - *Bayer/Hüls,* paragraph 31); Commission Decision of 6 April 2000 (COMP/M.1832 – *Ahold/ICA Förbundet/Canica*, paragraph 26).

36 Commission Decision of 29 August 2000 (COMP/M.1913 – *Lufthansa Menzies/LGS/JV*; paragraph 18); Commission Decision of 22 December 2000 (COMP/M.2243 – *Stora Enso Assidoman/JV*, paragraph 49, last sentence).

protected against competition from the other parent in markets other than those in which the joint venture will be active from the outset.

40. . Additionally, non-competition obligations between non-controlling parents and a joint venture are not directly related and necessary to the implementation of the concentration.

41. The same principles as for non-competition clauses apply to non-solicitation and confidentiality clauses.

B. Licence agreements

42. A licence granted by the parents to the joint venture may be considered directly related and necessary to the implementation of the concentration. This applies regardless of whether or not the licence is an exclusive one and whether or not it is limited in time. The licence may be restricted to a particular field of use which corresponds to the activities of the joint venture.

43. Licences granted by the joint venture to one of its parents, or cross-licence agreements, can be regarded as directly related and necessary to the implementation of the concentration under the same conditions as in the case of the acquisition of an undertaking. Licence agreements between the parents are not considered directly related and necessary to the implementation of a joint venture.

C. Purchase and supply obligations

44. If the parent undertakings remain present in a market upstream or downstream of that of the joint venture, any purchase and supply agreements, including service and distribution agreements are subject to the principles applicable in the case of the transfer of an undertaking.

ANNEX 12

HEARING OFFICER

Commission Decision 2001/462/EC, ECSC of May 23, 2001 on the terms of reference of hearing officers in certain competition proceedings, O.J. 2001 No. L 162/21

COMMISSION DECISION
of 23 May 2001
on the terms of reference of hearing officers in certain competition proceedings

(notified under document number C(2001) 1461)

(Text with EEA relevance)

(2001/462/EC, ECSC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Treaty establishing the European Coal and Steel Community,

Having regard to the Agreement on the European Economic Area,

Having regard to the Rules of Procedure of the Commission ([1]), and in particular Article 20 thereof,

Whereas:

(1) The right of the parties concerned and of third parties to be heard before a final decision affecting their interests is taken is a fundamental principle of Community law. That right is also set out in Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings ([2]), as last amended by Regulation (EC) No 1310/97 ([3]), Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty ([4]) and Commission Regulation (EC) No 447/98 of 1 March 1998 on the notifications, time limits and hearings provided for in Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings ([5]).

(2) The Commission must ensure that that right is guaranteed in its competition proceedings, having regard in particular to the Charter of Fundamental Rights of the European Union ([6]).

(3) The conduct of administrative proceedings should therefore be entrusted to an independent person experienced in competition matters who has the integrity necessary to contribute to the objectivity, transparency and efficiency of those proceedings.

(4) The Commission created the post of hearing officer for these purposes in 1982 and last laid down the terms of reference for that post in Commission Decision 94/810/ECSC, EC of 12 December 1994 on the terms of reference of hearing officers in competition procedures before the Commission ([7]).

(5) It is necessary to further strengthen the role of the hearing officer and to adapt and consolidate those terms of reference in the light of developments in competition law.

(6) In order to ensure the independence of the hearing officer, he should be attached, for administrative purposes, to the member of the Commission with special responsibility for competition. Transparency as regards the appointment, termination of appointment and transfer of hearing officers should be increased.

(7) The hearing officer should be appointed in accordance with the rules laid down in the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities. In accordance with those rules, consideration may be given to candidates who are not officials of the Commission.

(8) The terms of reference of the hearing officer in competition proceedings should be framed in such a way as to safeguard the right to be heard throughout the whole procedure.

(9) When disclosing information on natural persons, particular attention should be paid to Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data ([8]).

([1]) OJ L 308, 8.12.2000, p. 26.
([2]) OJ L 395, 30.12.1989, p. 1 (corrected version in OJ L 257, 21.9.1990, p. 13).
([3]) OJ L 180, 9.7.1997, p. 1.
([4]) OJ L 354, 30.12.1998, p. 18.
([5]) OJ L 61, 2.3.1998, p. 1.
([6]) OJ C 364, 18.12.2000, p. 1.
([7]) OJ L 330, 21.12.1994, p. 67.
([8]) OJ L 8, 12.1.2001, p. 1.

(10) This Decision should be without prejudice to the general rules granting or excluding access to Commission documents.

(11) Decision 94/810/ECSC, EC should be repealed,

HAS DECIDED AS FOLLOWS:

Article 1

The Commission shall appoint one or more hearing officers (hereinafter 'the hearing officer'), who shall ensure that the effective exercise of the right to be heard is respected in competition proceedings before the Commission under Articles 81 and 82 of the EC Treaty, Articles 65 and 66 of the ECSC Treaty, and Regulation (EEC) No 4064/89.

Article 2

1. The appointment of the hearing officer shall be published in the *Official Journal of the European Communities*. Any interruption, termination of appointment or transfer by whatever procedure, shall be the subject of a reasoned decision of the Commission. That decision shall be published in the *Official Journal of the European Communities*.

2. The hearing officer shall be attached, for administrative purposes, to the member of the Commission with special responsibility for competition (hereinafter 'the competent member of the Commission').

3. Where the hearing officer is unable to act, the competent member of the Commission, where appropriate after consultation of the hearing officer, shall designate another official, who is not involved in the case in question, to carry out the hearing officer's duties.

Article 3

1. In performing his duties, the hearing officer shall take account of the need for effective application of the competition rules in accordance with the Community legislation in force and the principles laid down by the Court of Justice and the Court of First Instance of the European Communities.

2. The hearing officer shall be kept informed by the director responsible for investigating the case (hereinafter 'the director responsible') about the development of the procedure up to the stage of the draft decsion to be submitted to the competent member of the Commission.

3. The hearing officer may present observations on any matter arising out of any Commission competition proceeding to the competent member of the Commission.

Article 4

1. The hearing officer shall organise and conduct the hearings provided for in the provisions implementing Articles 81 and 82 of the EC Treaty, Articles 65 and 66 of the ECSC Treaty and Regulation (EEC) No 4064/89, in accordance with Articles 5 to 13 of this Decision.

2. The provisions referred to in paragraph 1 are:

(a) the first paragraph of Article 36 of the ECSC Treaty;

(b) Regulation (EC) No 2842/98;

(c) Regulation (EC) No 447/98.

Article 5

The hearing officer shall ensure that the hearing is properly conducted and contributes to the objectivity of the hearing itself and of any decision taken subsequently. The hearing officer shall seek to ensure in particular that, in the preparation of draft Commission decisions, due account is taken of all the relevant facts, whether favourable or unfavourable to the parties concerned, including the factual elements related to the gravity of any infringement.

Article 6

1. Applications to be heard from third parties, be they persons, undertakings or associations of persons or undertakings, shall be submitted in writing, together with a written statement explaining the applicant's interest in the outcome of the procedure.

2. Decisions as to whether third parties are to be heard shall be taken after consulting the director responsible.

3. Where it is found that an application has not shown a sufficient interest to be heard, he shall be informed in writing of the reasons for such finding. A time limit shall be fixed within which he may submit any further written comments.

Article 7

1. Applications to be heard orally shall be made in the applicant's written comments on letters which the Commission has addressed to him.

2. The letters referred to in paragraph 1 are those:

(a) communicating a statement of objections;

(b) inviting the written comments of a third party having shown sufficient interest to be heard;

(c) informing a complainant that in the Commission's view there are insufficient grounds for finding an infringement and inviting him to submit any further written comments.

3. Decisions as to whether applicants are to be heard orally shall be taken after consulting the director responsible.

Article 8

1. Where a person, an undertaing or an association of persons or undertakings has received one or more of the letters listed in Article 7(2) and has reason to believe that the Commission has in its possession documents which have not been disclosed to it and that those documents are necessary for the proper exercise of the right to be heard, access to those documents may be sought by means of a reasoned request.

2. The reasoned decision on any such request shall be communicated to the person, undertaking or association that made the request and to any other person, undertaking or association concerned by the procedure.

Article 9

Where it is intended to disclose information which may constitute a business secret of an undertaking, it shall be informed in writing of this intention and the reasons for it. A time limit shall be fixed within which the undertaking concerned may submit any written comments.

Where the undertaking concerned objects to the disclosure of the information but it is found that the information is not protected and may therefore be disclosed, that finding shall be stated in a reasoned decision which shall be notified to the undertaking concerned. The decision shall specify the date after which the information will be disclosed. This date shall not be less than one week from the date of notification.

The first and second paragraphs shall apply *mutatis mutandis* to the disclosure of information by publication in the *Official Journal of the European Communities*.

Article 10

Where a person, undertaking or association of persons or undertakings considers that the time limit imposed for its reply to a letter referred to in Article 7(2) is too short, it may, within the original time limit, seek an extension of that time limit by means of a reasoned request. The applicant shall be informed in writing whether the request has been granted.

Article 11

Where appropriate, in view of the need to ensure that the hearing is properly prepared and particularly that questions of fact are clarified as far as possible, the hearing officer may, after consulting the director responsible, supply in advance to the parties invited to the hearing a list of the questions on which he wishes them to make known their views.

For this purpose, after consulting the director responsible, the hearing officer may hold a meeting with the parties invited to the hearing and, where appropriate, the Commission staff, in order to prepare for the hearing itself.

The hearing officer may also ask for prior written notification of the essential contents of the intended statement of persons whom the parties invited to the hearing have proposed for hearing.

Article 12

1. After consulting the director responsible, the hearing officer shall determine the date, the duration and the place of the hearing. Where a postponement is requested, the hearing officer shall decide whether or not to allow it.

2. The hearing officer shall be fully responsible for the conduct of the hearing.

3. The hearing officer shall decide whether fresh documents should be admitted during the hearing, what persons should be heard on behalf of a party and whether the persons concerned should be heard separately or in the presence of other persons attending the hearing.

4. Where appropriate, in view of the need to ensure the right to be heard, the hearing officer may, after consulting the Director responsible, afford persons, undertakings, and associations of persons or undertakings the opportunity of submitting further written comments after the oral hearing. The hearing officer shall fix a date by which such submissions may be made. The Commission shall not be obliged to take into account written comments received after that date.

Article 13

1. The hearing officer shall report to the competent member of the Commission on the hearing and the conclusions he draws from it, with regard to the respect of the right to be heard. The observations in this report shall concern procedural issues, including disclosure of documents and access to the file, time limits for replying to the statement of objections and the proper conduct of the oral hearing.

A copy of the report shall be given to the Director-General for Competition and to the director responsible.

2. In addition to the report referred to in paragraph 1, the hearing officer may make observations on the further progress of the proceedings. Such observations may relate among other things to the need for further information, the withdrawal of certain objections, or the formulation of further objections.

Article 14

Where appropriate, the hearing officer may report on the objectivity of any enquiry conducted in order to assess the competition impact of commitments proposed in relation to any proceeding initiated by the Commission in application of the provisions referred to in Article 1. This shall cover in particular the selection of respondents and the methodology used.

Article 15

The hearing officer shall, on the basis of the draft decision to be submitted to the Advisory Committee in the case in question, prepare a final report in writing on the respect of the right to be heard, as referred to in Article 13(1). This report will also consider whether the draft decision deals only with objections in respect of which the parties have been afforded the opportunity of making known their views, and, where appropriate, the objectivity of any enquiry within the meaning of Article 14.

The final report shall be submitted to the competent member of the Commission, the Director-General for Competition and the director responsible. It shall be communicated to the competent authorities of the Member States and, in accordance with the provisions on cooperation laid down in Protocol 23 and Protocol 24 of the EEA Agreement, to the EFTA Surveillance Authority.

Article 16

1. The hearing officer's final report shall be attached to the draft decision submitted to the Commission, in order to ensure that, when it reaches a decision on an individual case, the Commission is fully apprised of all relevant information as regards the course of the procedure and respect of the right to be heard.

2. The final report may be modified by the hearing officer in the light of any amendments to the draft decision up to the time the decision is adopted by the Commission.

3. The Commission shall communicate the hearing officer's final report, together with the decision, to the addressees of the decision. It shall publish the hearing officer's final report in the *Official Journal of the European Communities*, together with the decision, having regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 17

Decision 94/810/ECSC, EC is repealed.

Procedural steps already taken under that Decision shall continue to have effect.

Done at Brussels, 23 May 2001.

For the Commission

Mario MONTI

Member of the Commission

ANNEX 13

REMEDIES NOTICE

Commission Notice on remedies acceptable under
Council Regulation (EEC) No. 4064/89 and under
Commission Regulation (EC) No. 447/98, O.J. 2001 No. C 68/3

COMMISSION NOTICE

on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98

(2001/C 68/03)

(Text with EEA relevance)

I. INTRODUCTION

1. Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1], as last amended by Regulation (EC) No 1310/97 [2] (hereinafter referred to as 'the Merger Regulation') expressly provides that the Commission may decide to declare a concentration compatible with the common market following modification by the parties [3]. Recital 8 of Council Regulation (EC) No 1310/97 states that 'the Commission may declare a concentration compatible with the common market in the second phase [4] of the procedure, following commitments by the parties that are proportional to and would entirely eliminate the competition problem . . .'. Recital 8 also provides for 'commitments in the first phase [5] of the procedure where the competition problem is readily identifiable and can easily be remedied . . . Transparency and effective consultation of Member States and interested third parties should be ensured in both phases of the procedure'.

2. The purpose of this notice is to provide guidance on modifications to concentrations, including, in particular, commitments to modify a concentration. Such modifications are more commonly described as 'remedies' since their object is to reduce the merging parties' market power and to restore conditions for effective competition which would be distorted as a result of the merger creating or strengthening a dominant position. The guidance set out in this notice reflects the Commission's evolving experience with the assessment, acceptance and implementation of remedies under the Merger Regulation since its entry into force on 21 September 1990. The principles contained here will be applied and further developed and refined by the Commission in individual cases. The guidance provided on commitments is without prejudice to the interpretation which may be given by the Court of Justice or by the Court of First Instance of the European Communities.

3. This notice sets out the general principles applicable to remedies acceptable to the Commission, the main types of commitments that have been accepted by the Commission in cases under the Merger Regulation, the specific requirements which proposals of commitments need to fulfil in both phases of the procedure, and the main requirements for the implementation of commitments.

II. GENERAL PRINCIPLES

4. Under the Merger Regulation, the Commission assesses the compatibility of a notified concentration with the common market on the basis of its effect on the structure of competition in the Community [6]. The test for compatibility under Article 2(2) and (3) of the Merger Regulation is whether or not a concentration would create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or a substantial part of it [7]. A concentration that creates or strengthens a dominant position as described above is incompatible with the common market and the Commission is required to prohibit it.

5. Where a concentration raises competition concerns in that it could lead to the creation or strengthening of a dominant position, the parties may seek to modify the concentration in order to resolve the competition concerns raised by the Commission and thereby gain clearance of their merger. Such modifications may be offered and implemented in advance of a clearance decision. However, it is more common that the parties submit commitments with a view to rendering the concentration compatible with the common market within a specific period following clearance.

6. It is the responsibility of the Commission to show that a concentration creates or strengthens market structures which are liable to impede significantly effective competition in the common market. It is the responsibility of the parties to show that the proposed remedies, once implemented, eliminate the creation or strengthening of such a dominant position identified by the Commission. To this end, the parties are required to show clearly, to the Commission's satisfaction in accordance with its obligations under the Merger Regulation, that the remedy restores conditions of effective competition in the common market on a permanent basis.

7. In assessing whether or not a remedy will restore effective competition the Commission will consider all relevant factors relating to the remedy itself, including *inter alia* the type, scale and scope of the remedy proposed, together with the likelihood of its successful, full and timely implementation by the parties. Moreover, these factors have to be judged by reference to the structure and particular characteristics of the market in which the competition concerns arise, including of course the position of the parties and other players on the market. It follows that it is incumbent on the parties from the outset to remove any uncertainties as to any of these factors which might cause the Commission to reject the remedy proposed.

8. More generally, the Commission will take into account the fact that any remedy, so long as it remains a commitment which is not yet fulfilled, carries with it certain uncertainties as to its eventual outcome. This general factor must also be taken into consideration by the parties when presenting a remedy to the Commission.

9. In the Gencor case ([8]), the Court of First Instance established the principle that the basic aim of commitments is to ensure competitive market structures. Accordingly, commitments that would amount merely to a promise to behave in a certain way, for example a commitment not to abuse a dominant position created or strengthened by the proposed concentration, are as such not considered suitable to render the concentration compatible with the common market. According to the Court ([9]), commitments which are structural in nature, such as the commitment to sell a subsidiary, are, as a rule, preferable from the point of view of the Regulation's objective, inasmuch as such a commitment prevents the creation or strengthening of a dominant position previously identified by the Commission and does not, moreover, require medium or long-term monitoring measures. Nevertheless, the possibility cannot automatically be ruled out that other types of commitments may themselves also be capable of preventing the emergence or strengthening of a dominant position. However, whether such commitments can be accepted has to be determined on a case-by-case basis.

10. Once the concentration has been implemented, despite the possibility of some interim safeguards, the desired conditions of competition on the market cannot actually be restored until the commitments have been fulfilled. Therefore, commitments must be capable of being implemented effectively and within a short period. Commitments should not require additional monitoring once they have been implemented ([10]).

11. The Commission may accept commitments in either phase of the procedure. However, given the fact that an in-depth market investigation is only carried out in phase II, commitments submitted to the Commission in phase I must be sufficient to clearly rule out 'serious doubts' within the meaning of Article 6(1)(c) of the Merger Regulation ([11]). Pursuant to Article 10(2) of the Merger Regulation, the Commission has to take a clearance decision as soon as the serious doubts established in the decision pursuant to Article 6(1)(c) of the Merger Regulation are removed as a result of commitments submitted by the parties. This rule applies in particular to commitments proposed at an early stage of phase II-proceedings ([12]). After an in-depth investigation and where the Commission in a Statement of Objections has reached the preliminary view that the merger leads to the creation or strengthening of a dominant position within the meaning of Article 2(3) of the Merger Regulation, the commitments have to eliminate the creation or strengthening of such a dominant position.

12. Whilst commitments have to be offered by the parties, the Commission may ensure the enforceability of commitments by making its authorisation subject to compliance with them ([13]). A distinction must be made between conditions and obligations. The requirement for achievement of each measure that gives rise to the structural change of the market is a condition — for example, that a business is to be divested. The implementing steps which are necessary to achieve this result are generally obligations on the parties, e.g. such as the appointment of a trustee with an irrevocable mandate to sell the business. Where the undertakings concerned commit a breach of an obligation, the Commission may revoke clearance decisions issued either under Article 6(2) or Article 8(2) of the Merger Regulation, acting pursuant to Article 6(3) or Article 8(5)(b), respectively. The parties may also be subject to fines and periodic penalty payments as provided in Article 14(2)(a) and 15(2)(a) respectively of the Merger Regulation. Where, however, the situation rendering the concentration compatible with the common market does not materialise ([14]), that is, where the condition is not fulfilled, the compatibility decision no longer stands. In such circumstances, the Commission may, pursuant to Article 8(4) of the Merger Regulation, order any appropriate action necessary to restore conditions of effective competition ([15]). In addition, the parties may also be subject to fines as provided in Article 14(2)(c).

III. TYPES OF REMEDY ACCEPTABLE TO THE COMMISSION ([16])

1. Divestiture

13. Where a proposed merger threatens to create or strengthen a dominant position which would impede effective competition, the most effective way to restore effective competition, apart from prohibition, is to create the conditions for the emergence of a new competitive entity or for the strengthening of existing competitors via divestiture.

Viable business

14. The divested activities must consist of a **viable business** that, if operated by a suitable purchaser, can compete effectively with the merged entity on a lasting basis. Normally a viable business is an **existing** one that can operate on a **stand-alone-basis**, which means independently of the merging parties as regards the supply of input materials or other forms of cooperation other than during a transitory period.

15. In proposing a viable business for divestiture, the parties must take into account the uncertainties and risks related to the transfer of a business to a new owner. These risks may limit the competitive impact of the divested business, and, therefore, may lead to a market situation where the competition concerns of the Commission will not necessarily be eliminated.

Object of the divestiture

16. Where the competition problem results from horizontal overlap, the most appropriate business has to be divested ([17]). This might be the business of the acquiring company in cases of a hostile bid where the notifying party's knowledge of the business to be acquired is more limited. A commitment to divest activities of the target company might, in such circumstances, increase the risk that this business might not result in a viable competitor which could effectively compete in the market on a lasting basis.

17. In determining which overlapping business should be divested, the ability of the business to be operated on a stand-alone-basis is an important consideration ([18]). In order to assure a viable business, it might be necessary to include in a divestiture those activities which are related to markets where the Commission did not raise competition concerns because this would be the only possible way to create an effective competitor in the affected markets ([19]).

18. Although it has been accepted in certain specific circumstances ([20]), a divestiture consisting of a combination of certain assets from both the purchaser and the target may create additional risks as to the viability and efficiency of the resulting business. It will, therefore, be assessed with great care. In exceptional cases, a divestiture package including only brands and supporting production assets may be sufficient to create the conditions for effective competition ([21]). In such circumstances, the Commission would have to be convinced that the buyer could integrate these assets effectively and immediately.

Suitable purchaser

19. The condition for a clearance decision by the Commission is that the viable business will have been transferred to a suitable purchaser ([22]) within a specific deadline. The two elements of the viable business and the suitable purchaser are thus inter-linked. The potential of a business to attract a suitable purchaser is, therefore, an important element of the Commission's assessment of the appropriateness of the proposed commitment ([23]).

20. There are cases where the viability of the divestiture package depends, in view of the assets being part of the business, to a large extent on the identity of the purchaser. In such circumstances, the Commission will not clear the merger unless the parties undertake not to complete the notified operation before having entered into a binding agreement with a purchaser for the divested business (known as the 'upfront buyer'), approved by the Commission ([24]).

21. Once a divestiture of a business is made a condition of the clearance decision, it is a matter for the parties to find a suitable purchaser for this business. The parties may therefore add, on their own initiative, other assets to make the package more attractive to buyers ([25]).

Alternative divestiture commitments

22. In certain cases, the implementation of the parties' preferred divestiture option (of a viable business solving the competition concerns) might be uncertain or difficult in view of, for instance, third parties' pre-emption rights or uncertainty as to the transferability of key contracts, intellectual property rights or employees, as the case may be. Nevertheless, the parties may consider that they would be able to divest this business within the appropriate short time period.

23. In such circumstances, the Commission cannot take the risk that, in the end, effective competition will not be restored. Accordingly, it is up to the parties to set out in the commitment an alternative proposal, which has to be at least equal if not better suited to restore effective competition, as well as a clear timetable as to how and when the other alternative will be implemented ([26]).

Removal of structural links

24. Divestiture commitments may not be limited to overcoming competition problems created by horizontal overlaps. The divestiture of an existing shareholding in a joint venture may be necessary in order to sever a structural link with a major competitor ([27]).

25. In other cases, a possible remedy could be the divestiture of minority shareholdings or the elimination of interlocking directorates in order to increase the incentives for competing on the market ([28]).

2. **Other remedies**

26. Whilst being the preferred remedy, divestiture is not the only remedy acceptable to the Commission. First, there may be situations where a divestiture of a business is impossible ([29]). Secondly, competition problems can also result from specific features, such as the existence of exclusive agreements, the combination of networks ('network effects') or the combination of key patents. In such circumstances, the Commission has to determine whether or not other types of remedy may have a sufficient effect on the market to restore effective competition.

27. The change in the market structure resulting from a proposed concentration can cause existing contractual arrangements to be inimical to effective competition. This is in particular true for exclusive long-term supply and distribution agreements if such agreements limit the market potential available for competitors. Where the merged entity will have a considerable market share, the foreclosure effects resulting from **existing exclusive agreements** may contribute to the creation of a dominant position ([30]). In such circumstances, the termination of existing exclusive agreements ([31]) may be considered appropriate to eliminate the competitive concerns if there is clearly no evidence that de facto exclusivity is being maintained.

28. The change in the market structure resulting from a proposed concentration can lead to major barriers or impediments to entry into the relevant market. Such barriers may arise from control over infrastructure, in particular networks, or key technology including patents, know-how or other intellectual property rights. In such circumstances, remedies may aim at facilitating market entry by ensuring that competitors will have **access to the necessary infrastructure** ([32]) or **key technology**.

29. Where the competition problem is created by control over key technology, a divestiture of such technology ([33]) is the preferable remedy as it eliminates a lasting relationship between the merged entity and its competitors. However, the Commission may accept licensing arrangements (preferably exclusive licences without any field-of-use restrictions on the licensee) as an alternative to divestiture where, for instance, a divestiture would have impeded efficient, on-going research. The Commission has pursued this approach in mergers involving, for example, the pharmaceutical industry ([34]).

30. Owing to the specifics of the competition problems raised by a given concentration in several markets, the parties may have to offer **remedy packages** which comprise a combination of divestiture remedies and other remedies that facilitate market entry by granting network access or access to specific content ([35]). Such packages may be appropriate to remedy specific foreclosure problems arising, for instance, in concentrations in the telecommunication and media sectors. In addition, there may be transactions affecting mainly one product market where, however, only a package including a variety of other commitments will be able to remedy the competitive concerns raised by the specific concentration on an overall basis ([36]).

IV. SITUATIONS WHERE REMEDIES ARE DIFFICULT, IF NOT IMPOSSIBLE

31. The Commission is willing to explore solutions to the competition problems raised by a concentration, provided that these solutions are convincing and effective. There are, however, concentrations where remedies adequate to eliminate competition concerns within the common market cannot be found ([37]). In such circumstances, the only possibility is prohibition.

32. Where the parties submit proposed remedies that are so extensive and complex that it is not possible for the Commission to determine with the required degree of certainty that effective competition will be restored in the market, an authorisation decision cannot be granted ([38]).

V. SPECIFIC REQUIREMENTS FOR SUBMISSION OF COMMITMENTS

1. Phase I

33. Pursuant to Article 6(2) of the Merger Regulation the Commission may declare a concentration compatible with the common market, where it is confident that following modification a notified concentration no longer raises serious doubts within the meaning of paragraph 1(c). Parties can submit proposals for commitments to the Commission on an informal basis, even before notification. Where the parties submit proposals for commitments together with the notification or within three weeks from the date of receipt of the notification ([39]), the deadline for the Commission's decision pursuant to Article 6(1) of the Merger Regulation is extended from one month to six weeks.

34. In order to form the basis of a decision pursuant to Article 6(2), proposals for commitments must meet the following requirements:

    (a) they shall be submitted in due time, at the latest on the last day of the three-week period;

    (b) they shall specify the commitments entered into by the parties in a sufficient degree of detail to enable a full assessment to be carried out;

    (c) they shall explain how the commitments offered solve the competition concerns identified by the Commission.

    At the same time as submitting the commitments, the parties need to supply a non-confidential version of the commitments, for purposes of market testing ([40]).

35. Proposals submitted by the parties in accordance with these requirements will be assessed by the Commission. The Commission will consult the authorities of the Member States on the proposed commitments and, when considered appropriate, also third parties in the form of a market test. In addition, in cases involving a geographic market that is wider than the European Economic Area ('EEA') or where, for reasons related to the viability of the business, the scope of the business to be divested is wider than the EEA territory, the proposed remedies may also be discussed with non-EEA competition authorities in the framework of the Community's bilateral cooperation agreements with these countries.

36. Where the assessment confirms that the proposed commitments remove the grounds for serious doubts, the Commission clears the merger in phase I.

37. Where the assessment shows that the commitments offered are not sufficient to remove the competitive concerns raised by the merger, the parties will be informed accordingly. Given that phase I remedies are designed to provide a straightforward answer to a readily identifiable competition concern ([41]), only limited modifications can be accepted to the proposed commitments. Such modifications, presented as an immediate response to the result of the consultations, include clarifications, refinements and/or other improvements which ensure that the commitments are workable and effective.

38. If the parties have not removed the serious doubts, the Commission will issue an Article 6(1)(c) decision and open proceedings.

2. **Phase II**

39. Pursuant to Article 8(2) of the Merger Regulation, the Commission must declare a concentration compatible with the common market, where following modification a notified concentration no longer creates or strengthens a dominant position within the meaning of Article 2(3) of the Merger Regulation. Commitments proposed to the Commission pursuant to Article 8(2) must be submitted to the Commission within not more than three months from the day on which proceedings were initiated. An extension of this period shall only be taken into consideration on request by the parties setting forth the exceptional circumstances which, according to them, justify it. The request for extension must be received within the three-month-period. An extension is only possible in case of exceptional circumstances and where in the particular case there is sufficient time to make a proper assessment of the proposal by the Commission and to allow adequate consultation with Member States and third parties ([42]).

40. The Commission is available to discuss suitable commitments prior to the end of the three-month period. The parties are encouraged to submit draft proposals dealing with both substantive and procedural aspects which are necessary to ensure that the commitments are fully workable.

41. Proposals for commitments submitted in order to form the basis for a decision pursuant to Article 8(2) must meet the following requirements:

(a) they shall be submitted in due time, at the latest on the last day of the three-month period;

(b) they shall address all competition problems raised in the Statement of Objections and not subsequently abandoned. In this respect, they must specify the substantive and implementing terms entered into by the parties in sufficient detail to enable a full assessment to be carried out;

(c) they shall explain how the commitments offered solve the competition concerns.

At the same time as submitting the commitments, the parties shall supply a non-confidential version of the commitments, for purposes of market testing.

42. Proposals submitted by the parties in accordance with these requirements will be assessed by the Commission. If the assessment confirms that the proposed commitments remove the competition concerns, following consultation with the authorities of the Member States, discussions with non-Member States authorities ([43]) and, when considered appropriate, with third parties in the form of a market test, a clearance decision will be submitted for Commission approval.

43. Conversely, where the assessment leads to the conclusion that the proposed commitments appear not to be sufficient to resolve the competition concerns raised by the concentration, the parties will be informed accordingly. Where the parties subsequently modify the proposed commitments, the Commission may only accept these modified commitments ([44]) where it can clearly determine — on the basis of its assessment of information already received in the course of the investigation, including the results of prior market testing, and without the need for any other market test — that such commitments, once implemented, resolve the competition problems identified and allow sufficient time for proper consultation of Member States.

VI. REQUIREMENTS FOR IMPLEMENTATION OF COMMITMENTS

44. Commitments are offered as a means of securing a clearance, with the implementation normally taking place after the decision. These commitments require safeguards to ensure their successful and timely implementation. These implementing provisions will form part of the commitments entered into by the parties *vis-à-vis* the Commission. They have to be considered on a case-by-case basis. This is in particular true for the fixed time periods laid down for the implementation, which should in general be as short as is feasible. Consequently, it is not possible to standardise these requirements totally.

45. The following guidance is intended to assist the parties in framing commitment proposals. The principles are based on the framework of a divestiture commitment, which, as was seen above, is the most typical commitment. However, many of the principles discussed below are equally applicable to other types of commitments.

1. **Essential features of divestment commitments**

46. In a typical divestment commitment, the business to be divested normally consists of a combination of tangible and intangible assets, which could take the form of a pre-existing company or group of companies, or of a business activity which was not previously incorporated in its own right. Thus the parties ([45]), when submitting a divestiture commitment, have to give a precise and exhaustive definition of the intended subject of divestment (hereafter referred to as 'the description of the business' or 'the description'). The description has to contain all the elements of the business that are necessary for the business to act as a viable competitor in the market: tangible (such as R & D, production, distribution, sales and marketing activities) and intangible (such as intellectual property rights, goodwill) assets, personnel, supply and sales agreements (with appropriate guarantees about the transferability of these), customer lists, third party service agreements, technical assistance (scope, duration, cost, quality) and so forth. In order to avoid any misunderstanding about the business to be divested, assets that are used within the business but that should not, according to the parties, be divested, have to be identified separately.

47. The description has to provide for a mechanism whereby the acquirer of the business can retain and select the appropriate personnel. Such a mechanism is required both for the personnel that are currently working in the business unit as it is operated and for the personnel that provide essential functions for the business such as, for instance, group R & D and information technology staff even where such personnel are currently employed by another business unit of the parties. This mechanism is without prejudice to the application of the Council Directives on collective redundancies ([46]); on safeguarding employees rights in the event of transfers of undertakings ([47]); and on informing and consulting employees ([48]) as well as national provisions implementing those Directives.

48. The divestment has to be completed within a fixed time period agreed between the parties and the Commission, which takes account of all relevant circumstances. The package will specify what kind of agreement — binding letter of intent, final agreement, transfer of legal title — is required by what date. The deadline for the divestment should start on the day of the adoption of the Commission decision.

49. In order to ensure the effectiveness of the commitment, the sale to a proposed purchaser is subject to prior approval by the Commission. The purchaser is normally required to be a viable existing or potential competitor, independent of and unconnected to the parties, possessing the financial resources ([49]), proven expertise and having the incentive to maintain and develop the divested business as an active competitive force in competition with the parties. In addition, the acquisition of the business by a particular proposed purchaser must neither be likely to create new competition problems nor give rise to a risk that the implementation of the commitment will be delayed. These conditions are hereinafter referred to as 'the purchaser standards'. In order to maintain the structural effect of a remedy, the merged entity cannot, even in the absence of an explicit clause in the commitments, subsequently acquire influence over the whole or parts of the divested business unless the Commission has previously found that the structure of the market has changed to such an extent that the absence of influence over the divested business is no longer necessary to render the concentration compatible with the common market.

2. **Interim preservation of the business to be divested — the hold-separate trustee**

50. It is the parties' responsibility to reduce to the minimum any possible risk of loss of competitive potential of the business to be divested resulting from the uncertainties inherent to the transfer of a business. Pending divestment, the Commission will require the parties to offer commitments to maintain the independence, economic viability, marketability and competitiveness of the business.

51. These commitments will be designed to keep the business separate from the business retained by the parties, and to ensure that it is managed as a distinct and saleable business. The parties will be required to ensure that all relevant tangible and intangible assets of the divestiture package are maintained, pursuant to good business practice and in the ordinary course of business. This relates in particular to the maintenance of fixed assets, know-how or commercial information of a confidential or proprietary nature, the customer base and the technical and commercial competence of the employees. Furthermore, the parties must maintain the same conditions of competition as regards the divestiture package as those applied before the merger, so as to continue the business as it is currently conducted. This includes providing relevant administrative and management functions, sufficient capital, and a line of credit, and it may include other conditions specific to maintaining competition in an industry.

52. As the Commission cannot, on a daily basis, be directly involved in overseeing compliance with these interim preservation measures, it therefore approves the appointment of a trustee to oversee the parties' compliance with such preservation measures (a so-called 'hold-separate trustee'). The hold-separate trustee will act in the best interests of the business to be divested. The commitment will set out the specific details of the trustee's mandate. The trustee's mandate, to be approved by the Commission, together with the trustee appointment, will include for example, responsibilities for supervision, which include the right to propose, and, if deemed necessary, impose, all measures which the trustee considers necessary to ensure compliance with any of the commitments, and periodic compliance reports.

3. **Implementation of the commitments — the divestiture trustee**

53. The commitment will also set out the specific details and procedures relating to the Commission's oversight of the implementation of the divestiture: for example, criteria for approval of the purchaser, periodic reporting requirements, and approval of the prospectus or advertising material. Here, too, it is noted that the Commission cannot, on a daily basis, be directly involved in managing the divestment. Consequently, in most cases, the Commission considers it appropriate to approve the appointment a trustee with responsibilities for overseeing the implementation of the commitments (the 'divestiture trustee').

54. The divestiture trustee's role will vary on a case-by-case basis, but will generally include supervision which includes the right to propose, and if deemed necessary, impose, all measures which the trustee requires to ensure compliance with any of the commitments, and reporting at regular intervals. Where appropriate, the trustee's role will span two phases: in the first phase, he or she will be responsible for overseeing the parties' efforts to find a potential purchaser. If the parties do not succeed in finding an acceptable purchaser within the time frame set out in their commitments, then in the second phase, the trustee will be given an irrevocable mandate to dispose of the business within a specific deadline at any price, subject to the prior approval of the Commission.

4. **Approval of the trustee and the trustee mandate**

55. Depending on the types of commitments involved and the facts of the case, the divestiture trustee may or may not be the same person or institution as the hold-separate trustee. The trustee will normally be an investment bank, management consulting or accounting company or similar institution. The parties shall suggest the trustee (or a number of trustees) to the Commission. The trustee shall be independent of the parties, possess the necessary qualifications to carry out the job and shall not be, or become, exposed to a conflict of interests. It is the parties' responsibility to supply the Commission with adequate information for it to verify that the trustee fulfils these requirements. The Commission will review and approve the terms of the trustee's appointment, which should be irrevocable unless 'good cause' is shown to the Commission for the appointment of a new trustee.

56. The parties are responsible for remuneration of each trustee for all services rendered in the execution of their responsibilities, and the remuneration structure must be such as to not impede the trustee's independence and effectiveness in fulfilling his mandate. The trustee will assume specified duties designed to ensure compliance in good faith with the commitments on behalf of the Commission, and these duties will be defined in the trustee's mandate. The mandate must include all provisions necessary to enable the trustee to fulfil its duties under the commitments accepted by the Commission. It is subject to Commission's approval.

57. When the specific commitments with which the trustee has been entrusted have been implemented — that is to say, when legal title for the divestiture package to be divested has passed or at the end of some specific obligations which continue post-divestiture — the mandate will provide for the trustee to request the Commission for a discharge from further responsibilities. Even after the discharge has been given, the Commission has the discretion to require the reappointment of the trustee, if subsequently it appears to the Commission that the relevant commitments might not have been fully and properly implemented.

5. **Approval of the purchaser and the purchase agreement**

58. The parties or the trustee can only proceed with the sale if the Commission approves a proposed purchaser and the purchase agreement on the basis of the arrangements set out in the commitment. The parties or the trustee will be required to demonstrate satisfactorily to the Commission that the proposed buyer meets the requirements of the commitments, which means the purchaser's standards, and that the business is sold in a manner consistent with the commitment. The Commission will formally communicate its view to the parties. Before doing so, the Commission officials may have discussed with the proposed purchaser its incentives for competing with the merged entity on the basis of its business plans. Where different purchasers are being proposed for different parts of the package, the Commission will assess whether each individual proposed purchaser is acceptable and that the total package solves the competition problem.

59. Where the Commission determines that the acquisition of the divestiture package by the proposed purchaser, in the light of the information available to the Commission, threatens to create *prima facie* competition problems ([50]) or other difficulties, which may delay the timely implementation of the commitment or indicate the lack of appropriate incentives for the purchaser to compete with the merged entity, the proposed purchaser will not be considered acceptable. In this case, the Commission will formally communicate its view that the buyer does not satisfy the purchaser's standards ([51]).

60. Where the purchase results in a concentration that has a Community dimension, this new operation will have to be notified under the Merger Regulation and cleared under normal procedures ([52]). Where this is not the case, the Commission's approval of a purchaser is without prejudice to the jurisdiction of merger control of national authorities.

(1) OJ L 395, 30.12.1989, p. 1; corrected version OJ L 257, 21.9.1990, p. 13.

(2) OJ L 180, 9.7.1997, p. 1.

(3) The references to 'parties' and 'merging parties' also cover situations with one notifying party.

(4) Referred to hereinafter as 'phase II'.

(5) Referred to hereinafter as 'phase I'.

(6) Recital 7 of the Merger Regulation.

(7) In the case of the creation of a joint venture, the Commission will also examine the concentration under Article 2(4) of the Merger Regulation. In this respect, the Commission examines whether or not the creation of the joint venture has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent. Such coordination will be appraised in accordance with the criteria of Article 81(1) and (3) of the Treaty, with a view to establishing whether or not the operation is compatible with the common market. The principles set out in this notice would normally also apply to cases dealt with under Article 2(4).

(8) Judgment of the Court of First Instance of 25 March 1999 in Case T-102/96 *Gencor* v *Commission* [1999] ECR II-753, at paragraph 316.

(9) *Op. cit.*, at paragraph 319.

(10) Only in exceptional circumstances will the Commission consider commitments which require further monitoring: Commission Decision 97/816/EC (IV/M.877 — *Boeing/McDonnell Douglas*; OJ L 336, 8.12.1997, p. 16).

(11) Commitments in phase I can only be accepted in certain types of situation. The competition problem needs to be so straightforward and the remedies so clear-cut that it is not necessary to enter into an in-depth investigation.

(12) Commission Decision of 30 March 1999 (IV/JV.15 — *BT/AT & T*); Commission Decision 2000/45/EC (IV/M.1532 — *BP Amoco/Arco*; OJ L 18, 19.1.2001, p. 1).

(13) If the Commission's final assessment of a case shows that there are no competition concerns or that the resolution of the concerns does not depend on a particular element of the submitted commitments, the parties, being informed, may withdraw them. If the parties do not withdraw them, the Commission may either take note of their proposals in the decision or ignore them. Where the Commission takes note of them, it will explain in its decision that they do not constitute a condition for clearance.

(14) The same principle applies where the situation that originally rendered the concentration compatible is subsequently reversed; see the last sentence of paragraph 49.

(15) These measures may also lead to periodic penalty payments as provided in Article 15(2)(b).

(16) The following overview is non-exhaustive.

(17) Where the competition problem arises in vertical integration cases, divestiture may also resolve the competition concern.

(18) Commission Decision of 29 September 1999 (IV/M.1383 — *Exxon/Mobil*, at paragraph 860); Commission Decision of 9 February 2000 (COMP/M.1641 *Linde/AGA*, at paragraph 94).

(19) Commission Decision 1999/229/EC (IV/M.913 — *Siemens/Elektrowatt*; OJ L 88, 31.3.1999, p. 1, at paragraph 134); Commission Decision 2000/718/EC (COMP/M.1578 — *Sanitec/Sphinx*; OJ L 294, 22.11.2000, p. 1, at paragraph 255); Commission Decision of 8 March 2000 (COMP/M.1802 — *Unilever/Amora Maille*); Commission Decision of 28 September 2000 (COMP/M.1990 — *Unilever/Bestfoods*; OJ C 311, 31.10.2000, p. 6).

(20) Commission Decision 96/222/EC (IV/M.603 — *Crown Cork & Seal/CarnaudMetalbox*; OJ L 75, 23.3.1996, p. 38).

(21) Commission Decision 96/435/EC (IV/M.623 — *Kimberly-Clark/Scott Paper*; OJ L 183, 23.7.1996, p. 1).

(22) See paragraph 49 for the purchaser standards.

(23) IV/M.913 — *Siemens/Elektrowatt*: cited above.

(24) Commission Decision of 13 December 2000 (COMP/M.2060 — *Bosch/Rexroth*).

(25) IV/M.1532 — *BP Amoco/Arco* (cited above) where the commitment was to divest the interests in certain gas pipelines and processing facilities in the North Sea, also the interests in the related gas fields were divested.

(26) Commission Decision of 8 April 1999 (COMP/M.1453 — *AXA/GRE*; OJ C 30, 2.2.2000, p. 6).

(27) Commission Decision 98/455/EC (IV/M.942 — *VEBA/Degussa*; OJ L 201, 17.7.1998, p. 102).

(28) Commission Decision of 9 February 2000 (COMP/M.1628 — *TotalFina/Elf*); Commission Decision of 13 June 2000 (COMP/M.1673 — *VEBA/VIAG*); Commission Decision of 1 September 2000 (COMP/M.1980 — *Volvo/Renault*; OJ C 301, 21.10.2000, p. 23).

(29) IV/M.877 — *Boeing/McDonnell Douglas* (cited above). The Commission's investigations revealed that no existing aircraft manufacturer was interested in acquiring Douglas Aircraft Company (DAC, the commercial aircraft division of McDonell Douglas) from Boeing, nor was it possible to find a potential entrant to the commercial jet aircraft market who might achieve entry through the acquisition of DAC.

(30) Commission Decision 98/475/EC (IV/M. 986 — *AGFA Gevaert/DuPont*; OJ L 211, 29.7.1998, p. 22).

(31) Commission Decision of 28 October 1999 (IV/M.1571 — *New Holland/Case*: OJ C 130, 11.5.2000, p. 11); Commission Decision of 19 April 1999 (IV/M.1467 — *Rohm and Haas/Morton*; OJ C 157, 4.6.1999, p. 7).

(32) Commission Decision of 5 October 1992 (IV/M.157 — *Air France/Sabena*; OJ C 272, 21.10.1992, p. 1; Commission Decision of 27 November 1992 (IV/M.259 — *British Airways/TAT*; OJ C 326, 11.12.1992, p. 1); Commission Decision of 20 July 1995 (IV/M.616 — *Swissair/Sabena*; OJ C 200, 4.8.1995, p. 10); Commission Decision of 13 October 1999 (IV/M.1439 — *Telia/Telenor*); Commission Decision of 12 April 2000 (COMP/M.1795 — *Vodafone/Mannesmann*).

(33) Commission Decision of 9 August 1999 (IV/M.1378 — *Hoechst/Rhône-Poulenc*; OJ C 254, 7.9.1999, p. 5); Commission Decision of 1 December 1999 (COMP/M.1601 — *Allied Signal/Honeywell*); Commission Decision of 3 May 2000 (COMP/M.1671 — *Dow/UCC*).

(34) Commission Decision of 28 February 1995 (IV/M.555 — *Glaxo/Wellcome*; OJ C 65, 16.3.1995, p. 3).

(35) COMP/M.1439 — *Telia/Telenor*; COMP/M.1795 — *Vodafone Airtouch/Mannesmann* (cited above); Commission Decision of 13 October 2000 (COMP/M.2050 — *Vivendi/Canal+/Seagram*; OJ C 311, 31.10.2000, p. 3).

(36) Commission Decision 97/816/EC (IV/M.877 — *Boeing/McDonnell Douglas*; OJ L 336, 8.12.1997, p. 16); COMP/M.1673 — *VEBA/VIAG*.

(37) Commission Decision 94/922/EC (*MSG Media Service*, OJ L 364, 31.12.1994, p. 1); Commission Decision 96/177/EC (*Nordic Satellite Distribution*, OJ L 53, 2.3.1996, p. 20); Commission Decision 96/342/EC (*RTL/Veronica/Endemol*, OJ L 134, 5.6.1996, p. 32); Commission Decision 1999/153/EC (*Bertelsmann/Kirch/Premiere*; OJ L 53, 27.2.1999, p. 1; Commission Decision 1999/154/EC (*Deutsche Telekom BetaResearch*; OJ L 53, 27.2.1999, p. 31); Commission Decision 97/610/EC (*St Gobain/Wacker Chemie/NOM*; OJ L 247, 10.9.1997, p. 1); Commission Decision 91/619/EEC (*Aerospatiale/Alenia/De Havilland*, OJ L 334, 5.12.1991, p. 42); Commission Decision 97/26/EC *Gencor/Lonrho*, OJ L 11, 14.1.1997, p. 30); Commission Decision 2000/276/EC (M.1524 — *Airtours/First Choice*; OJ L 93, 13.4.2000, p. 1).

(38) Commission Decision of 15 March 2000 (COMP/M.1672 — *Volvo/Scania*); Commission Decision of 28 June 2000 (COMP/M.1741 — *WorldCom/Sprint*).

(39) Article 18(1) of Commission Regulation (EC) No 447/98 (Implementing Regulation), OJ L 61, 2.3.1998, p. 1.

(40) By way of a market test, customers, competitors, suppliers and other companies which might be affected or have specific expertise are requested to indicate to the Commission their reasoned opinion as to the effectiveness of the commitment.

(41) See recital 8 of Council Regulation (EC) No 1310/97 referred to in paragraph 1.

(42) M.1439 — *Telia/Telenor*; and in Commission Decision 98/335/EC (M.754 — *Anglo American/Lonrho*; OJ L 149, 20.5.1998, p. 21).

(43) See paragraph 35.

(44) COMP/M.1628 — *TotalFina/Elf*, LPG, cited above, at paragraph 345.

(45) Commitments must be signed by a person duly authorised to do so.

(46) Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (OJ L 225, 12.8.1998, p. 16).

(47) Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees rights in the event of transfers of undertakings, businesses or parts of a business (OJ L 61, 5.3.1977, p. 26) as amended by Council Directive 98/50/EC (OJ L 201, 17.7.1998, p. 88).

(48) Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (OJ L 254, 30.9.1994, p. 64), as amended by Directive 97/74/EC (OJ L 10, 16.1.1998, p. 22).

(49) The Commission does not accept seller-financed divestitures because of the impact this has on the divested company's independence.

(50) This is most likely to arise where the market structure is already highly concentrated and where the remedy would transfer the market share to another market player.

(51) COMP/M.1628 — *TotalFina/Elf* — motorway service stations.

(52) Commission Decision of 29 September 1999 (Case M.1383 — *Exxon/Mobil*) and the Commission Decisions of 2 February 2000 in the follow-up Cases M.1820 — *BP/JV Dissolution* (not published) and M.1822 — *Mobil/JV Dissolution* (OJ C 112, 19.4.2000, p. 6).

Non-opposition to a notified concentration

(Case COMP/M.2199 — Quantum/Maxtor)

(2001/C 68/04)

(Text with EEA relevance)

On 8 December 2000 the Commission decided not to oppose the above notified concentration and to declare it compatible with the common market. This decision is based on Article 6(1)(b) of Council Regulation (EEC) No 4064/89. The full text of the decision is only available in English and will be made public after it is cleared of any business secrets it may contain. It will be available:

— as a paper version through the sales offices of the Office for Official Publications of the European Communities (see list on the last page),

— in electronic form in the 'CEN' version of the CELEX database, under document No 300M2199. CELEX is the computerised documentation system of European Community law.

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ANNEX 14

BEST PRACTICE GUIDELINES FOR DIVESTITURE COMMITMENTS

Explanatory Note with standard model for divestiture commitments and standard model for trustee mandate, May 2, 2003

Best Practice Guidelines: The Commission's Model Texts for Divestiture Commitments and the Trustee Mandate under the EC Merger Regulation

1. The European Commission's model texts for divestiture commitments and trustee mandates are designed to serve as best practice guidelines for notifying parties submitting commitments under the EC Merger Regulation[1]. These texts are (1) the model to be used for divestiture commitments (the "***Standard Model for Divestiture Commitments"*** *or the* "***Standard Commitments***"); and (2) the model for the mandate of the two types of trustees referred to in the Standard Commitments, that is, the mandate appointing monitoring and divestiture trustees (the "***Standard Trustee Mandate***").

2. The model texts (the "***Standard Models***") are based upon the experience the Commission has gained to date in fashioning remedies from previous merger cases and are drafted in line with the remedies policy set out in the Commission's Notice on Remedies[2] (the "***Remedies Notice***"). The Standard Models are neither intended to provide an exhaustive coverage of all issues that may become relevant in all cases, nor are they legally binding upon parties in a merger procedure. Rather, they contain the elements for all standard provisions that should be included in commitments and trustee mandates relating to divestitures. In providing a framework for commitments and trustee mandates to be submitted in concrete cases, the Standard Models leave the flexibility to adapt the texts to the specific requirements of the case in question.

3. The Standard Models are designed to apply to all remedy proceedings in both Phase I and Phase II, therefore to all Commission decisions according to Articles 6(2) and 8(2) of the Merger Regulation. The Standard Models deal specifically with divestiture commitments inasmuch as the Commission's Remedies Notice stipulates that divestiture commitments are normally the preferred form of merger remedies; they are also the most common. However, it should be underlined that the Commission will consider the acceptability of other types of commitments in appropriate circumstances, as set out in the Remedies Notice. Individual provisions contained in the Standard Models can be used in cases involving such other types of commitments.

4. Finally, it is expected that the text of these models will evolve, based on ongoing practice, and will be regularly up-dated by the Commission, taking into consideration both the developments of the Commission's remedies policy and the experience gained from working with the merging parties and trustees in future matters.

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[1] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, as amended, OJ L 395, 30.12.1989, p. 1; corrigendum OJ L 257, 21.9.1990, p. 13.

[2] See Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and Regulation (EC) No 447/98 at *Official Journal* C 68, 02.03.2001, pages 3-11; published on http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/c_068/c_06820010302en00030011.pdf.

The Purpose of the Standard Models

5. The Commission recognises that timing is crucial when merging parties reach the remedies stage in merger review procedures, where they offer commitments in order to resolve the Commission's competition concerns in a given case. Through the use of standardised models, the merging parties and the Commission will be relieved of the heavy demands – both in terms of time and resources – that would otherwise be required to negotiate the standard terms and provisions for commitments and trustee mandates under tight time constraints. The use of standardised models will expedite the proceedings and allow the merging parties to concentrate more on the actual substance and implementation of the commitments.

6. The use of the standard models will ensure consistency across cases and will thereby contribute to increasing the level of transparency and legal certainty for the merging parties offering commitments to the Commission.

Overview of the Contents of the Standard Models

7. The Standard Model for Divestiture Commitments sets out all requirements for achieving full and effective compliance with divestiture commitments offered by the merging parties (the "***Parties***") to obtain a clearance decision. More specifically, this Model is designed (i) to describe clearly the business to be divested ("***Divestment Business***"), the divestiture procedure and the obligations of the parties in relation to the Divestment Business for the interim period until divestiture has been completed, (ii) to set out the various responsibilities that the merging parties will thereby have, respectively, to the Commission, the Trustee, and the Divestment Business; and (iii) to enshrine the importance which the Commission places upon requiring an acceptable purchaser for the Divestment Business in order to ensure the viability and competitiveness of the new entity in the market where the divestiture takes place.

8. The Standard Model for Trustee Mandates sets out the role and functions of the Trustee, as provided in the Standard Commitments, in a contractual relationship between the Parties responsible for the divestiture and the Trustee. As the Commitments set out the basis for the responsibilities of the Trustee, the Standard Trustee Mandate has been prepared in conformity with the requirements laid down for the Trustee in the Standard Model for Divestiture Commitments.

9. Although the Standard Trustee Mandate is a bilateral contract between the Parties responsible for the divestiture and the Trustee, this document forms the basis for a tri-partite relationship among the Commission, the Trustee, and the Parties. The relationship between the Parties and the Trustee is not a traditional trusteeship. The Trustee rather benefits from a status which makes it independent from the Parties and which is characterised by the role of the Trustee to monitor (Monitoring Trustee) or even to effectuate (Divestiture Trustee) the Parties' compliance with the commitments. Accordingly, the Parties are not entitled to give instructions to the Trustee, whereas the Commission is allowed to do so. This

specific relationship is also confirmed by the fact that the Trustee Mandate requires the Commission's approval.

10. The Standard Trustee Mandate is designed (i) to facilitate the smooth and timely appointment of the Trustee and the approval of the Trustee Mandate; (ii) to clarify the relationship among the Commission, the Trustee, and the Parties; and (iii) to set out the tasks of the Trustee in the process in order to enable the Trustee to expedite compliance with the commitments. Whereas the Standard Trustee Mandate defines the role of a Monitoring and a Divestiture Trustee in one text, they can be assigned to different Trustees in practice.

11. In providing guidance for the interpretation of the Standard Texts, a certain hierarchy is established. The Standard Trustee Mandate should be interpreted in the light of the Standard Commitments, as they lay the foundation for the application of the Trustee Mandate. To the extent that they are attached as conditions and obligations, the commitments are to be interpreted in the light of the respective Commission decision. Moreover, both Standard Texts should be interpreted in the general framework of Community law, in particular in the light of the EC Merger Regulation, and by reference to the Commission's Remedies Notice setting out the Commission's remedies policy.

Description of the Provisions of the Standard Models

12. The most important provisions contained in both Standard Models are briefly set out below.

Standard Model for Divestiture Commitments

13. The Standard Model for Commitments consists of the following main elements:

14. Section A contains a definitions section.

15. Section B contains the commitment to divest and the definition of the Divestment Business. After spelling out the general obligation to divest the Divestment Business as a going concern, paragraph 1 describes the divestiture procedure, which may take two phases. The Commitments provide that in the first phase (that is, the Divestiture Period), the Parties have the sole responsibility for finding a suitable purchaser for the Divestment Business. If the Parties do not succeed in divesting the business on their own in the Divestiture Period, then a Divestiture Trustee will be appointed with an exclusive mandate to dispose of the Divestment Business at no minimum price, in the Extended Divestiture Period. The individual deadlines are determined in the definitions section. The experience of the Commission has shown that short divestiture periods contribute largely to the success of the divestiture as, otherwise, the Divestment Business will be exposed to an extended period of uncertainty. The Commission will normally consider a period of around 6 months for the Divestiture Period and an additional period of 3 to 6 months for the Extended Divestiture Period as appropriate. These periods may be modified according to the particular requirements of the case in question.

16. The divestiture commitment will take a special form in those cases where the Parties propose an up-front buyer. The Parties commit not to implement the proposed concentration unless and until they have entered into a binding agreement with a purchaser for the Divestment Business, approved by the Commission. The qualification of the buyer are the same as in other divestiture commitments. The up-front buyer concept has been applied in several cases[3] and will be used in the specific circumstances as described in the Notice[4]. The structure of the divestiture commitment also needs to be adapted in cases of alternative divestitures, in particular "Crown Jewels" structures, i.e. structures in which the Parties commit to divest a very attractive business if they have not divested the originally proposed business until the end of a period fixed in the commitments. The circumstances in which the Commission will accept alternative divestiture commitments are also set out in the Remedies Notice[5].

17. The divestiture commitment includes the commitment not to re-acquire direct or indirect influence over the Divestment Business (paragraph 3). This re-acquisition prohibition is limited to ten years after the date of the decision and serves to maintain the structural effects of the Commitments. The Commission may grant a waiver if the structure of the market has changed to such an extent that the absence of influence over the Divestment Business is no longer necessary to render the concentration compatible with the common market.

18. Section B, together with the Schedule to the Commitments, defines what is included in the Divestment Business. The clear identification of the Divestment Business is of great importance as thereby the scope of the divestiture and of the hold-separate obligations are defined. As set out in the Notice, the Divestment Business is considered to be an existing entity that can operate on a stand-alone-basis[6]. The Divestment Business is the minimum which is to be divested by the Parties in order to comply with the Commitments. In order to make the package more attractive to buyers, the Parties may add, on their own initiative, other assets[7]. The Divestment Business must include all the assets and personnel necessary to ensure the viability of the divested activities. Whereas this principle is set out as an undertaking of the Parties in paragraph 3 of the Standard Commitments, the Parties have to give a detailed factual description of the Divestment Business in the Schedule to the Standard Commitments.

19. The Divestment Business must comprise the Personnel and the Key Personnel retained by the Divestment Business as well as the personnel providing essential functions for the Divestment Business, such as the central R&D staff. The personnel (according to groups and functions performed) is to be listed in the Schedule to the Commitments, the Key Personnel is to be listed separately. The

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[3] Cases COMP/M.2060 – Bosch/Rexroth; COMP/M.1915 – The Post Office/TPG/SPPL; COMP/M.2544 – Masterfood/Royal Canin.

[4] Paragraph 18 of the Remedies Notice.

[5] Paragraphs 22, 23 of the Remedies Notice.

[6] Cf. paragraph 14 of the Remedies Notice. The importance of the divestiture of an on-going business for the success of the remedy has also been underlined by the FTC in a published study entitled A Study of the Commission's Divestiture Process, prepared by the Staff of the Bureau of Competition of the Federal Trade Commission, p. 10 ff.

[7] Cf. paragraph 21 of the Remedies Notice.

principle, indicated in paragraph 4 (d), is that the personnel should be transferred with the Divestment Business. If the Divestment Business takes the form of a company or if the transfer of undertakings legislation applies, the personnel will normally be transferred by operation of law. In other cases, the acquirer of the business can retain and select the personnel and can make offers of employment. The transfer – whichever form it takes - is without prejudice to the application of Council Directives, where applicable, on collective redundancies[8]; on safeguarding employees rights in the event of transfers of undertakings[9]; and on informing and consulting employees,[10] as well as relevant national law on these matters.

20. Furthermore, the Standard Commitments foresee that the Divestment Business shall be entitled to benefit from products or services provided by the Parties for a transitional period, determined on a case-by-case basis, if this is necessary to maintain the full economic viability and competitiveness of the Divestment Business (paragraph 4 (e) of the Standard Commitments referring to the products or services listed in the Schedule).

21. Section C contains a number of related commitments, which are designed to maintain, pending divestiture, the viability, marketability and competitiveness of the Divestment Business. These provisions deal with the preservation of the divested entity's viability and independence, as well as the hold-separate and ring-fencing obligations. The Hold Separate Manager, to be appointed by the Parties and normally the manager of the Divestment Business, is responsible for the management of the Divestment Business as a distinct entity separate from the businesses retained by the Parties, and is supervised by the Monitoring Trustee.

22. In certain cases it may also be necessary for the hold-separate obligation to apply to the corporate structure itself. That is, in cases where the Divestment Business takes the form of a company and a strict separation of the corporate structure is necessary, the Monitoring Trustee must be given the authority to (i) exercise the Parties' rights as shareholders in the Divestment Business and (ii) to replace members of the supervisory board or non-executive directors on the board of directors who have been appointed on behalf of the Parties (cf. paragraph 8 of the Standard Commitments and paragraph 6 (d) of the Standard Trustee Mandate).

23. Of particular importance is the ring-fencing of competitively sensitive information of the Divestment Business. The parties are obliged to implement all necessary measures to ensure that they do not obtain such information of the Divestment Business and, in particular, to sever its participation in a central information technology network. The Monitoring Trustee may allow the disclosure of

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[8] Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (OJ L 225, 12.8.1998, p.16).

[9] Council Directive 77/187/EEC on the approximation of the laws of the Member States relating to the safeguarding of employees rights in the event of transfers of undertakings, businesses or parts of a business (OJ L 61, 5.3.1977, p. 26) as amended by Council Directive 98/50/EC (OJ L 201, 17.7.1998, p.88).

[10] Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (OJ L 254, 30.9.1994, p. 64) as amended by Directive 97/74/EC (OJ L 10, 16.1.1998, p 22).

information to the divesting party if this is reasonably necessary for the divestiture of the Divestment Business or required by law (e.g. information necessary for group accounts).

24. The related commitments further contain a non-solicitation clause for Key Personnel of the Divestment Business. According to the experience of the Commission, the non-solicitation period, dependent on the circumstances of the case, should normally be two years. In addition, the Commission may request the inclusion of a non-compete clause in the commitments protecting the customers of the Divestment Business for a start-up period. This may be required to enable the Divestment Business to be active as a viable competitor in the market. The period for such customer protection clause will depend on the market in question.

25. During the Divestiture Phase, the divestiture lies in the hands of the divesting party. The Commission does not have a preference as to the method the parties use to select an acceptable purchaser as long as they meet the objective of the divestiture, to maintain or restore competition. However, as part of the due diligence procedure, it is foreseen that the divesting party shall provide to potential purchasers sufficient information as regards the Divestment Business and allow them access to its personnel (paragraph 11 of the Standard Commitments) in order to enable them to determine whether it will be possible to maintain and to develop the Divestment Business as active and viable competitive force in the market after the divestiture.

26. The divesting party shall further submit regular reports on potential purchasers and developments in the divestiture process to the Commission and the Monitoring Trustee (paragraph 12 of the Standard Commitments). This reporting mechanism gives the Monitoring Trustee the basis on which to assess the progress of the divestiture process as well as potential purchasers (for the Trustee's report, see paragraph 23 (vi) of the Standard Commitments) and keeps the Commission informed.

27. Section D sets out the requirements to be met by the Purchaser. The aim of this section is to ensure that the Divestment Business will be sold to a suitable purchaser who is independent of and unconnected to the Parties, and who possesses the financial resources, proven expertise and incentive to maintain and develop the Divestment Business as a viable and active competitive force in the marketplace. These Purchaser Requirements can generally be met by either industrial or financial investors. The latter must demonstrate the necessary management capabilities and "proven expertise" which can in particular be met by financing a management buy-out.

28. Section D also deals with the approval process. After finalising the agreement(s), the divesting party shall submit a fully documented and reasoned proposal to the Commission. The Commission will verify that the purchaser will fulfil the requirements and that the Divestment Business is being sold in a manner consistent with the Commitments. One element for its assessment will be the report of the Monitoring Trustee according to paragraph 23 (vii). The Commission may approve the sale of the Divestment Business without parts of the assets or personnel of the Divestment Business if this does not affect the viability and

competitiveness of the Divestment Business, in particular if the Purchaser provides for such assets or personnel itself.

29. Section E deals with both the Monitoring and Divestiture Trustees. It identifies the terms for their appointment, as well as the content of the Trustee Mandates, and conditions for replacement of the Trustee during the divestiture periods if that becomes necessary. A Monitoring Trustee must be proposed by the Parties within one week after the adoption of the decision, whereas a Divestiture Trustee must be proposed no later than one month before the end of the Divestiture Period, (paragraph 16 of the Standard Commitments). The Commission wishes to emphasise the importance it attaches to compliance with these deadlines in practise, as otherwise the Parties are in breach of the commitments and the divestiture procedure is endangered.

30. Section E also sets out the duties and obligations of both types of Trustees. The Monitoring Trustee's responsibilities (mainly set out in paragraph 23 Standard Commitments) relate to both the management of the Divestment Business during the hold-separate period and the monitoring of the divestiture process itself. The supervision of the management shall in particular ensure the viability, marketability and competitiveness of the Divestment Business and the compliance with the hold-separate and ring-fencing obligations. The Standard Commitments further assign certain monitoring tasks concerning the divestiture process to the Monitoring Trustee in the Divestiture Period. Once the Parties have proposed a purchaser for the Divestment Business, the Monitoring Trustee assesses the independence and suitability of the proposed purchaser and the viability of the Divestment Business after the sale to the purchaser, in order to assist the Commission in assessing the suitability of the proposed purchaser.

31. In the Extended Divestiture Period, the Divestiture Trustee will have an exclusive mandate to sell the Divestment Business at no minimum price and is empowered to include in the sale and purchase agreement such terms and conditions as it considers appropriate for an expedient sale. However, it is foreseen that the Trustee has to protect the legitimate financial interests of the divesting parties, subject to its unconditional obligation to divest at no minimum price. The Divestiture Trustee must report regularly on the progress of the divestiture process.

32. Also in Section E (paragraphs 26 – 30), the duties and obligations of the Parties vis-à-vis the Trustee are defined. Beside the provision of information, the Parties are in particular obliged to provide the Monitoring Trustee with all managerial and administrative support necessary for the Divestment Business and to grant to the Divestiture Trustee comprehensive powers of attorney covering all steps of the sale of the Divestment Business. An indemnification clause is included in order to reinforce the independent status of the Trustee from the Parties. Such a clause is already common practice in the trustee mandates submitted to the Commission for approval. The Trustee may further, at the expense of the Parties, retain advisors with specialised skills, in particular for corporate finance or legal advice.

33. Section E further foresees that trustees may only be removed in exceptional circumstances and with the approval of the Commission before the complete implementation of the Commitments.

34. Section F contains a review clause, which allows the Commission to extend the periods specified in the Commitments and to waive or modify the undertakings in the Commitments. The Parties must show good cause in order to be able to benefit from the exercise of the review clause. Requests for the extension of time periods shall, normally, be submitted no later than one month before the expiry of the time period in question.

Standard Model for Trustee Mandates

35. The Standard Model for Trustee Mandates sets out the duties and responsibilities of both Monitoring and Divestiture Trustee in a single text. However, the language makes clear that the Commission does not have a preference for the appointment of a single person to serve in the dual role of both Monitoring and Divestiture Trustee. Rather, the decision as to whether one or more trustees are appointed should be determined on a case-by-case basis by the Parties. If more than one trustee shall serve in these roles, only the provisions relevant for the Monitoring or Divestiture Trustee, respectively, have to be included in the individual mandate.

36. The Standard Trustee Mandate consists of the following main elements:

37. Section A contains some definitions and references the definitions included in the Standard Commitments.

38. Sections B to G contain provisions regarding the appointment of the Trustee (Section B), its general duties (Section C), the specific duties and obligations of the Monitoring and Divestiture Trustees (Sections D and E), reporting obligations identifying certain important subjects that should be discussed in each report (Section G), and duties and obligations of the Parties vis-à-vis the Trustee (Section F). These arrangements are based on the provisions established in the Standard Commitments in relation to the Trustee and described above.

39. Sections H to J cover additional trustee-related provisions, including provisions regarding the remuneration of the Trustee(s), procedures concerning the termination of the Mandate, and certain additional provisions, such as determination of applicable national law.

40. In particular, the independence of the trustee and the absence of conflicts of interests of the trustee are of great importance for the Commission in deciding on the approval of the Trustee and the respective mandate. The provisions in the Standard Trustee Mandate (paragraphs 20 to 23) ensuring the independence of the trustee from the parties and the absence of conflicts of interest foresee the following procedure: (1) The Trustee must disclose all current relationships with the Parties (paragraph 20) at the time at which the Trustee Mandate is entered into. (2) During the term of the mandate, the Trustee undertakes not to create a conflict of interest by having or accepting employment or appointment as a

Member of the Board of the Parties or by having or accepting any assignments or other business relationships with, or financial interests in, the Parties. (3) As legal consequences it is foreseen that, if the Trustee becomes aware of a conflict of interest during the Mandate, the Trustee must notify the Commission and resolve the problem immediately and, if the conflict of interest cannot subsequently be resolved, the Commission may require the termination of the trustee mandate. These rules concerning conflicts of interests apply to the Trustee itself, members of the Trustee Team and the Trustee Partner Firms as members of the same organisation. (4) For a period of one year following termination of the Mandate, the members of the Trustee Team shall not provide services to the Parties without the Commission's prior approval and must establish measures to ensure the integrity of the members of the Trustee Team.

41. In addition to the rules laid down in the Standard Trustee Mandate, it is up to the Parties and the Trustee to include provisions dealing with other potential conflicts of interests, such as conflicts of interests of the Trustee with potential purchasers.

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Case M. [*No*…] – [*Title*…]

COMMITMENTS TO THE EUROPEAN COMMISSION

Pursuant to [Article 6(2), *if Phase I Commitments*] [Article 8(2), *if Phase II Commitments*] [Articles 8(2) and 10(2), *if in Phase II Commitments prior to the sending out of the Statement of Objections*] of Council Regulation (EEC) No. 4064/89 as amended (the "***Merger Regulation***"), [*Indicate the name of the Undertakings offering the Commitments*] (the "***Parties***") hereby provide the following Commitments (the "***Commitments***") in order to enable the European Commission (the "***Commission***") to declare [*Description of the operation: e.g. the acquisition of…; the creation of a full-function joint venture between…*] compatible with the common market and the EEA Agreement by its decision pursuant to [Article 6(1)(b) of the Merger Regulation, *if Phase I Commitments*] [Article 8(2), *if Phase II Commitments*] of the Merger Regulation (the "***Decision***").

The Commitments shall take effect upon the date of adoption of the Decision.

This text shall be interpreted in the light of the Decision to the extent that the Commitments are attached as conditions and obligations, in the general framework of Community law, in particular in the light of the Merger Regulation, and by reference to the Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98.

Section A. Definitions

For the purpose of the Commitments, the following terms shall have the following meaning:

Affiliated Undertakings: undertakings controlled by the Parties and/or by the ultimate parents of the Parties, including the JV [*Only in the case when the proposed operation is a creation of a JV*], whereby the notion of control shall be interpreted pursuant to Article 3 Merger Regulation and in the light of the Commission Notice on the concept of concentration under Council Regulation (EEC) No 4064/89.

Closing: the transfer of the legal title of the Divestment Business to the Purchaser.

Divestment Business: the business or businesses as defined in Section B and the Schedule that the Parties commit to divest.

Divestiture Trustee: one or more natural or legal person(s), independent from the Parties, who is approved by the Commission and appointed by [*X*] and who has received from [*X*] the exclusive Trustee Mandate to sell the Divestment Business to a Purchaser at no minimum price.

Effective Date: the date of adoption of the Decision.

First Divestiture Period: the period of [•] months from the Effective Date.

Hold Separate Manager: the person appointed by [*X*] for the Divestment Business to manage the day-to-day business under the supervision of the Monitoring Trustee.

Key Personnel: all personnel necessary to maintain the viability and competitiveness of the Divestment Business, as listed in the Schedule.

Monitoring Trustee: one or more natural or legal person(s), independent from the Parties, who is approved by the Commission and appointed by [*X*], and who has the duty to monitor [*X*'s] compliance with the conditions and obligations attached to the Decision.

Personnel: all personnel currently employed by the Divestment Business, including Key Personnel, staff seconded to the Divestment Business, shared personnel and the additional personnel listed in the Schedule.

Purchaser: the entity approved by the Commission as acquirer of the Divestment Business in accordance with the criteria set out in Section D.

Trustee(s): the Monitoring Trustee and the Divestiture Trustee.

Trustee Divestiture Period: the period of [•] months from the end of the First Divestiture Period.

[*X*]: [*Indicate the short name of the Undertaking Concerned that will divest its business/es*], incorporated under the laws of [•], with its registered office at [•] and registered with the Commercial/Company Register at [•] under number [•].

Section B. The Divestment Business

Commitment to divest

1. In order to restore effective competition, [*X*] commits to divest, or procure the divestiture of the Divestment Business by the end of the Trustee Divestiture Period as a going concern to a purchaser and on terms of sale approved by the Commission in accordance with the procedure described in paragraph 15. To carry out the divestiture, [X] commits to find a purchaser and to enter into a final binding sale and purchase agreement for the sale of the Divestment Business within the First Divestiture Period. If [*X*] has not entered into such an agreement at the end of the First Divestiture Period, [*X*] shall grant the Divestiture Trustee an exclusive mandate to sell the Divestment Business in accordance with the procedure described in paragraph 24 in the Trustee Divestiture Period. [*The following sentence should be inserted in case of an "up-front buyer":* The proposed concentration shall not be implemented unless and until [*X*] or the Divestiture Trustee has entered into a final binding sale and purchase agreement for the sale of the Divestment Business and the Commission has approved the purchaser and the terms of sale in accordance with paragraph 15].

2. [*X*] shall be deemed to have complied with this commitment if, by the end of the Trustee Divestiture Period, [*X*] has entered into a final binding sale and purchase agreement, if the Commission approves the Purchaser and the terms in accordance with the procedure described in paragraph 15 and if the closing of the sale of the Divestment Business takes place within a period not exceeding 3 months after the approval of the purchaser and the terms of sale by the Commission.

3. In order to maintain the structural effect of the Commitments, the Parties shall, for a period of 10 years after the Effective Date, not acquire direct or indirect influence over the whole or part of the Divestment Business, unless the Commission has previously found that the structure of the market has changed to such an extent that the absence of influence over the Divestment Business is no longer necessary to render the proposed concentration compatible with the common market.

<u>Structure and definition of the Divestment Business</u>

4. The Divestment Business consists of [*Provide a summary description of the Divestment Business*]. The present legal and functional structure of the Divestment Business as operated to date is described in the Schedule. The Divestment Business, described in more detail in the Schedule, includes

   (a) all tangible and intangible assets (including intellectual property rights), which contribute to the current operation or are necessary to ensure the viability and competitiveness of the Divestment Business;

   (b) all licences, permits and authorisations issued by any governmental organisation for the benefit of the Divestment Business;

(c) all contracts, leases, commitments and customer orders of the Divestment Business; all customer, credit and other records of the Divestment Business (items referred to under (a)-(c) hereinafter collectively referred to as "***Assets***");

(d) the Personnel; and

(e) [*To be included in* cases *in which the Divestment Business needs an on-going relationship with the Parties in order to be fully competitive and viable:* the benefit, for a transitional period of up to [*insert*] years after Closing and on terms and conditions equivalent to those at present afforded to the Divestment Business, of all current arrangements under which [*X*] or Affiliated Undertakings supply products or services to the Divestment Business, as detailed in the Schedule, unless otherwise agreed with the Purchaser.]

Section C. Related commitments

Preservation of Viability, Marketability and Competitiveness

5. From the Effective Date until Closing, [*X*] shall preserve the economic viability, marketability and competitiveness of the Divestment Business, in accordance with good business practice, and shall minimise as far as possible any risk of loss of competitive potential of the Divestment Business. In particular [*X*] undertakes:
   (a) not to carry out any act upon its own authority that might have a significant adverse impact on the value, management or competitiveness of the Divestment Business or that might alter the nature and scope of activity, or the industrial or commercial strategy or the investment policy of the Divestment Business;
   (b) to make available sufficient resources for the development of the Divestment Business, on the basis and continuation of the existing business plans
   (c) to take all reasonable steps, including appropriate incentive schemes (based on industry practice), to encourage all Key Personnel to remain with the Divestment Business.

Hold-separate obligations of Parties

6. [*X*] commits, from the Effective Date until Closing, to keep the Divestment Business separate from the businesses it is retaining and to ensure that Key Personnel of the Divestment Business – including the Hold Separate Manager – have no involvement in any business retained and vice versa. [*X*] shall also ensure that the Personnel does not report to any individual outside the Divestment Business.

7. Until Closing, [*X*] shall assist the Monitoring Trustee in ensuring that the Divestment Business is managed as a distinct and saleable entity separate from the businesses retained

by the Parties. [*X*] shall appoint a Hold Separate Manager who shall be responsible for the management of the Divestment Business, under the supervision of the Monitoring Trustee. The Hold Separate Manager shall manage the Divestment Business independently and in the best interest of the business with a view to ensuring its continued economic viability, marketability and competitiveness and its independence from the businesses retained by the Parties.

8. [*The following is to be inserted in cases in which a company or a share in a company is to be divested and a strict separation of the corporate structure is necessary:* To ensure that the Divestment Business is held and managed as a separate entity the Monitoring Trustee shall exercise [*X*'s] rights as shareholder in the Divestment Business (except for its rights for dividends that are due before Closing), with the aim of acting in the best interest of the business, determined on a stand-alone basis, as an independent financial investor, and with a view to fulfilling [X's] obligations under the Commitments. Furthermore, the Monitoring Trustee shall have the power to replace members of the supervisory board or non-executive directors of the board of directors, who have been appointed on behalf of [X]. Upon request of the Monitoring Trustee, [*X*] shall resign as member of the boards or shall cause such members of the boards to resign.]

Ring-fencing

9. [*X*] shall implement all necessary measures to ensure that it does not after the Effective Date obtain any business secrets, know-how, commercial information, or any other information of a confidential or proprietary nature relating to the Divestment Business. In particular, the participation of the Divestment Business in a central information technology network shall be severed to the extent possible, without compromising the viability of the Divestment Business. [*X*] may obtain information relating to the Divestment Business which is reasonably necessary for the divestiture of the Divestment Business or whose disclosure to [*X*] is required by law.

Non-solicitation clause

10. The Parties undertake, subject to customary limitations, not to solicit, and to procure that Affiliated Undertakings do not solicit, the Key Personnel transferred with the Divestment Business for a period of [•] after Closing.

Due Diligence

11. In order to enable potential purchasers to carry out a reasonable due diligence of the Divestment Business, [X] shall, subject to customary confidentiality assurances and dependent on the stage of the divestiture process:
    (a) provide to potential purchasers sufficient information as regards the Divestment Business;

(b) provide to potential purchasers sufficient information relating to the Personnel and allow them reasonable access to the Personnel.

Reporting

12. [*X*] shall submit written reports in [*Indicate the language of the procedure or another language agreed with the Commission*] on potential purchasers of the Divestment Business and developments in the negotiations with such potential purchasers to the Commission and the Monitoring Trustee no later than 10 days after the end of every month following the Effective Date (or otherwise at the Commission's request).

13. The Parties shall inform the Commission and the Monitoring Trustee on the preparation of the data room documentation and the due diligence procedure and shall submit a copy of an information memorandum to the Commission and the Monitoring Trustee before sending the memorandum out to potential purchasers.

Section D. The Purchaser

14. In order to ensure the immediate restoration of effective competition, the Purchaser, in order to be approved by the Commission, must:
    (a) be independent of and unconnected to the Parties;
    (b) have the financial resources, proven expertise and incentive to maintain and develop the Divestment Business as a viable and active competitive force in competition with the Parties and other competitors;
    (c) neither be likely to create, in the light of the information available to the Commission, *prima facie* competition concerns nor give rise to a risk that the implementation of the Commitments will be delayed, and must, in particular, reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the Divestment Business (the before-mentioned criteria for the purchaser hereafter the "***Purchaser Requirements***").

15. The final binding sale and purchase agreement shall be conditional on the Commission's approval. When [*X*] has reached an agreement with a purchaser, it shall submit a fully documented and reasoned proposal, including a copy of the final agreement(s), to the Commission and the Monitoring Trustee. [*X*] must be able to demonstrate to the Commission that the purchaser meets the Purchaser Requirements and that the Divestment Business is being sold in a manner consistent with the Commitments. For the approval, the Commission shall verify that the purchaser fulfils the Purchaser Requirements and that the Divestment Business is being sold in a manner consistent with the Commitments. The Commission may approve the sale of the Divestment Business without one or more Assets or parts of the Personnel, if this does not affect the viability and competitiveness of the Divestment Business after the sale, taking account of the proposed purchaser.

Section E. Trustee

I. Appointment Procedure

16. [*X*] shall appoint a Monitoring Trustee to carry out the functions specified in the Commitments for a Monitoring Trustee. If [*X*] has not entered into a binding sales and purchase agreement one month before the end of the First Divestiture Period or if the Commission has rejected a purchaser proposed by [*X*] at that time or thereafter, [*X*] shall appoint a Divestiture Trustee to carry out the functions specified in the Commitments for a Divestiture Trustee. The appointment of the Divestiture Trustee shall take effect upon the commencement of the Extended Divestment Period.

17. The Trustee shall be independent of the Parties, possess the necessary qualifications to carry out its mandate, for example as an investment bank or consultant or auditor, and shall neither have nor become exposed to a conflict of interest. The Trustee shall be remunerated by the Parties in a way that does not impede the independent and effective fulfilment of its mandate. In particular, where the remuneration package of a Divestiture Trustee includes a success premium linked to the final sale value of the Divestment Business, the fee shall also be linked to a divestiture within the Trustee Divestiture Period.

Proposal by the Parties

18. No later than one week after the Effective Date, [*X*] shall submit a list of one or more persons whom [*X*] proposes to appoint as the Monitoring Trustee to the Commission for approval. No later than one month before the end of the First Divestiture Period, [*X*] shall submit a list of one or more persons whom [X] proposes to appoint as Divestiture Trustee to the Commission for approval. The proposal shall contain sufficient information for the Commission to verify that the proposed Trustee fulfils the requirements set out in paragraph 17 and shall include:
    (a) the full terms of the proposed mandate, which shall include all provisions necessary to enable the Trustee to fulfil its duties under these Commitments;
    (b) the outline of a work plan which describes how the Trustee intends to carry out its assigned tasks;
    (c) an indication whether the proposed Trustee is to act as both Monitoring Trustee and Divestiture Trustee or whether different trustees are proposed for the two functions.

Approval or rejection by the Commission

19. The Commission shall have the discretion to approve or reject the proposed Trustee(s) and to approve the proposed mandate subject to any modifications it deems necessary for

the Trustee to fulfil its obligations. If only one name is approved, [*X*] shall appoint or cause to be appointed, the individual or institution concerned as Trustee, in accordance with the mandate approved by the Commission. If more than one name is approved, [*X*] shall be free to choose the Trustee to be appointed from among the names approved. The Trustee shall be appointed within one week of the Commission's approval, in accordance with the mandate approved by the Commission.

New proposal by the Parties

20. If all the proposed Trustees are rejected, [*X*] shall submit the names of at least two more individuals or institutions within one week of being informed of the rejection, in accordance with the requirements and the procedure set out in paragraphs 16 and 19.

Trustee nominated by the Commission

21. If all further proposed Trustees are rejected by the Commission, the Commission shall nominate a Trustee, whom [*X*] shall appoint, or cause to be appointed, in accordance with a trustee mandate approved by the Commission.

II. Functions of the Trustee

22. The Trustee shall assume its specified duties in order to ensure compliance with the Commitments. The Commission may, on its own initiative or at the request of the Trustee or [*X*], give any orders or instructions to the Trustee in order to ensure compliance with the conditions and obligations attached to the Decision.

Duties and obligations of the Monitoring Trustee

23. The Monitoring Trustee shall:

(i) propose in its first report to the Commission a detailed work plan describing how it intends to monitor compliance with the obligations and conditions attached to the Decision.

(ii) oversee the on-going management of the Divestment Business with a view to ensuring its continued economic viability, marketability and competitiveness and monitor compliance by [*X*] with the conditions and obligations attached to the Decision. To that end the Monitoring Trustee shall:

(a) monitor the preservation of the economic viability, marketability and competitiveness of the Divestment Business, and the keeping separate of the Divestment Business from the business retained by the Parties, in accordance with paragraphs 5 and 6 of the Commitments;

(b) supervise the management of the Divestment Business as a distinct and saleable entity, in accordance with paragraph 7 of the Commitments;

(c) (i) in consultation with [*X*], determine all necessary measures to ensure that [*X*] does not after the effective date obtain any business secrets, know-how, commercial information, or any other information of a confidential or proprietary nature relating to the Divestment Business, in particular strive for the severing of the Divestment Business' participation in a central information technology network to the extent possible, without compromising the viability of the Divestment Business, and (ii) decide whether such information may be disclosed to [*X*] as the disclosure is reasonably necessary to allow [*X*] to carry out the divestiture or as the disclosure is required by law;

(d) monitor the splitting of assets and the allocation of Personnel between the Divestment Business and [*X*] or Affiliated Undertakings;

(iii) assume the other functions assigned to the Monitoring Trustee under the conditions and obligations attached to the Decision;

(iv) propose to [*X*] such measures as the Monitoring Trustee considers necessary to ensure [*X*]'s compliance with the conditions and obligations attached to the Decision, in particular the maintenance of the full economic viability, marketability or competitiveness of the Divestment Business, the holding separate of the Divestment Business and the non-disclosure of competitively sensitive information;

(v) review and assess potential purchasers as well as the progress of the divestiture process and verify that, dependent on the stage of the divestiture process, (a) potential purchasers receive sufficient information relating to the Divestment Business and the Personnel in particular by reviewing, if available, the data room documentation, the information memorandum and the due diligence process, and (b) potential purchasers are granted reasonable access to the Personnel;

(vi) provide to the Commission, sending [X] a non-confidential copy at the same time, a written report within 15 days after the end of every month. The report shall cover the operation and management of the Divestment Business so that the Commission can assess whether the business is held in a manner consistent with the Commitments and the progress of the divestiture process as well as potential purchasers. In addition to these reports, the Monitoring Trustee shall promptly report in writing to the Commission, sending [*X*] a non-confidential copy at the same time, if it concludes on reasonable grounds that [*X*] is failing to comply with these Commitments;

(vii) within one week after receipt of the documented proposal referred to in paragraph 15, submit to the Commission a reasoned opinion as to the suitability and independence of the proposed purchaser and the viability of the Divestment Business after the Sale and as to whether the Divestment Business is sold in a manner consistent with the conditions and obligations attached to the Decision, in particular, if relevant, whether the Sale of the Divestment Business without one or more Assets or not all of the Personnel affects the viability of the Divestment Business after the sale, taking account of the proposed purchaser.

Duties and obligations of the Divestiture Trustee

24. Within the Trustee Divestiture Period, the Divestiture Trustee shall sell at no minimum price the Divestment Business to a purchaser, provided that the Commission has approved both the purchaser and the final binding sale and purchase agreement in accordance with the procedure laid down in paragraph 15. The Divestiture Trustee shall include in the sale and purchase agreement such terms and conditions as it considers appropriate for an expedient sale in the Trustee Divestiture Period. In particular, the Divestiture Trustee may include in the sale and purchase agreement such customary representations and warranties and indemnities as are reasonably required to effect the sale. The Divestiture Trustee shall protect the legitimate financial interests of [*X*], subject to the Parties' unconditional obligation to divest at no minimum price in the Trustee Divestiture Period.

25. In the Trustee Divestiture Period (or otherwise at the Commission's request), the Divestiture Trustee shall provide the Commission with a comprehensive monthly report written in [*Please indicate the language of the procedure or a different language agreed with the Commission*] on the progress of the divestiture process. Such reports shall be submitted within 15 days after the end of every month with a simultaneous copy to the Monitoring Trustee and a non-confidential copy to the Parties.

III. Duties and obligations of the Parties

26. [*X*] shall provide and shall cause its advisors to provide the Trustee with all such co-operation, assistance and information as the Trustee may reasonably require to perform its tasks. The Trustee shall have full and complete access to any of [*X's*] or the Divestment Business' books, records, documents, management or other personnel, facilities, sites and technical information necessary for fulfilling its duties under the Commitments and [*X*] and the Divestment Business shall provide the Trustee upon request with copies of any document. [*X*] and the Divestment Business shall make available to the Trustee one or more offices on their premises and shall be available for meetings in order to provide the Trustee with all information necessary for the performance of its tasks.

27. [*X*] shall provide the Monitoring Trustee with all managerial and administrative support that it may reasonably request on behalf of the management of the Divestment Business. This shall include all administrative support functions relating to the Divestment Business

which are currently carried out at headquarters level. [*X*] shall provide and shall cause its advisors to provide the Monitoring Trustee, on request, with the information submitted to potential purchasers, in particular give the Monitoring Trustee access to the data room documentation and all other information granted to potential purchasers in the due diligence procedure. [*X*] shall inform the Monitoring Trustee on possible purchasers, submit a list of potential purchasers, and keep the Monitoring Trustee informed of all developments in the divestiture process.

28. [*X*] shall grant or procure Affiliated Undertakings to grant comprehensive powers of attorney, duly executed, to the Divestiture Trustee to effect the sale, the Closing and all actions and declarations which the Divestiture Trustee considers necessary or appropriate to achieve the sale and the Closing, including the appointment of advisors to assist with the sale process. Upon request of the Divestiture Trustee, [*X*] shall cause the documents required for effecting the sale and the Closing to be duly executed.

29. [X] shall indemnify the Trustee and its employees and agents (each an "***Indemnified Party***") and hold each Indemnified Party harmless against, and hereby agrees that an Indemnified Party shall have no liability to [*X*] for any liabilities arising out of the performance of the Trustee's duties under the Commitments, except to the extent that such liabilities result from the wilful default, recklessness, gross negligence or bad faith of the Trustee, its employees, agents or advisors.

30. At the expense of [*X*], the Trustee may appoint advisors (in particular for corporate finance or legal advice), subject to [X*'s*] approval (this approval not to be unreasonably withheld or delayed) if the Trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under the Mandate, provided that any fees and other expenses incurred by the Trustee are reasonable. Should [*X*] refuse to approve the advisors proposed by the Trustee the Commission may approve the appointment of such advisors instead, after having heard [X]. Only the Trustee shall be entitled to issue instructions to the advisors. Paragraph 29 shall apply mutatis mutandis. In the Trustee Divestiture Period, the Divestiture Trustee may use advisors who served [*X*] during the Divestiture Period if the Divestiture Trustee considers this in the best interest of an expedient sale.

IV. Replacement, discharge and reappointment of the Trustee

31. If the Trustee ceases to perform its functions under the Commitments or for any other good cause, including the exposure of the Trustee to a conflict of interest:

(a) the Commission may, after hearing the Trustee, require [*X*] to replace the Trustee; or

(b) [X], with the prior approval of the Commission, may replace the Trustee.

32. If the Trustee is removed according to paragraph 31, the Trustee may be required to continue in its function until a new Trustee is in place to whom the Trustee has effected a full hand over of all relevant information. The new Trustee shall be appointed in accordance with the procedure referred to in paragraphs 16-21.

33. Beside the removal according to paragraph 31, the Trustee shall cease to act as Trustee only after the Commission has discharged it from its duties after all the Commitments with which the Trustee has been entrusted have been implemented. However, the Commission may at any time require the reappointment of the Monitoring Trustee if it subsequently appears that the relevant remedies might not have been fully and properly implemented.

Section F. The Review Clause

34. The Commission may, where appropriate, in response to a request from [*X*] showing good cause and accompanied by a report from the Monitoring Trustee:

    (i) Grant an extension of the time periods foreseen in the Commitments, or

    (ii) Waive, modify or substitute, in exceptional circumstances, one or more of the undertakings in these Commitments.

    Where [*X*] seeks an extension of a time period, it shall submit a request to the Commission no later than one month before the expiry of that period, showing good cause. Only in exceptional circumstances shall [*X*] be entitled to request an extension within the last month of any period.

……
duly authorised for and on behalf of
[*Indicate the name of each of the Parties*]

SCHEDULE

1. The Divestment Business as operated to date has the following legal and functional structure: [*Describe the legal and functional structure of the Divestment Business, including the organisational chart*].

2. Following paragraph [4] of these Commitments, the Divestment Business includes, but is not limited to:

(a) the following main tangible assets: [*Indicate the essential tangible assets, e.g. xyz factory/warehouse/pipelines located at abc and the real estate/property on which the factory/warehouse is located; the R&D facilities*];

(b) the following main intangible assets: [*Indicate the main intangible assets. This should in particular include (i) the brand names and (ii) all other Intellectual Property Rights used in conducting the Divestment Business.*];

(c) the following main licences, permits and authorisations: [*Indicate the main licences, permits and authorisations*];

(d) the following main contracts, agreements, leases, commitments and understandings [*Indicate the main contracts, etc.*];

(e) the following customer, credit and other records: [*Indicate the main customer, credit and other records, according to further sector specific indications, where appropriate*];

(f) the following Personnel: [*Indicate the personnel to be transferred in general, including personnel providing essential functions for the Divestment Business, such as central R&D staff*];

(g) the following Key Personnel: [*Indicate the names and functions of the Key Personnel, including the Hold Separate Manager, where appropriate*]; and

(h) the arrangements for the supply with the following products or services by [*X*] or Affiliated Undertakings for a transitional period of up to [•] after Closing: [*Indicate the products or services to be provided for a transitional period in order to maintain the economic viability and competitiveness of the Divestment Business*].

3. The Divestment Business shall not include:

(i) …;

(ii) [*It is the responsibility of the Parties to indicate clearly what the Divestment Business will not encompass*].

TRUSTEE MANDATE

BETWEEN:

1. [*X*] [*Indicate a short name(s) of the Undertaking(s) Concerned that will divest its/their businesses*](hereafter [***X***]), a company organised under the laws of [*Indicate law of origin*], which has its registered seat at [*Indicate complete address*], represented by [*Indicate name and title of individual representing X for the Mandate*],

AND

2. [*Insert name, address, and, as the case may be, company details of the Trustee*], (the "***Trustee***").

[*X*] and the Trustee are hereafter referred to as the "***Mandate Parties***".

WHEREAS

In [*Indicate full case name and number*] and pursuant to [*Article 6(2)/Article 8(2)*] of Council Regulation (EEC) No. 4064/89 as amended (the "***Merger Regulation***"), [*X*] offered commitments (the "***Commitments***"), attached hereto as Annex 1, in order to enable the European Commission (the "***Commission***") to declare [*Description of the operation: e.g. the acquisition of…; the creation of a full-function joint venture between…*] compatible with the common market and the functioning of the EEA Agreement. The Commission approved the operation by its decision pursuant to [*Article 6(1)(b)/Article 8(2)*] of the Merger Regulation (the "***Decision***"), subject to full compliance with the conditions and obligations attached to the Decision (the " ***Conditions and Obligations***").

According to the Conditions and Obligations, [*X*] undertakes to divest the [*Indicate the business to be divested*] and, in the meantime, to preserve the economic viability, marketability and competitiveness of this business. Therefore, [*X*] undertakes to appoint a Monitoring Trustee for the monitoring of the hold separate obligations and of the divestiture procedure, and to appoint a Divestiture Trustee for the divestiture of the said business if [X] has not succeeded in divesting it during the First Divestiture Period. In accordance with the Conditions and Obligations, [*X*] hereby engages the Trustee and this agreement forms the mandate referred to in the Commitments (hereafter the "***Mandate***").

The appointment of the Trustee and the terms of this Mandate were approved by the Commission on [*Indicate date of approval letter*].

In case of doubt or conflict, this Mandate shall be interpreted in the light of (1) the Conditions and Obligations and the Decision, (2) the general framework of Community law, in particular in the light of the Merger Regulation, and (3) the Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98.

IT HAS BEEN AGREED AS FOLLOWS:

Section A. Definitions

Terms used in this Mandate shall have the meaning set out in Section 1 of the Commitments. For the purpose of this Mandate, the following terms shall have the following meaning:

Sale: the entering into a binding sale and purchase agreement for the selling of the Divestment Business to the Purchaser.

Trustee Partner Firms: the other firms belonging to the same organisation of individual partnerships and companies as the Trustee.

Trustee Team: The key persons responsible for carrying out the tasks assigned by the Mandate and identified in paragraph [*3*] below of the Mandate.

Work-Plan: the outline of the work-plan submitted to the Commission by the Trustee before the approval of the Trustee and attached hereto as Annex [•], a more detailed version of which will be prepared by the Trustee and submitted to the Commission in its first report.

Section B. Appointment of Trustee

1. [*X*] hereby appoints the Trustee to act as its exclusive trustee for fulfilling the tasks of a [Monitoring Trustee and/or Divestiture Trustee] according to the Conditions and Obligations and the Trustee hereby accepts the said appointment in accordance with the terms of this Mandate.

2. The appointment and this Mandate shall become effective on the date hereof except for the provisions specifically addressing the duties and obligations of the Divestiture Trustee which shall become effective with the beginning of the Trustee Divestiture Period.

3. The Trustee Team consists of the following key persons: [*Indicate name and title of each of the key persons (partners/leading persons)*]. The Trustee shall not replace the persons of the Trustee Team without prior approval of the Commission and [*X*].

Section C. General Duties and Obligations of the Trustee

4. The Trustee shall act on behalf of the Commission to ensure [*X's*] compliance with the Conditions and Obligations and assume the duties specified in the Conditions and Obligations for a [*Monitoring and/or Divestiture Trustee*]. The Trustee shall carry out the

duties under this Mandate in accordance with the Work-Plan as well as revisions of the Work-Plan, approved by the Commission. The Commission may, on its own initiative or at the request of the Trustee or [*X*], give any orders or instructions to the Trustee in order to ensure compliance with the Conditions and Obligations. [*X*] is not entitled to give instructions to the Trustee.

5. The Trustee shall propose to [*X*] such measures as the Trustee considers necessary to ensure [*X's*] compliance with the Commitments and/or the Mandate, and the Trustee shall propose necessary measures to the Commission in the event that [*X*] does not comply with the Trustee's proposals within the timeframe set by the Trustee.

Section D. Duties and Obligations of the Monitoring Trustee

Monitoring and Management of the Divestment Business

6. The Monitoring Trustee shall, in conformity with the Conditions and Obligations, oversee the on-going management of the Divestment Business with a view to ensuring its continued economic viability, marketability and competitiveness and monitor the compliance of [*X*] with the Conditions and Obligations. To that end, the Monitoring Trustee shall until Closing in particular:

(a) monitor (i) the preservation of the economic viability, marketability and competitiveness of the Divestment Business in accordance with good business practice, (ii) the minimisation, as far as possible, of any risk of loss of competitive potential of the Divestment Business; (iii) the not carrying out by [*X*] or Affiliated Undertakings of any act on its own authority that might have a significant adverse impact on the value, management or competitiveness of the Divestment Business or that might to alter the nature and scope of activity, or the industrial or commercial strategy or the investment policy of the Divestment Business; and (iv) the making available by [*X*] of sufficient resources for the Divestment Business to develop, based on the existing business plans and their continuation, and (v) the taking of all reasonable steps by [*X*], including appropriate incentive schemes (based on business practice), to encourage all Key Personnel to remain with the Divestment Business ;

(b) monitor (i) the holding separate of the Divestment Business from the businesses retained by [*X*] and Affiliated Undertakings, (ii) the absence of involvement of Key Employees of the Divestment Business – including the Hold Separate Manager – in any business retained and vice versa, and (iii) the absence of reporting of the Personnel of the Divestment Business to any individual outside the Divestment Business, except where permitted in the Commitments;

(c) seek to ensure that the Divestment Business is managed as a distinct and saleable entity separate from [*X*'s] or Affiliated Undertakings' businesses and

that the Hold Separate Manager manages the Divestment Business independently and in the best interest of the business and ensuring its continued economic viability, marketability and competitiveness as well as its independence from the businesses retained by the Parties;

[(d) *the following paragraph to be inserted in cases in which the Commitments foresee the voting of shares by the Monitoring Trustee and/or the replacement of member of the supervisory board/board of directors*: exercise [*X*'s] rights as shareholder in the Divestment Business (except for its rights for dividends that are due before Closing), with the aim of acting in the best interest of the business, determined on a stand-alone basis, as an independent financial investor, and with a view to fulfilling [*X's*] obligation under the Conditions and Obligations. Consequently, [*X*] grants a comprehensive and duly executed proxy to the Monitoring Trustee in Annex [•] for the exercise of the voting rights attached to [X's] shares in the Divestment Business. The Monitoring Trustee shall have the power to replace members of the supervisory board or non-executive directors of the board of directors of the Divestment Business, who have been appointed on behalf of [*X*]. Upon request of the Monitoring Trustee, [*X*] shall resign as a member of the boards or shall cause such members of the boards to resign. The representatives of the Monitoring Trustee to be appointed to the board shall be one or more persons of the Trustee Team. In the event that appointments outside these named individuals are envisaged the prior approval of the Commission is required;]

(e) monitor the splitting of assets and the allocation of Personnel between the Divestment Business and [*X*] or Affiliated Undertakings;

(f) (i) in consultation with [*X*], determine all necessary measures to ensure that [X] does not after the Effective Date obtain any business secrets, know-how, commercial information, or any other information of a confidential or proprietary nature relating to the Divestment Business, in particular strive for the severing of the Divestment Business' participation in a central information technology network to the extent possible, without compromising the viability of the Divestment Business, and (ii) decide whether such information may be disclosed to [*X*] as the disclosure is reasonably necessary to allow [*X*] to carry out the divestiture or as the disclosure is required by law.

<u>Monitoring of Divestiture</u>

7. Until the end of the First Divestiture Period, the Monitoring Trustee shall assist the Commission in reviewing the divestiture process and assessing proposed purchasers. Therefore the Monitoring Trustee shall during the First Divestiture Period:

(a) review and assess the progress of the divestiture process and potential purchasers;

(b) verify that, dependent on the stage of the divestiture process, (i) potential purchasers receive sufficient information relating to the Divestment Business and the Personnel, in particular by reviewing, if available, the data room documentation, the information memorandum and the due diligence process, and (ii) potential purchasers are granted reasonable access to the Personnel;

8. Once [*X*] has submitted to the Commission a proposal for a purchaser, the Trustee shall, within one week after receipt of the documented proposal by the Parties, submit to the Commission a reasoned opinion as to the suitability and independence of the proposed purchaser and the viability of the Divestment Business after the Sale and as to whether the Divestment Business is sold in a manner consistent with the Conditions and Obligations, in particular, if relevant, whether the Sale of the Divestment Business without one or more Assets or not all of the Personnel affects the viability of the Divestment Business after the Sale, taking account of the proposed purchaser.

Section E. - Duties and Obligations of the Divestiture Trustee

9. With the commencement of the Trustee Divestiture Period, [*X*] hereby gives the Trustee an exclusive mandate to sell the Divestment Business to a purchaser according to the provisions of this section of the Mandate and the Commitments.

10. The purchaser shall fulfil the Purchaser Requirements and both the purchaser and the final sale and purchase agreement shall be approved by the Commission in accordance with the procedure laid down in paragraph [15] of the Commitments.

11. The Divestiture Trustee shall sell the Divestment Business at no minimum price and at such terms and conditions as it considers appropriate for an expedient sale in the Trustee Divestiture Period. In particular, the Divestiture Trustee may include in the sale and purchase agreement such customary representations and warranties and indemnities as are reasonably required to effect the Sale. At the same time, the Divestiture Trustee shall protect the legitimate financial interests of [*X*], subject to the Parties' unconditional obligation to divest at no minimum price in the Trustee Divestiture Period.

12. [*X*] grants a comprehensive and duly executed power of attorney to the Divestiture Trustee in Annex [•] to effect the Sale of the Divestment Business, the Closing and all actions and declarations which the Trustee considers necessary or appropriate for achieving the Sale of the Divestment Business or the Closing, including the power to appoint advisors to assist with the sale process. The power of attorney shall include the authority to grant sub-powers of attorney to members of the Trustee Team. If necessary to accomplish the Sale, [*X*] shall grant the Divestiture Trustee further powers of attorney, duly executed, or cause the documents required for the effecting of the Sale and the Closing to be duly executed. Any power of attorney granted by [*X*], including any sub-powers of attorney granted pursuant to them, shall expire on the earlier of the termination of this Mandate or the discharge of the Trustee.

13. The Trustee shall comply with the Commission's instructions as regards any aspects of the conduct or conclusion of the sale, in particular in ending negotiations with any prospective purchaser, if the Commission notifies the Trustee and [*X*] of the Commission's determination that the negotiations are being conducted with an unacceptable purchaser.

Section F. - Reporting Obligations

14. Within 15 days of the end of each month or as otherwise agreed with the Commission, the Monitoring Trustee shall submit a written report to the Commission, sending [X] a non-confidential copy at the same time. The report shall cover the Monitoring Trustee's fulfilment of its obligations under the Mandate and the compliance of the Parties with the Conditions and Obligations. The reports shall cover in particular the following topics:

- Operational and financial performance of the Divestment Business in the relevant period;
- Any issues or problems which have arisen in the execution of the obligations as Monitoring Trustee, in particular any issues of non-compliance by [*X*] or the Divestment Business with the Conditions and Obligations;
- Monitoring of the preservation of the economic viability, marketability and competitiveness of the Divestment Business and of [X's] compliance with the hold-separate and ring-fencing obligations as well as monitoring of the splitting of assets and of the allocation of Personnel between the Divestment Business and the businesses retained by [*X*] or Affiliated Undertakings;
- Review and assessment of the progress of the divestiture process, including reporting on potential purchasers and all other information received from [*X*] regarding the divestiture;
- Any particular issues as set out in the Work-Plan;
- Estimated future timetable, including the date of next anticipated reporting;
- A proposal for a detailed Work-Plan in the first report as well as revisions in subsequent reports.

15. In the Trustee Divestiture Period, within 15 days after the end of every month, the Divestiture Trustee shall provide to the Commission, with a simultaneous copy to the Monitoring Trustee and a non-confidential copy to [*X*], a comprehensive report written in [*Indicate the language*] on the discharge of its obligations under the Mandate and the progress of the divestiture process, covering in particular the following information:

- List of potential purchasers and a preliminary assessment of each of them;
- State of negotiations with potential purchasers;

- Any issues or problems regarding the sale of the Divestment Business, including any issues and problems regarding the negotiation of the necessary agreement(s);
- Need for advisers for the sale of the Divestment Business and a list of advisers selected by the Trustee for this purpose;
- Any particular issues as set out in the Work-Plan;
- A proposal for a detailed Work-Plan in the first report as well as revisions in subsequent reports.

16. At any time, the Trustee will provide to the Commission, at its request (or on the Trustee's own initiative), a written or oral report on matters falling within the Trustee's Mandate. [*X*] shall receive simultaneously a non-confidential copy of such additional written reports and shall be informed promptly of the non-confidential content of any oral reports.

Section G. - Duties and Obligations of [*X*]

17. [*X*] shall provide and shall cause its advisors to provide the Trustee with all such co-operation, assistance and information as the Trustee may reasonably require to perform its tasks. The Trustee shall have full and complete access to any of [*X's*] or the Divestment Business' books, records, documents, management or other personnel, facilities, sites and technical information necessary for fulfilling its duties under the Mandate and [X] and the Divestment Business shall provide the Trustee upon request with copies of any document. [*X*] and the Divestment Business shall make available to the Trustee one or more offices on their premises and shall be available for meetings in order to provide the Trustee with all information necessary for the performance of its tasks.

18. [*X*] shall provide the Monitoring Trustee with all managerial and administrative support that it may reasonably request on behalf of the management of the Divestment Business. This shall include all administrative support functions relating to the Divestment Business which are currently carried out at headquarters level. [*X*] shall provide and shall cause its advisors to provide the Monitoring Trustee, on request, with access to the information submitted to potential purchasers, in particular to the data room documentation and all other information granted to potential purchasers in the due diligence procedure. [*X*] shall inform the Monitoring Trustee on possible purchasers, submit a list of potential purchasers, and keep the Monitoring Trustee informed of all developments in the divestiture process. Once a purchaser has been chosen, [*X*] shall submit the fully documented and reasoned proposal, including a copy of the final agreement(s), to the Monitoring Trustee and allow the Monitoring Trustee to have confidential contacts with the proposed purchaser in order for the Monitoring Trustee to determine whether or not, in its opinion, it meets the Purchaser Criteria.

19. At the expense of [*X*], the Trustee may appoint advisors (in particular for corporate finance or legal advice), subject to [X*'s*] approval (this approval not to be unreasonably withheld or delayed) if the Trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under the Mandate, provided that any fees and other expenses incurred by the Trustee are reasonable. Should [*X*] refuse to approve the advisors proposed by the Trustee, the Commission may, after having heard [X], approve the appointment of such advisors instead. Only the Trustee shall be entitled to issue instructions to the advisors. Paragraph 25 of this Mandate shall apply to the advisors mutatis mutandis. In the Trustee Divestiture Period, the Divestiture Trustee may use advisors who served [X] during the First Divestiture Period if the Divestiture Trustee considers this in the best interest of an expedient sale.

Section H. - Trustee Related Provisions

Conflict of Interests

20. The Trustee's, the Trustee Team's and the Trustee Partner Firms' current relationships with [*X*] and Affiliated Undertakings are disclosed in Annex [•] to this Mandate. On this basis, the Trustee confirms that, as of the date of this Mandate, the Trustee and each member of the Trustee Team is independent of [*X*] and Affiliated Undertakings and has no conflict of interest that impairs the Trustee's objectivity and independence in discharging its duties under the Mandate ("***Conflict of Interest***").

21. The Trustee undertakes not to create a Conflict of Interest during the term of the Mandate. The Trustee, members of the Trustee Team and the Trustee Partner Firms may therefore not during the term of this Mandate:

    (a) Have or accept any employment by or be or accept any appointment as Member of the Board or member of other management bodies of the Parties or Affiliated Undertakings other than appointments pertaining to the establishment and performance of the Mandate;

    (b) Have or accept any assignments or other business relationships with or financial interests in the Parties or Affiliated Undertakings that might lead to a Conflict of Interest. This affects neither assignments or other business relationships between the Trustee or Trustee Partner Firms and the Parties or Affiliated Undertakings nor investments by the Trustee or Trustee Partner Firms in the stock or securities of the Parties or Affiliated Undertakings if such assignments, business relationships or investments are in the normal course of business and are material neither to the Trustee or the Trustee Partner Firms nor to the undertaking concerned.

    Should the Trustee, the Trustee Partner Firms or members of the Trustee Team wish to undertake an assignment, business relationship or investment, such a person must seek the prior approval of the Commission. Should the Trustee become aware of a Conflict of

Interest, the Trustee shall promptly inform [*X*] and the Commission, of such Conflict of Interest. In the event that [*X*] becomes aware that the Trustee or the Trustee Partner Firms have or may have a Conflict of Interest, [*X*] shall promptly notify the Trustee and the Commission, of such Conflict of Interest. Where a Conflict of Interest occurs during the term of the Mandate the Trustee undertakes to resolve it immediately. In case the Conflict of Interest cannot be resolved or is not resolved by the Trustee in a timely manner, the Mandate may be terminated in accordance with paragraph 30 below.

22. *[It is up to the Mandate Parties to insert suitable provisions regarding conflict of interests of the Trustee and the Trustee Partner Firms with (potential) purchasers.*]

23. The Trustee undertakes that, during the term of the Mandate and for a period of one year following termination of the Mandate, members of the Trustee Team shall not provide services to the Parties or Affiliated Undertakings without first obtaining the Commission's prior approval. Moreover, the Trustee undertakes to establish measures to ensure the independence and integrity of the Trustee Team and the Trustee's employees and agents directly assigned to the Trustee Team ("***Assigned Persons***") during the term of the Mandate and for a period of one year following termination of the Mandate, from any undue influence that might interfere with or in any way compromise the Trustee Team in the performance of its duties under the Mandate. In particular:

    (a) Access to confidential information shall be limited to the Trustee Team and Assigned Persons; and

    (b) The Trustee Team and Assigned Persons shall be prohibited from communicating any information relating to this Mandate to any other of the Trustee's personnel, except for information of a general nature (e.g. Trustee's appointment, fees, etc.), and except for information whose disclosure is required by law.

Remuneration

24. [*It is up to the Mandate Parties to agree on a suitable fee structure. As set out in the Standard Commitments Text, the Trustee shall be remunerated in such a way that it does not impede its independence and effectiveness in fulfilling the Mandate. Regarding the Divestiture Trustee, the Commission is in favour of fee structures that, at least to a significant part, are contingent on the Divestiture Trustee's accomplishing a timely divestiture. In particular, if the remuneration package includes a success premium linked to the final sale value of the Divestment Business, the fee should also be linked to a divestiture within the Trustee Divestiture Period as specified in the Commitments. It should be noted that the fee structure – as well as the entire Mandate - is subject to the Commission's approval.*]

Indemnity

25. [*X*] shall indemnify the Trustee and its employees and agents (each an "***Indemnified Party***") and hold each Indemnified Party harmless against, and hereby agrees that an

Indemnified Party shall have no liability to [*X*] for any liabilities arising out of the performance of the Mandate, except to the extent that such liabilities result from the wilful default, recklessness, gross negligence or bad faith of the Trustee, its employees, agents or advisors.

Confidentiality

26. [*It is up to the Mandate Parties to agree a suitable confidentiality provision prohibiting the use, or disclosure to anyone other than the Commission of any sensitive or proprietary information gained as a result of performing the Trustee role. As a matter of course, the Mandate cannot limit the disclosure of information by the Trustee vis-à-vis the Commission. However, the Trustee must not disclose certain information gained as a result of the Trustee role to the Parties. This in particular applies to information gained on the Divestment Business to which the ring-fencing provisions apply and to information received from (potential) purchasers of the Divestment Business.]*

Section I. - Termination of the Mandate

27. The Mandate may only be terminated under the conditions set out in paragraphs 28-31.

Regular Termination of the Mandate

28. The Mandate shall automatically terminate if the Commission approves the discharge in writing of the Trustee from its obligations under this Mandate. The approval of the discharge of the Trustee may be requested after the Trustee has completed the performance of its obligations under the Mandate.

29. The Mandate Parties acknowledge that the Commission may at any time request the reappointment of the Trustee by [*X*] if it subsequently appears that the Conditions and Obligations might not have been fully and properly implemented. The Trustee hereby accepts such a reappointment in accordance with the terms and conditions of this Mandate.

Termination of the Mandate before the Discharge

30. [*X*] may only terminate the Mandate before the discharge of the Trustee in accordance with paragraph 31 of the Commitments. The Trustee may only terminate the Mandate for good cause by giving written notice to [*X*], with a copy to the Commission. The Trustee shall continue carrying out its functions under the Mandate until it has effected a full handover of all relevant information to a new trustee appointed by [X] pursuant to the procedure laid down in the Commitments.

Surviving Provisions

31. Paragraphs [*23*] - [26] shall survive the termination of the Mandate.

Section J. – Additional Provisions

Amendments to the Mandate

32. The Mandate may only be amended in writing and with the Commission's prior approval. The Mandate Parties agree to amend this Mandate if required by the Commission, after consultation with the Mandate Parties, in order to secure compliance with the Commitments, in particular if the amendment is necessary in order to adapt the Mandate to amendments of the Commitments under the Review Clause.

Governing Law and Dispute Resolution

33. This Mandate shall be governed by, and construed in accordance with, the laws of [*Indicate the state by whose laws the Mandate shall be governed*].

34. In the event that a dispute arises concerning the Mandate Parties' obligations under the Mandate, such dispute shall be submitted to the non-exclusive jurisdiction of the [*Indicate the state whose courts shall have jurisdiction for disputes regarding the Mandate*] courts.

Severability

35. [*It is up to the Mandate Parties to agree on a suitable provision on severability, taking into account the rules under the governing law*].

Notices

36. All notices sent under this Mandate shall be made in writing and be deemed to have been duly given if served by personal delivery upon the party for whom it is intended or the Commission or delivered by registered or certified mail; return receipt requested, or if sent by fax, upon receipt of oral confirmation that such transmission has been received, to the person at the address set forth below :

If to [*X*], addressed as follows :

[•]

If to the Trustee, addressed as follows :

[•]

If to the Commission, addressed as follows :

To the attention of the Director
Director of Directorate B
European Commission
Directorate General for Competition
70 rue Joseph II / Jozef II-straat 70
B-1000 Brussels
Ref: Case No COMP/M……
Fax : + 32 2 296 43 01

Or to any such other address or person as the relevant party may from time to time advise by notice in writing given pursuant to this section. The date of receipt of any such notice, request, consent, agreement or approval shall be deemed to be the date of delivery thereof.

[*Indicate place and date*]

_____

By:
Title:

_____

By:
Title:

Annex [•]

Power of Attorney, duly executed, for the exercise of [X's] rights as shareholder (pursuant to paragraph 6 (d) of the Mandate)

Annex [•]

Power of Attorney, duly executed, for the Divestiture Trustee (pursuant to paragraph 12 of the Mandate)

Annex [•]

Disclosure of current relationships between the Trustee, the Trustee Team and the Trustees Partner Firm and [X] and Affiliated Undertakings.

ANNEX 15

SIMPLIFIED PROCEDURE NOTICE

Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No. 139/2004
(not yet published in the O.J.)

COMMISSION NOTICE

on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004

(Text with EEA relevance)

I. INTRODUCTION

1. This Notice sets out a simplified procedure under which the Commission intends to treat certain concentrations pursuant to Council Regulation (EC) No 139/2004 of 20 January 2004, on the control of concentrations between undertakings[1] (the 'EC Merger Regulation') on the basis that they do not raise competition concerns. This Notice replaces the Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EEC) No 4064/89.[2] The Commission's experience gained in applying Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings[3], as amended by Regulation (EC) No 1310/97[4], has shown that certain categories of notified concentrations are normally cleared without having raised any substantive doubts, provided that there were no special circumstances.

2. The purpose of this Notice is to set out the conditions under which the Commission usually adopts a short-form decision declaring a concentration compatible with the common market pursuant to the simplified procedure and to provide guidance in respect of the procedure itself. When all necessary conditions set forth at point 5 of this Notice are met and provided there are no special circumstances, the Commission adopts a short-form clearance decision within 25 working days from the date of notification, pursuant to Article 6(1)(b) of the EC Merger Regulation.[5]

3. However, if the safeguards or exclusions set forth at points 6 to 11 of this Notice are applicable, the Commission may launch an investigation and/or adopt a full decision under the EC Merger Regulation.

4. By following the procedure outlined in the following sections, the Commission aims to make Community merger control more focused and effective.

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1 OJ L 24, 29.1.2004 p.1.

2 OJ C 217, 29.07.2000, p. 32.

3 OJ L 395, 30.12.1989 p. 1; corrected version OJ L 257, 21.9.1990, p. 13.

4 OJ L 180, 9.7.1997, p. 1; corrected version OJ L 40, 13.2.1998, p. 17.

5 The notification requirements are set out in Annex I and II of Council Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings ('The EC Merger Implementing Regulation').

II. CATEGORIES OF CONCENTRATIONS SUITABLE FOR TREATMENT UNDER THE SIMPLIFIED PROCEDURE

Eligible concentrations

5. The Commission will apply the simplified procedure to the following categories of concentrations:

   a. two or more undertakings acquire joint control of a joint venture, provided that the joint venture has no, or negligible, actual or foreseen activities within the territory of the European Economic Area (EEA). Such cases occur where:

      (i) the turnover[6] of the joint venture and/or the turnover of the contributed activities[7] is less than EUR 100 million in the EEA territory; and

      (ii) the total value of assets[8] transferred to the joint venture is less than EUR 100 million in the EEA territory[9]; or

   b. two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking, provided that none of the parties to the concentration are engaged in business activities in the same product and geographical market, or in a product market which is upstream or downstream of a product market in which any other party to the concentration is engaged[10]; or

   c. two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking:

      (i) and two or more of the parties to the concentration are engaged in business activities in the same product and geographical market (horizontal relationships) provided that their combined market share is less than 15%; or

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6 The turnover of the joint venture should be determined according to the most recent audited accounts of the parent companies, or the joint venture itself, depending upon the availability of separate accounts for the resources combined in the joint venture.

7 The expression "and/or" refers to the variety of situations covered; for example:
- in the case of a joint acquisition of a target company, the turnover to be taken into account is the turnover of this target (the joint venture),
- in the case of the creation of a joint venture to which the parent companies contribute their activities, the turnover to be taken into account is that of the contributed activities,
- in the case of entry of a new controlling party into an existing joint venture, the turnover of the joint venture and the turnover of the activities contributed by the new parent company (if any) must be taken into account.

8 The total value of assets of the joint venture should be determined according to the last prepared and approved balance sheet of each parent company. The term "assets" includes: (1) all tangible and intangible assets that will be transferred to the joint venture (examples of tangible assets include production plants, wholesale or retail outlets, and inventory of goods; examples of intangible assets include intellectual property, goodwill, etc.), and (2) any amount of credit or any obligations of the joint venture which any parent company of the joint venture has agreed to extend or guarantee.

9 Where the assets transferred generate turnover, then neither the value of the assets nor that of the turnover may exceed EUR 100 million.

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

(ii) one or more of the parties to the concentration are engaged in business activities in a product market which is upstream or downstream of a product market in which any other party to the concentration is engaged (vertical relationships)[11], provided that none of their individual or combined market shares is at either level 25% or more[12]; or

d. a party is to acquire sole control of an undertaking over which it already has joint control.

Safeguards and exclusions

6. In assessing whether a concentration falls into one of the categories referred to in point 5 above, the Commission will ensure that all relevant circumstances are established with sufficient clarity. Given that market definitions are likely to be a key element in this assessment, the parties should provide information on all plausible alternative market definitions during the pre-notification phase (see point 15). Notifying parties are responsible for describing all alternative relevant product and geographic markets on which the notified concentration could have an impact and for providing data and information relating to the definition of such markets[13]. The Commission retains the discretion to take the ultimate decision on market definition, basing its decision on an analysis of the facts of the case. Where it is difficult to define the relevant markets or to determine the parties' market shares, the Commission will not apply the simplified procedure. In addition, to the extent that concentrations involve novel legal issues of a general interest, the Commission would normally abstain from adopting short-form decisions, and would normally revert to a normal first phase merger procedure.

7. While it can normally be assumed that concentrations falling into the above categories will not raise serious doubts as to their compatibility with the common market, there may nonetheless be certain situations, which exceptionally require a closer investigation and/or a full decision. In such cases, the Commission may revert to a normal first phase merger procedure.

8. The following are indicative examples of types of cases which may be excluded from the simplified procedure. Certain types of concentrations may increase the parties' market power, for instance by combining technological, financial or other resources, even if the parties to the concentration do not operate in the same market. Concentrations where at least two parties to the concentration are present in closely

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[11] See footnote 7.

[12] This means that only concentrations, which do not lead to affected markets, as defined in Section 6 III of Form CO, fall into this category. The thresholds for horizontal and vertical relationships apply to market shares both at national and at EEA levels and to any plausible alternative product market definition that may have to be considered in a given case. It is important that the underlying market definitions set out in the notification are precise enough to justify the assessment that these thresholds are not met, and that all plausible alternative market definitions are mentioned (including geographic markets narrower than national).

[13] As with all other notifications, the Commission may revoke the short-form decision if it is based on incorrect information for which one of the undertakings concerned is responsible (Article 6, paragraph 3(a), of the EC Merger Regulation).

related neighbouring markets[14] may also be unsuitable for the simplified procedure, in particular, where one or more of the parties to the concentration holds individually a market share of 25% or more in any product market in which there is no horizontal or vertical relationship between the parties but which is a neighbouring market to a market where another party is active. In other cases, it may not be possible to determine the parties' precise market shares. This is often the case when the parties operate in new or little developed markets. Concentrations in markets with high entry barriers, with a high degree of concentration[15] or other known competition problems may also be unsuitable.

9. The Commission's experience to date has shown that a change from joint to sole control may exceptionally require closer investigation and/or a full decision. A particular competition concern could arise in circumstances where the former joint venture is integrated into the group or network of its remaining single controlling shareholder, whereby the disciplining constraints exercised by the potentially diverging incentives of the different controlling shareholders are removed and its strategic market position could be strengthened. For example, in a scenario in which undertaking A and undertaking B jointly control a joint venture C, a concentration pursuant to which A acquires sole control of C may give rise to competition concerns in circumstances in which C is a direct competitor of A and where C and A will hold a substantial combined market position and where this removes a degree of independence previously held by C.[16] In cases where such scenarios require a closer analysis, the Commission may revert to a normal first phase merger procedure.[17]

10. The Commission may also revert to a normal first phase merger procedure where neither the Commission nor the competent authorities of Member States have reviewed the prior acquisition of joint control of the joint venture in question.

11. Furthermore, the Commission may revert to a normal first phase merger procedure where an issue of coordination as referred to in Article 2(4) of the Merger Regulation arises.

12. If a Member State expresses substantiated concerns about the notified concentration within 15 working days of receipt of the copy of the notification, or if a third party expresses substantiated concerns within the time-limit laid down for such comments, the Commission will adopt a full decision. The time-limits set out in Article 10(1) of the EC Merger Regulation apply.

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[14] Product markets are closely related neighbouring markets when the products are complementary to each other or when they belong to a range of products that is generally purchased by the same set of customers for the same end use.

[15] See Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, points 14-21, OJ C31 p.5, 5.2.2004.

[16] Case No. IV/M.1328 *KLM/Martinair, XXIXth Report on Competition Policy 1999 – SEC(2000) 720 FINAL, points 165-166.*

[17] Case No COMP/M.2908 *Deutsche Post/DHL (II) 18.09.2002.*

Referral requests

13. The simplified procedure will not be applied if a Member State requests the referral of a notified concentration pursuant to Article 9 of the EC Merger Regulation or if the Commission accepts a request from one or more Member States for referral of a notified concentration pursuant to Article 22 of the EC Merger Regulation.

Pre-notification referrals at the request of the notifying parties

14. Subject to the safeguards and exclusions of this Notice, the Commission may apply the simplified procedure to concentrations where:(i) following a reasoned submission pursuant to Article 4(4) of the EC Merger Regulation, the Commission decides not to refer the case to a Member State; or (ii) following a reasoned submission pursuant to Article 4(5) of the EC Merger Regulation the case is referred to the Commission.

III. PROCEDURAL PROVISIONS

Pre-notification contacts

15. The Commission has found pre-notification contacts between notifying parties and the Commission beneficial even in seemingly unproblematic cases.[18] The Commission's experience of the simplified procedure has shown that candidate cases for simplified procedure may raise complex issues for instance, of market definition (see point 6 above) which should preferably be resolved during pre-notification. Such contacts allow the Commission and the notifying parties to determine the precise amount of information to be provided in a notification. Pre-notification contacts should be initiated at least two weeks prior to the expected date of notification. Notifying parties are therefore advised to engage in pre-notification contacts, particularly where they request the Commission to waive full-form notification in accordance with Article 3(1) of the EC Merger Implementing Regulation on the grounds that the operation to be notified will not raise competition concerns.

Publication of the fact of notification

16. The information to be published in the *Official Journal of the European Union* upon receipt of a notification[19] will include: the names of the parties to the concentration, their country of origin, the nature of the concentration and the economic sectors involved, as well as an indication that, on the basis of the information provided by the notifying party, the concentration may qualify for a simplified procedure. Interested parties will then have the opportunity to submit observations, in particular on circumstances which might require an investigation.

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[18] See DG Competition Best Practices on the conduct of EC merger control proceedings available at: http://europa.eu.int/comm/competition/mergers/legislation/regulation/best_practices.pdf

[19] Article 4, paragraph 3, of the EC Merger Regulation.

Short-form decision

17. If the Commission is satisfied that the concentration fulfils the criteria for the simplified procedure (see point 5 above), it will normally issue a short-form decision. This includes appropriate cases not giving rise to any competition concerns where it receives a full form notification. The concentration will thus be declared compatible with the common market, within 25 working days from the date of notification, pursuant to Article 10(1) and (6) of the EC Merger Regulation. The Commission will endeavour to issue a short-form decision as soon as practicable following expiry of the 15 working day period during which Member States may request referral of a notified concentration pursuant to Article 9 of the EC Merger Regulation. However, in the period leading up to the 25 working day deadline, the option of reverting to a normal first phase merger procedure and thus launching investigations and/or adopting a full decision remains open to the Commission, should it judge such action appropriate in the case in question.

Publication of the short-form decision

18. The Commission will publish a notice of the fact of the decision in the *Official Journal of the European Union* as it does for full clearance decisions. The public version of the decision will be made available on the DG Competition's Internet website for a limited period. The short-form decision will contain the information about the notified concentration published in the *Official Journal* at the time of notification (names of the parties, their country of origin, nature of the concentration and economic sectors concerned) and a statement in the decision that the concentration is declared compatible with the common market because it falls within one or more of the categories described in the Notice on simplified procedure, with the applicable category(ies) being explicitly identified.

IV. ANCILLARY RESTRICTIONS

19. The simplified procedure is not suited to cases in which the undertakings concerned request an express assessment of restrictions which are directly related to, and necessary for, the implementation of the concentration.

ANNEX 16

CASE REFERRAL NOTICE

Commission Notice on case referral in respect of concentrations
(not yet published in the O.J.)

Commission Notice on Case Referral in respect of concentrations

Only the text published in the Official Journal is authentic

(Text with EEA relevance)

TABLE OF CONTENTS

1. The purpose of this Notice is to describe in a general way the rationale underlying the case referral system in Articles 4(4), 4(5), 9 and 22 of the Council Regulation (EC) No 139/2004 of 20 January 2004[1] (hereafter "the Merger Regulation"), including the recent changes made to the system, to catalogue the legal criteria that must be fulfilled in order for referrals to be possible, and to set out the factors which may be taken into consideration when referrals are decided upon. The Notice also provides practical guidance regarding the mechanics of the referral system, in particular regarding the pre-notification referral mechanism provided for in Article 4(4) and (5) of the Regulation. The guidance provided in this notice applies, *mutatis mutandis*, to the referral rules contained in the EEA Agreement[2].

I. INTRODUCTION

2. Community jurisdiction in the field of merger control is defined by the application of the turnover-related criteria contained in Articles 1(2) and 1(3)[3] of the Merger Regulation. When dealing with concentrations, the Commission and Member States do not have concurrent jurisdiction. Rather, the Merger Regulation establishes a clear division of competence. Concentrations with a "Community dimension", i.e. those above the turnover thresholds in Article 1 of the Merger Regulation, fall within the exclusive jurisdiction of the Commission; Member States are precluded from applying national competition law to such concentrations by virtue of Article 21 of the Merger Regulation. Concentrations falling below the thresholds remain within the competence of the Member States; the Commission has no jurisdiction to deal with them under the Merger Regulation.

3. Determining jurisdiction exclusively by reference to fixed turnover-related criteria provides legal certainty for merging companies. While the financial criteria generally serve as effective proxies for the category of transactions for which the Commission is the more appropriate authority, Council Regulation 4064/89 complemented this "bright-line" jurisdictional scheme with a possibility for cases to be re-attributed by the Commission to Member States and vice versa, upon request and provided certain criteria are fulfilled.

4. When the Merger Regulation was first introduced, it was envisaged by the Council and Commission that case referrals would only be resorted to in "exceptional circumstances" and where "the interests in respect of competition of the Member State concerned could not be adequately protected in any other way"[4]. There have, however, been a number of developments since the adoption

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1 O.J. 2004, L 24. This Regulation has recast Council Regulation (EEC) n° 4064/89 of 21 December 1989.

2 See EEA Joint Committee Decision No 78/2004 of 4 June 2004

3 The jurisdictional criteria set out in Article 1(2) of Council Regulation (EEC) No. 4064/89 were supplemented in 1997 [Council Regulation 1310/97] by a more elaborate set of criteria designed to bring within the Regulation's scope transactions not covered by Article 1(2) but which nonetheless have a significant cross-border impact.

4 See the Notes on Council Regulation (EEC) 4064/89 ["Merger Control in the European union", European Commission, Brussels-Luxembourg, 1998, at p. 54]. See also *Philips v The*

of the Merger Regulation. First, merger control laws have been introduced in almost all Member States. Second, the Commission has exercised its discretion to refer a number of cases to Member States pursuant to Article 9 in circumstances where it was felt that the Member State in question was in a better position to carry out the investigation than the Commission[5]. Likewise, in a number of cases[6], several Member States decided to make a joint referral of a case pursuant to Article 22 in circumstances where it was felt that the Commission was the authority in a better position to carry out the investigation[7]. Third, there has been an increase in the number of transactions not meeting the thresholds in Article 1 of the Merger Regulation and requiring to be filed in multiple EU Member State jurisdictions, a trend which is likely to continue in line with the EU's growing membership. Many of these transactions affect competition beyond the territories of individual Member States[8].

5. The revisions made to the referral system in the Merger Regulation were designed to facilitate the re-attribution of cases between the Commission and Member States, consistent with the principle of subsidiarity, so that the more appropriate authority or authorities for carrying out a particular merger investigation should in principle deal with the case. At the same time, the revisions were intended to preserve the basic features of the Community merger control system introduced in 1989, in particular the provision of a "one stop shop" for the competition scrutiny of mergers with a cross-border impact and an alternative to multiple merger control notifications within the EU[9]. Such multiple filings often entail considerable cost for competition authorities and businesses alike.

6. The case re-attribution system now provides that a referral may also be triggered before a formal filing has been made in any EU jurisdiction, thereby affording merging companies the possibility of ascertaining, at as early as possible a stage, where jurisdiction for scrutiny of their transaction will ultimately lie. Such pre-notification referrals have the advantage of alleviating the additional cost, notably in terms of time delay, associated with post-filing referral.

7. The revisions made to the referral system in Council Regulation EC No. 139/2004 were motivated by a desire that it should operate as a jurisdictional mechanism which is flexible[10], but which at the same time ensures effective protection of

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Commission Case T-119/02 of 3 April 2003 [2003] ECR II-1433 (Case M.2621 *SEB/Moulinex*) at para. 354.

5 It is a fact that some concentrations of Community dimension affect competition in national or sub-national markets within one or more Member States.

6 M.2698 *Promatech/Sulzer*; M.2738 *GE/Unison*; M.3136 *GE/AGFA*.

7 In the same vein, Member States' competition authorities, in the context of the European Competition Authorities' association, have issued a recommendation designed to provide guidance as to the principles upon which national competition authorities should deal with cases eligible for joint referrals under Article 22 of the Merger Regulation - *Principles on the application, by National Competition Authorities within the ECA network, of Article 22 of the EC Merger Regulation*.

8 While the introduction of Article 1(3) in 1997 has brought some such cases under the jurisdiction of the Merger Regulation, many are unaffected. See para. 21 *et seq* of the Commission's Green Paper of 11 December 2001 [COM (2001)745 final]

9 See Recitals 11, 12 and 14 to the Merger Regulation.

10 See Recital 11 to the Merger Regulation.

competition and limits the scope for "forum shopping" to the greatest extent possible. However, having regard in particular to the importance of legal certainty, it should be stressed that referrals remain a derogation from the general rules which determine jurisdiction based upon objectively-determinable turnover thresholds. Moreover, the Commission and Member States retain a considerable margin of discretion in deciding whether to refer cases falling within their "original jurisdiction", or whether to accept to deal with cases not falling within their "original jurisdiction", pursuant to Articles 4(4), 4(5), 9(2)(a) and 22[11]. To that extent, the current Notice is intended to provide no more than general guidance regarding the appropriateness of particular cases or categories of cases for referral.

II. REFERRAL OF CASES

Guiding principles

8. The system of merger control established by the Merger Regulation, including the mechanism for re-attributing cases between the Commission and Member States contained therein, is consistent with the principle of subsidiarity enshrined in the EC Treaty[12]. Decisions taken with regard to the referral of cases should accordingly take due account of all aspects of the application of the principle of subsidiarity in this context, in particular the suitability of a concentration being examined by the authority more appropriate for carrying out the investigation, the benefits inherent in a "one-stop-shop" system, and the importance of legal certainty with regard to jurisdiction[13]. These factors are inter-linked and the respective weight placed upon each of them will depend upon the specificities of a particular case. Above all, in considering whether or not to exercise their discretion to make or accede to a referral, the Commission and Member States should bear in mind the need to ensure effective protection of competition in all markets affected by the transaction[14].

More appropriate authority

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11 See, however, *infra*, footnote 14. It should moreover be noted that, pursuant to Article 4(5), the Commission has no discretion as to whether or not to accept a case not falling within its original jurisdiction.

12 See Article 5 EC Treaty

13 See Recitals 11 and 14 to the Merger Regulation.

14 See Article 9(8) of the Merger Regulation; see also *Philips v The Commission* (para. 343) where the CFI states that "..although the first sub-paragraph of Article 9(3) of Regulation No. 4064/89 confers on the Commission broad discretion as to whether or not to refer a concentration, it cannot decide to make such a referral if, when the Member State's request for referral is examined, it is clear, on the basis of a body of precise and coherent evidence, that such a referral cannot safeguard effective competition on the relevant market."; see also T-346/02 and T-347/02 *Cableuropa SA v The Commission* of 30 September 2003 (para. 215). Circumstances relevant for the purpose of the Commission assessment include, *inter alia*, the fact that a Member State: i) has specific laws for the control of concentrations on competition grounds and specialised bodies to ensure that these laws are implemented under the supervision of the national courts; ii) has accurately identified the competition concerns raised by the concentration on the relevant markets in that Member State (see paras. 346-347 of *Philips v Commission*, cited above).

9. In principle, jurisdiction should only be re-attributed to another competition agency in circumstances where the latter is the more appropriate for dealing with a merger, having regard to the specific characteristics of the case as well as the tools and expertise available to the agency. Particular regard should be had to the likely locus of any impact on competition resulting from the merger. Regard may also be had to the implications, in terms of administrative effort, of any contemplated referral[15].

10. The case for re-attributing jurisdiction is likely to be more compelling where it appears that a particular transaction may have a significant impact on competition and thus may deserve careful scrutiny.

One-stop-shop

11. Decisions on the referral of cases should also have regard to the benefits inherent in a "one-stop-shop", which is at the core of the Merger Regulation[16]. The provision of a one-stop-shop is beneficial to competition authorities and businesses alike. The handling of a merger by a single competition agency normally increases administrative efficiency, avoiding duplication and fragmentation of enforcement effort as well as potentially incoherent treatment (regarding investigation, assessment and possible remedies) by multiple authorities. It normally also brings advantages to businesses, in particular to merging firms, by reducing the costs and burdens arising from multiple filing obligations and by eliminating the risk of conflicting decisions resulting from the concurrent assessment of the same transaction by a number of competition authorities under diverse legal regimes.

12. Fragmentation of cases through referral should therefore be avoided where possible[17], unless it appears that multiple authorities would be in a better position to ensure that competition in all markets affected by the transaction is effectively protected. Accordingly, while partial referrals are possible under Articles 4(4) and 9, it would normally be appropriate for the whole of a case (or at least all connected parts thereof) to be dealt with by a single authority[18].

Legal certainty

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15 This may involve consideration of the relative cost, time delay, legal uncertainty and the risk of conflicting assessment which may be associated with the investigation, or a part of the investigation, being carried out by multiple authorities.

16 See Recital 11 of the Merger Regulation.

17 The CFI in *Philips v The Commission* took the view, *obiter dictum*, that "fragmentation" of cases, while possible as a result of the application of Article 9, is "undesirable in view of the 'one-stop-shop' principle on which Regulation 4064/89 is based". Moreover, the CFI, while recognising that the risk of "inconsistent, or even irreconcilable" decisions by the Commission and Member States" is inherent in the referral system established by Article 9", made it clear that this is not, in its view, desirable. (See paras. 350 and 380).

18 This is consistent with the Commission's decision in cases M.2389 *Shell/DEA* and M.2533 *BP/E.ON* to refer to Germany all of the markets for downstream oil products. The Commission retained the parts of the cases involving upstream markets. Likewise, in M.2706 *P&O Princess/Carnival*, the Commission exercised its discretion not to refer a part of the case to the UK, because it wished to avoid a fragmentation of the case (See Commission press release of 11/04/2002, IP/02/552)

13. Due account should also be taken of the importance of legal certainty regarding jurisdiction over a particular concentration, from the perspective of all concerned[19]. Accordingly, referral should normally only be made when there is a compelling reason for departing from "original jurisdiction" over the case in question, particularly at the post-notification stage. Similarly, if a referral has been made prior to notification, a post-notification referral in the same case should be avoided to the greatest extent possible[20].

14. The importance of legal certainty should also be borne in mind with regard to the legal criteria for referral, and particularly – given the tight deadlines - at the pre-notification stage. Accordingly, pre-filing referrals should in principle be confined to those cases where it is relatively straightforward to establish, from the outset, the scope of the geographic market and/or the existence of a possible competitive impact, so as to be able to promptly decide upon such requests

Case referrals: legal requirements and other factors to be considered

Pre-notification referrals

15. The system of pre-notification referrals is triggered by a reasoned submission lodged by the parties to the concentration. When contemplating such a request, the parties to the concentration are required, first, to verify whether the relevant legal requirements set out in the Merger Regulation are fulfilled, and second, whether a pre-notification referral would be consistent with the guiding principles outlined above.

Referral of cases by the Commission to Member States under Article 4(4)

Legal requirements

16. In order for a referral to be made by the Commission to one or more Member States pursuant to Articles 4(4), two legal requirements must be fulfilled. There must:

    i) first, be indications *that the concentration may significantly affect competition* in a market/s, and

    ii) second, the market/s in question must be within a Member State and *present all the characteristics of a distinct market*.

17. As regards the *first criterion*, the requesting parties are in essence required to demonstrate that the transaction is liable to have a potential impact on competition on a distinct market in a Member State, which may prove to be significant, thus deserving close scrutiny. Such indications may be no more than preliminary in nature, and would be without prejudice to the outcome of the investigation. While

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[19] See Recital 11 of the Merger Regulation.

[20] See Recital 14 to the Merger Regulation. This is of course subject to the parties having made a full and honest disclosure of all relevant facts in their request for a pre-filing referral.

the parties are not required to demonstrate that the effect on competition is likely to be an adverse one[21], they should point to indicators which are generally suggestive of the existence of some competitive effects stemming from the transaction[22].

18. As regards the *second criterion*, the requesting parties are required to show that a geographic market/s in which competition is affected by the transaction in the manner just described is/are national, or narrower than national in scope[23].

Other factors to be considered

19. Other than verification of the legal requirements, in order to anticipate to the greatest extent possible the likely outcome of a referral request, merging parties contemplating a request should also consider whether referral of the case is likely to be considered appropriate. This will involve an examination of the application of the guiding principles referred to above, and in particular whether the competition authority or authorities to which they are contemplating requesting the referral of the case is the most appropriate authority for dealing with the case. To this end, consideration should be given in turn both to the likely locus of the competitive effects of the transaction and to how appropriate the national competition authority (NCA) would be for scrutinising the operation.

20. Concentrations with a Community dimension which are likely to affect competition in markets that have a national or narrower than national scope, and which effects are likely to be confined to, or have their main economic impact in, a single Member State[24], are the most appropriate candidate cases for referral to that Member State. This applies in particular to cases where the impact would occur on a distinct market which does not constitute a substantial part of the common market. To the extent that referral is made to one Member State only, the benefit of a "one-stop shop" is also preserved.

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21 See Recital 16, which states that "the undertakings concerned should not … be required to demonstrate that the effects of the concentration would be detrimental to competition".

22 The existence of "affected markets" within the meaning of Form RS would generally be considered sufficient to meet the requirements of Article 4(4). However, the parties can point to any factors which may be relevant for the competitive analysis of the case (market overlap, vertical integration, etc).

23 To this end, the requesting parties should consider those factors which are typically suggestive of national or narrower than national markets, such as, primarily, the product characteristics (e.g. low value of the product as opposed to significant costs of transport), specific characteristics of demand (e.g. end consumers sourcing in proximity of their centre of activity) and supply, significant variation of prices and market shares across countries, national consumers habits, different regulatory frameworks, taxation or other legislation. Further guidance can be found in the Commission notice on the definition of the relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5).

24 See, for example, the Commission's referral of certain distinct oil storage markets for assessment by the French authorities in Cases M.1021 *Compagnie Nationale de Navigation-SOGELF*, M.1464 *Total/Petrofina*, and Case M.1628 *Totalfina/Elf Aquitaine*, Case M.1030 *Lafarge/Redland*, Case M.1220 *Alliance Unichem/Unifarma*, Case M.2760 *Nehlsen/Rethmann/SWB/Bremerhavener Energiewirtschaft*, and Case M.2154 *C3D/Rhone/Go-ahead*; Case M.2845 *Sogecable/Canal Satelite Digital/Vias Digital.*

21. The extent to which a concentration with a Community dimension which, despite having a potentially significant impact on competition in a nation-wide market, nonetheless potentially engenders substantial cross-border effects (e.g. because the effects of the concentration in one geographic market may have significant repercussions in geographic markets in other Member States, or because it may involve potential foreclosure effects and consequent fragmentation of the common market[25]), may be an appropriate candidate for referral will depend on the specific circumstances of the case. As, under such circumstances, both the Commission and Member States may be equally well equipped or be in an equally good position to deal with such cases, a considerable margin of discretion should be retained in deciding whether or not to refer such cases.

22. The extent to which concentrations with a Community dimension, and potentially affecting competition in a series of national or narrower than national markets in more than one Member State, may be appropriate candidates for referral to Member States will depend on factors specific to each individual case, such as the number of national markets likely to be significantly affected, the prospect of addressing any possible concerns by way of proportionate, non-conflicting remedies, and the investigative efforts that the case may require. To the extent that a case may engender competition concerns in a number of Member States, and require coordinated investigations and remedial action, this may militate in favour of the Commission retaining jurisdiction over the entirety of the case in question[26]. On the other hand, to the extent that the case gives rise to competition concerns which, despite involving national markets in more than one Member State, do not appear to require coordinated investigation and/or remedial action, a referral may be appropriate. In a limited number of cases[27], the Commission has even found it appropriate to refer a concentration to more than one Member State, in view of the significant differences in competitive conditions that characterised the affected markets in the Member States concerned. While fragmentation of the treatment of a case deprives the merging parties of the benefit of a one-stop-shop in such cases, this consideration is less pertinent at the pre-notification stage, given that the referral is triggered by a voluntary request from the merging parties.

23. Consideration should also, to the extent possible, be given to whether the national competition authority or authorities to which referral of the case is

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[25] See Case M.580 *ABB/Daimler Benz*, where the Commission did not accede to Germany's request for referral of a case under Article 9 in circumstances where, while the competition concerns were confined to German markets, the operation (which would create the largest supplier of railway equipment in the world) would have significant repercussions throughout Europe. See also Case M.2434 *Hidroelectrica del Cantabrico/EnBW/Grupo Vilar Mir*, where, despite a request by Spain to have the case referred under Article 9, the Commission pursued the investigation and adopted an Article 8(2) decision.

[26] For some examples, see M.1383 *Exxon/Mobil*, where the Commission, despite the UK request to have the part of the concentration relating to the market for motor fuel retailing in North west of Scotland referred to it, pursued the investigation as the case required a single and coherent remedy package designed to address all the problematic issues in the sector concerned; see also M.2706 *P&O Princess/Carnival*, where, despite the fact that the UK authorities were assessing a rival bid by Royal Caribbean, the Commission did not accede to a request for a partial referral, so as to avoid a fragmentation of the case and secure a single investigation of the various national markets affected by the operation.

[27] See M. 2898, *Le Roy Merlin/Brico*, M.1030, *Redland/Lafarge*, M. 1684, *Carrefour/Promodes.*

contemplated may possess specific expertise concerning local markets[28], or is examining, or about to examine, another transaction in the sector concerned[29].

Referral of cases from Member States to the Commission under Article 4(5)

Legal requirements

24. Under Article 4(5), only two legal requirements must be met in order for the parties to the transaction to request the referral of the case to the Commission: the transaction must be a concentration within the meaning of Article 3 of the Merger Regulation, and the concentration must be *capable of being reviewed under the national competition laws for the control of mergers of three or more Member States*. (See also paras. 65 *et seq* and 70 *et seq*.)

Other factors to be considered

25. Other than verification of the legal requirements, in order to anticipate to the greatest extent possible the likely outcome of a referral request, merging parties contemplating a request should also consider whether referral of the case is likely to be considered appropriate. This will involve an examination of the application of the guiding principles referred to above, and in particular whether the Commission is the more appropriate authority for dealing with the case.

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28 In Case M.330 *MacCormick/CPC/Rabobank/Ostmann*, the Commission referred a case to Germany, because it was better placed to investigate local conditions in 85,000 sales points in Germany; a referral to the Netherlands was made in Case M.1060 *Vendex/KBB*, because it was better placed to assess local consumer tastes and habits; See also Case M.1555 *Heineken/Cruzcampo*, Case M.2621 *SEB/Moulinex* (where consumer preferences and commercial and marketing practice swere specific to the French market); Case M.2639 *Compass/Restorama/Rail Gourmet/Gourmet*, and Case M.2662 *Danish-Crown/Steff-Houlberg*.

29 In Case M.716 *Gehe/Lloyds Chemists*, for example, the Commission referred a case because Lloyds was also subject to another bid not falling under ECMR thresholds but being scrutinised by the UK authorities: the referral allowed both bids to be scrutinised by the same authority; In M.1001/M.1019 *Preussag/Hapag-Lloyd/TUI*, a referral was made to Germany of two transactions, which together with a third one notified in Germany, would present competition concerns: the referral ensured that all three operations were dealt with in like manner; In case M.2044 *Interbrew/Bass*, the Commission referred the case to the UK authorities, because they were at the same time assessing Interbrew's acquisition of another brewer, Whitbread, and because of their experience in recent investigations in the same markets; Similarly, see also Cases M.2760 *Nehlsen/Rethmann/SWB/Bremerhavener Energiewirtschaft*, M.2234 *Metsalilitto Osuuskunta/Vapo Oy/JV*, M.2495 *Haniel/Fels*, M.2881 *Koninklijke BAM NBM/HBG*, and M.2857/M.3075-3080 *ECS/IEH* and six other acquisitions by Electrabel of local distributors. In M.2706 *P&O Princess/Carnival*, however, despite the fact that the UK authorities were already assessing a rival bid by Royal Caribbean, the Commission did not accede to a request for a partial referral. The Commission had identified preliminary competition concerns in other national markets affected by the merger and thus wished to avoid a fragmentation of the case (See Commission press release of 11/04/2002, IP/02/552).

26. In this regard, Recital 16 to the Merger Regulation makes it clear that requests for pre-notification referral to the Commission would be particularly pertinent in situations where the concentration would affect competition beyond the territory of one Member State. Particular consideration should therefore be given to the likely locus of any competitive effects resulting from the transaction, and to how appropriate it would be for the Commission to scrutinise the operation.

27. It should in particular be assessed whether the case is genuinely cross-border in nature, having regard to elements such as its likely effects on competition and the investigative and enforcement powers likely to be required to address any such effects. In this regard, particular consideration should be given to whether the case is liable to have a potential impact on competition in a market/s affected by the concentration. In any case, indications of possible competitive impact may be no more than preliminary in nature[30], and would be without prejudice to the outcome of the investigation. Nor would it be necessary for the parties to demonstrate that the effect on competition is likely to be an adverse one.

28. Cases where the market/s in which there may be a potential impact on competition is/are wider than national in geographic scope[31], or where some of the potentially affected markets are wider than national and the main economic impact of the concentration is connected to such markets, are the most appropriate candidate cases for referral to the Commission. In such cases, as the competitive dynamics extend over territories reaching beyond national boundaries, and may consequently require investigative efforts in several countries as well as appropriate enforcement powers, the Commission is likely to be in the best position to carry out the investigation.

29. The Commission may be more appropriately placed to treat cases (including investigation, assessment and possible remedial action) that give rise to potential competition concerns in a series of national or narrower than national markets located in a number of different countries in the EU[32]. The Commission is likely to be in the best position to carry out the investigation in such cases, given the desirability of ensuring consistent and efficient scrutiny across the different countries, of employing appropriate investigative powers, and of addressing any competition concerns by way of coherent remedies.

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30 The existence of "affected markets" within the meaning of Form RS would generally be considered sufficient. However, the parties can point to any factors which may be relevant for the competitive analysis of the case (market overlap, vertical integration, etc).

31 See the joint referral by seven Member States to the Commission of a transaction affecting worldwide markets in M.2738 *GE/Unison,* and the joint referral by seven Member States to the Commission of a transaction affecting a Western European market in M.2698 *Promatech/Sulzer*; See also *Principles on the application, by National Competition Authorities within the ECA network, of Article 22 of the EC Merger Regulation*, a paper published by the European Competition Authorities (ECA), at para. 11.

32 This may, for example, be the case in relation to operations where the affected markets, while national (or even narrower than national in scope for the purposes of a competition assessment), are nonetheless characterised by common Europe-wide or world-wide brands, by common Europe-wide or world-wide intellectual property rights, or by centralised manufacture or distribution - at least to the extent that such centralised manufacture or distribution would be likely to impact upon any remedial measures.

30. –Similarly to what has been said above in relation to Article 4(4), the appropriateness of referring concentrations which, despite having a potentially significant impact on competition in a nation-wide market, nonetheless potentially engender substantial cross-border effects, will depend on the specific circumstances of the case. As, under such circumstances, both the Commission and Member States may be in an equally good position to deal with such cases, a considerable margin of discretion should be retained in deciding whether or not to refer such cases.

31. Consideration should also, to the extent possible, be given to whether the Commission is particularly well equipped to properly scrutinise the case, in particular having regard to factors such as specific expertise, or past experience in the sector concerned. The greater a merger's potential to affect competition beyond the territory of one Member State, the more likely it is that the Commission will be better equipped to conduct the investigation, particularly in terms of fact finding and enforcement powers.

32. Finally, the parties to the concentration might submit that, despite the apparent absence of an effect on competition, there is a compelling case for having the operation treated by the Commission, having regard in particular to factors such as the cost and time delay involved in submitting multiple Member State filings[33].

Post-notification referrals

Referrals from the Commission to Member States pursuant to Article 9

33. Under Article 9 there are two options for a Member State wishing to request referral of a case following its notification to the Commission: Articles 9(2)a and 9(2)b respectively.

Article 9(2)a

Legal requirements

34. In order for a referral to be made to a Member State or States pursuant to Article *9(2) a,* the following legal requirements must be fulfilled. The concentration must:

i) *threaten to affect significantly competition in a market*, and

ii) the market in question must be *within the requesting Member State, and present all the characteristics of a distinct market*.

35. As regards the *first criterion*, in essence a requesting Member State is required to demonstrate that, based on a preliminary analysis, there is a real risk that the transaction may have a significant adverse impact on competition, and thus that it deserves close scrutiny. Such preliminary indications may be in the nature of

[33] See Recitals 12 and 16of the Merger Regulation.

prima facie evidence of such a possible significant adverse impact, but would be without prejudice to the outcome of a full investigation.

36. As regards the *second criterion*, the Member State is required to show that a geographic market/s in which competition is affected by the transaction in the manner just described is/are national, or narrower than national in scope[34].

Other factors to be considered

37. Other than verification of the legal requirements, other factors should also be considered in assessing whether referral of a case is likely to be considered appropriate. This will involve an examination of the application of the guiding principles referred to above, and in particular whether the competition authority or authorities requesting the referral of the case is/are in the best position to deal with the case. To this end, consideration should be given in turn both to the likely locus of the competitive effects of the transaction and to how well equipped the national competition authority would be to scrutinise the operation. (See above at paras. 19-23)

Article 9(2)b

Legal requirements

38. In order for a referral to be made to a Member State or States pursuant to Article *9(2) b,* the following legal requirements must be fulfilled. The concentration must:

i) *affect competition in a market*, and

ii) the market in question must be *within the requesting Member State, present all the characteristics of a distinct market, and not constitute a substantial part of the common market*.

39. As regards the *first criterion*, a requesting Member State is required to show, based on a preliminary analysis, that the concentration is liable to have an impact on competition in a market. Such preliminary indications may be in the nature of *prima facie* evidence of a possible adverse impact, but would be without prejudice to the outcome of a full investigation.

40. As to the *second criterion*, a requesting Member State is required to show not only that the market in which competition is affected by the operation in the manner just described constitutes a distinct market within a Member State, but also that the market in question does not constitute a substantial part of the common market. In this respect, based on the past practice and case-law[35], it appears that

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[34] See Commission notice on the definition of the relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5).

[35] See Commission referrals granted under Article 9(2)b in: M.2446, *Govia/Connex South Central*, where the operation affected competition on specific railway routes in the London/Gatwick-Brighton area in the UK; in M.2730, *Connex/DNVBVG*, where the transaction affected competition in local public transport services in the Riesa area (Saxony,

such situations are generally limited to markets with a narrow geographic scope, within a Member State.

41. If these conditions are met, the Commission has an obligation to refer the case.

Referrals from Member States to the Commission pursuant to Article 22

Legal requirements

42. In order for a referral to be made by a Member State/s to the Commission pursuant to Article 22, two legal requirements must be fulfilled as pre-conditions. The concentration must:

i) first, *affect trade between Member States*, and

ii) second, it must *threaten to significantly affect competition within the territory of the Member State or States making the request*.

43. As to the *first criterion*, a concentration fulfills this requirement to the extent that it is liable to have some discernible influence on the pattern of trade between Member States[36].

44. As to the *second criterion*, as under Article 9(2)a, a referring Member State or States is/are required in essence to demonstrate that, based on a preliminary analysis, there is a real risk that the transaction may have a significant adverse impact on competition, and thus that it deserves close scrutiny. Such preliminary indications may be in the nature of *prima facie* evidence of such a possible significant adverse impact, but would be without prejudice to the outcome of a full investigation.

Germany); and in M. 3130, *Arla Foods/Express Diaries*, where the transaction affected competition in the market for the supply of bottled milk to doorstep deliverers in the London, Yorkshire and Lancashire regions of the UK. For the purpose of defining the notion of a non-substantial part of the common market, some guidance can also be found in the case-law relating to the application of Article 82 EC Treaty. In that context, the Court of Justice has articulated quite a broad notion of what may constitute a substantial part of the common market, resorting *inter alia* to empirical evidence. In the case-law there can be found, for instance, indications essentially based on practical criteria such as "the pattern and volume of the production and consumption of the said product as well as the habits and economic opportunities of vendors and purchasers", See Case 40/73, *Suiker Unie/Commission*, 1975, ECR 1663. See also Case C-179/90, *Porto di Genova*, 1991, ECR 5889, where the Port of Genova was considered as constituting a substantial part of the common market. In its case-law the Court has also stated that a series of separate markets may be regarded as together constituting a substantial part of the common market. See, for example, Case C-323/93, *Centre d'insémination de la Crespelle*, par. 17, where the Court stated "In this case, by making the operation of the insemination centres subject to authorization and providing that each centre should have the exclusive right to serve a defined area, the national legislation granted those centres exclusive rights. By thus establishing, in favour of those undertakings, a contiguous series of monopolies territorially limited but together covering the entire territory of a Member State, those national provisions create a dominant position, within the meaning of Article 86 of the Treaty, in a substantial part of the common market".

[36] See also, by analogy, the Commission Notice on the notion of effect on trade concept contained in Articles 81 and 82 of the Treaty (*Official Journal C 101, 27.04.2004, pages 81-96*).

Other factors to be considered

45. As post-notification referrals to the Commission may entail additional cost and time delay for the merging parties, they should normally be limited to those cases which appear to present a real risk of negative effects on competition and trade between Member States, and where it appears that these would be best addressed at the Community level[37]. The categories of cases normally most appropriate for referral to the Commission pursuant to Article 22 are accordingly the following:

- Cases which give rise to serious competition concerns in a market/s which is/are wider than national in geographic scope, or where some of the potentially affected markets are wider than national, and where the main economic impact of the concentration is connected to such markets.

- Cases which give rise to serious competition concerns in a series of national or narrower than national markets located in a number of countries of the EU, in circumstances where coherent treatment of the case (regarding possible remedies, but also, in appropriate cases, the investigative efforts as such) is considered desirable, and where the main economic impact of the concentration is connected to such markets.

III. MECHANICS OF THE REFERRAL SYSTEM

A. OVERVIEW OF THE REFERRAL SYSTEM

46. The Merger Regulation sets out the relevant legal rules for the functioning of the referral system. The rules contained in Articles 4(4), 4(5), 9 and 22 set out in detail the various steps required for a case to be referred from the Commission to Member States and vice versa.

47. Each of the four relevant referral provisions establishes a self-contained mechanism for the referral of a given category of concentration. The provisions can be categorised in the following way:

- Pre-notification referrals:
    - From the Commission to Member States (Article 4(4))
    - From Member States to the Commission (Article 4(5))

[37] See the joint referral by seven Member States to the Commission of a transaction affecting worldwide markets in M.2738 *GE/Unison,* and the joint referral by seven Member States to the Commission of a transaction affecting a Western European market in M.2698 *Promatech/Sulzer*; See also *Principles on the application, by National Competition Authorities within the ECA network, of Article 22 of the EC Merger Regulation*, a paper published by the European Competition Authorities (ECA), at para. 11.

- Post-notification referrals:
    - From the Commission to Member States (Article 9)
    - From Member States to the Commission (Article 22)

48. The flowcharts attached as Annex I to this Notice describe in graphical form the various procedural steps to be followed in the referral mechanism set out by Articles 4(4), 4(5), 9 and 22.

Pre-notification referrals

49. Pre-notification referrals can only be requested by the undertakings concerned[38]. It is for the undertakings concerned to verify whether the concentration meets the criteria specified in Articles 4(4) (that the concentration has a Community dimension but may significantly affect competition in a distinct market within a Member State) or 4(5) (that the concentration does not have a Community dimension but is capable of being reviewed under the national competition laws of at least three Member States) are met. The undertakings concerned may then decide to request a referral to or from the Commission by submitting a reasoned request on Form RS. The request is transmitted without delay by the Commission to all Member States. The remainder of the process differs under Articles 4(4) and 4(5).

    - Under Article 4(4), the Member State/s concerned[39] have 15 working days from the date they receive the submission within which they can express agreement or disagreement with the request. Silence on the part of a Member State is deemed to constitute agreement[40]. If the Member State or States concerned agrees to the referral, the Commission has an additional period of approximately 10 working days (25 working days from the date the Commission received Form RS) in which it may decide to refer the case. Silence on the part of the Commission is deemed to constitute assent. If the Commission assents, the case (or part/s thereof) is referred to one or more Member States as requested by the undertakings concerned. If the referral is made, the Member State concerned applies its national law to the referred part of the case[41]. Articles 9(6)-9(9) apply.

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38 The term "undertakings concerned" includes "persons" within the meaning of Article 3(1)(b).

39 The Member State or States concerned are the ones identified in Form RS to which the case will be referred if the request is granted.

40 This mechanism is an essential feature of all referral procedures set out in the Merger Regulation. The mechanism may be termed "positive silence" or non-opposition: that is to say that failure to take a decision on the part of the Commission or a Member State will be deemed to constitute the taking of a positive decision. This mechanism was already a feature of Regulation 4064/89 in its Article 9(5). It is now included in Articles 4(4) (second and fourth sub-paragraphs), 4(5) (fourth sub-paragraph), 9(5), 22(3) first sub-paragraph, last sentence. The positive silence mechanism is, however, not applicable with regard to decisions by Member States to join a request under Article 22(2).

41 Article 4(4) allows merging parties to request partial or full referrals. The Commission and Member States must either accede to or refuse the request, and may not vary its scope by, for example, referring only a part of case when a referral of the whole of the case had been requested. In the case of a partial referral, the Member State concerned will apply its national competition law to the referred part of the case. For the remainder of the case, the Merger

- Under Article 4(5), the Member States concerned[42] have 15 working days from the date they receive the submission within which they can express agreement or disagreement with the request. At the end of this period, the Commission checks whether any Member State competent to examine the concentration under its national competition law has expressed disagreement. If there is no expression of disagreement by any such competent Member State, the case is deemed to acquire a Community dimension and is thus referred to the Commission which has exclusive jurisdiction over it. It is then for the parties to notify the case to the Commission, using Form CO. On the other hand, if one or more competent Member States has/have expressed its/their disagreement, the Commission informs all Member States and the undertakings concerned without delay of any such expression of disagreement and the referral process ends. It is then for the parties to comply with any applicable national notification rules.

Post-notification referrals

50. Pursuant to Articles 9(2) and 22(1), post-notification referrals are triggered by Member States either on their own initiative or following an invitation by the Commission pursuant to Articles 9(2) and 22(5). The procedures differ according to whether the referral is from or to the Commission.

- Under Article 9, a Member State may request that the Commission refer to it a concentration with Community dimension, or a part thereof, which has been notified to the Commission and which threatens to significantly affect competition within a distinct market within that Member State (Article 9(2)(a)), or which affects such a distinct market not constituting a substantial part of the common market (Article 9(2)(b)). The request must be made within 15 working days from the date the Member State received a copy of Form CO. The Commission must first verify whether those legal criteria are met. It may then decide to refer the case, or a part thereof, exercising its administrative discretion. In the case of a referral request made pursuant to Article 9(2)(b), the Commission must (i.e. has no discretion) make the referral if the legal criteria are met. The decision must be taken within 35 working days from notification or, where the Commission has initiated proceedings, within 65 working days[43]. If the referral is made, the Member State concerned applies its own national competition law, subject only to Article 9(6) and 9(8).

Regulation will continue to apply in the normal way, that is the undertakings concerned will be obliged to make a notification of the non-referred part of the concentration on Form CO pursuant to Article 4(1) of the Merger Regulation. By contrast, if the whole of the case is referred to a Member State, Article 4(4) final subparagraph specifies that there will be no obligation to notify the case also to the Commission. The case will thus not be examined by the Commission. The Member State concerned will apply its national law to the whole of the case; no other Member State can apply national competition law to the concentration in question.

42 i.e. those that would be competent to review the case under their national competition law in the absence of a referral. For the concept of "competent to review the case", see section B5 below.

As regards cases where the Commission takes preparatory steps within 65 working days, see Article 9(4) b and 9(5).

- Under Article 22, a Member State may request that the Commission examine a concentration which has no Community dimension but which affects trade between Member States and threatens to significantly affect competition within its territory. The request must be made within 15 working days from the date of national notification or, where no notification is required, the date when the concentration was "made known"[44] to the Member State concerned. The Commission transmits the request to all Member States. Any other Member State/s can decide to join the request[45] within a period of 15 working days from the date it received a copy of the initial request. All national time limits relating to the concentration are suspended until it has been decided where it will be examined; a Member State can re-start the national time limits before the expiry of the 15 working day period by informing the Commission and the merging parties that it does not wish to join the request. At the latest 10 working days following this 15 working day period, the Commission must decide whether to accept the case from the requesting Member State/s. If the Commission accepts jurisdiction, national proceedings in the referring Member State/s are terminated and the Commission examines the case pursuant to Article 22(4) of the Merger Regulation on behalf of the requesting State/s[46]. Non-requesting States can continue to apply national law.

51. The following section of the Notice focuses on a number of detailed elements of the system with the aim in particular of providing further guidance to undertakings contemplating making requests at the pre-notification stage, or who may be party to transactions subject to the possibility of post-notification referral.

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44 The notion of "made known", derived from the wording of Article 22, should in this context be interpreted as implying sufficient information to make a preliminary assessment as to the existence of the criteria for the making of a referral request pursuant to Article 22.

45 It should be noted that Article 22 enables a Member State to join the initial request even if the concentration has not yet been notified to it. However, Member States may be unable to do so if they have not yet received the necessary information from the merging parties at the time of being informed by the Commission that a referral request has been lodged by another Member State. Notwithstanding the Member State's ability to contact the merging parties in order to verify whether they are competent to review any particular transaction, the notifying parties are therefore strongly encouraged to file, where feasible, their notification to all competent Member States simultaneously.

46 Where the Commission examines a concentration on behalf of one or more Member States pursuant to Article 22, it can adopt all the substantive decisions provided for in Articles 6 and 8 of the ECMR. This is established in Article 22(4) of the Merger Regulation. It is to be noted that the Commission examines the concentration upon the request of and on behalf of the requesting Member States. The Article should therefore be interpreted as requiring the Commission to examine the impact of the concentration within the territory of those Member States. The Commission will not examine the effects of the concentration in the territory of Member States which have not joined the request unless this examination is necessary for the assessment of the effects of the concentration within the territory of the requesting Member States (e.g. where the geographic market extends beyond the territory/ies of the requesting Member State/s).

B. DETAILS OF THE REFERRAL MECHANISM

52. This section of the Notice provides guidance regarding certain aspects of the functioning of the referral system set out in Articles 4(4), 4(5), 9 and 22 of the Merger Regulation.

1. The network of competition authorities

53. The Commission carries out the procedures set out in the Merger Regulation in close and constant liaison with the competent authorities of the Member States (National Competition Authorities, or "NCAs") as provided in Article 19(2) of the Merger Regulation. Cooperation and dialogue between the Commission and the NCAs, and between the NCAs themselves, is particularly important in the case of concentrations which are subject to the referral system set out in the Merger Regulation.

54. According to Recital 14 to the Merger Regulation, the Commission and the NCAs form together a network of public authorities, applying their respective competences in close cooperation using efficient arrangements for information sharing and consultation with a view to ensuring that a case is dealt with by the most appropriate authority, in the light of the principle of subsidiarity, and with a view to ensuring that multiple notifications of a given concentration are avoided to the greatest extent possible.

55. The network should ensure the efficient re-attribution of concentrations according to the principles described in section II above. This involves facilitating the smooth operation of the pre-notification referral mechanism, as well as providing, to the extent foreseeable, a system whereby potential post-notification referral requests are identified as soon as possible[47].

56. Pursuant to Articles 4(4) and 4(5), the Commission transmits reasoned requests made by the undertakings concerned "without delay"[48]. The Commission will endeavour to transmit such documents within one working day from the day they are received or issued. Information within the network will be exchanged by various means, depending on the circumstances: e-mail, surface mail, courier, fax, telephone. It should be noted that for sensitive information or confidential information exchanges will be carried out by secure e-mail or by any other protected means of communication between these contact points.

57. All members of the network, including both the Commission and all NCAs, their officials and other servants, and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the Member States, will be bound by the professional secrecy obligations set out in Article 17 of the Merger Regulation. They shall not disclose non-public information they have acquired through the application of the Merger Regulation,

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[47] Advance knowledge of the possibility of a referral request might, for example, be taken into account by the Commission in deciding not to accede to a request for derogation from the suspensive effect pursuant to Article 7(3) of the Merger Regulation.

[48] It should be noted that, as provided for in Article 19(1) of the Merger Regulation, the Commission is also under an obligation to transmit to the NCAs copies of notifications and of the most important documents lodged with or issued by the Commission.

unless the natural or legal person who provided that information has consented to its disclosure.

58. Consultations and exchanges within the network is a matter between public enforcement agencies and do not alter any rights or obligations arising from Community or national law for companies. Each competition authority remains fully responsible for ensuring that due process is observed in the cases it deals with.

2. Triggering the pre-notification referral system; information to be provided by the requesting parties

59. For the referral system to work swiftly and smoothly, it is crucial that the requesting parties, provide, whenever required, complete and accurate information in a timely fashion and in the most efficient way possible. Legal requirements as to what information needs to be provided and the consequences of providing incorrect, incomplete or misleading information are set out in the Merger Regulation, the Merger Implementing Regulation and Form RS[49].

60. As specified in Form RS, all information submitted in a reasoned submission must be correct and complete. If parties submit incorrect or incomplete information, the Commission has the power to either adopt a decision pursuant to Article 6(1)(a) of the Merger Regulation (where failure to fulfill the conditions of Article 4(5) comes to its attention during the course of the investigation), or to revoke any Article 6 or 8 decision it adopts following an Article 4(5) referral, pursuant to Article 6(3)(a) or 8(6)(a) of the Merger Regulation. Following the adoption of a decision pursuant to Article 6(1)(a) or following revocation, national competition laws would once again be applicable to the transaction. In the case of referrals under Article 4(4) made on the basis of incorrect or incomplete information, the Commission may require a notification pursuant to Article 4(1). In addition, the Commission has the power to impose fines under Article 14(1)(a) of the Merger Regulation. Finally, parties should also be aware that, if a referral is made on the basis of incorrect or incomplete information included in Form RS, the Commission and/or the Member States may consider making a post-notification referral reversing a pre-notification referral based on such incorrect or incomplete information[50].

61. When providing information on Form RS or generally in making a request for a pre-notification referral, it is not envisaged or necessary for the undertakings concerned to show that their concentration will lead to detrimental effects on competition51. They should, however, provide as much information as possible showing clearly in what way the concentration meets the relevant legal criteria set out in Articles 4(4) and 4(5) and why the concentration would be most appropriately dealt with by the competition authority or authorities specified in the request. The Merger Regulation does not provide that the fact of a Form RS

Form RS is annexed to the Merger Implementing Regulation No 802/2004 of 7 April 2004, OJ 2004, L 133.

[50] This would be the appropriate "remedy" where the requesting parties have submitted incorrect or incomplete information not affecting fulfilment of the conditions of Article 4(5), which comes to the Commission's attention during the course of the investigation.

[51] See Recital 16 to the Merger Regulation.

having been lodged should be published, and it is not intended to do so. A non-public transaction can consequently be the subject of a pre-notification referral request.

62. Even though, according to the Merger Implementing Regulation, the Commission will accept Form RS in any official Community language, undertakings concerned providing information which is to be distributed to the network are strongly encouraged to use in their communications a language which will be understood by all addressees of the information. This will facilitate Member State treatment of such requests. Moreover, as regards requests for referral to a Member State or States, the requesting parties are strongly encouraged to include a copy of the request in the language/s of the Member State/s to which the referral is being requested.

63. Beyond the legal requirements specified in Form RS, the undertakings concerned should be prepared to provide additional information, if required, and to discuss the matter with the Commission and NCAs in a frank and open manner in order to enable the Commission and NCAs to assess whether the concentration in question should be the subject of referral.

64. Informal contacts between merging parties contemplating lodging a pre-filing referral request, on the one hand, and the Commission and/or Member State authorities, on the other, are actively encouraged, including following the submission of Form RS. The Commission is committed to providing informal, early guidance to firms wishing to use the pre-notification referrals system set out in Article 4(4) and 4(5) of the Merger Regulation[52].

3. Concentrations eligible for referral

65. Only concentrations within the meaning of Article 3 of the Merger Regulation are eligible for referral pursuant to Articles 4(5) and 22. Only concentrations falling within the ambit of the relevant national competition laws for the control of mergers are eligible for referral pursuant to Articles 4(4), and 9[53].

66. Pre-filing referral requests pursuant to Articles 4(4) and 4(5) of the Merger Regulation must concern concentrations the plans for which are sufficiently concrete. In that regard, there must at least exist a good faith intention to merge on the part of the undertakings concerned, or, in the case of a public bid, at least a public announcement of an intention to make such a bid[54].

4. The concept of "prior to notification" under Articles 4(4) and 4(5)

67. Articles 4(4) and 4(5) only apply at the pre-notification stage.

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[52] A request for derogation from the suspensive effect pursuant to Article 7(3) of the Merger Regulation would normally be inconsistent with an intention to make a pre-notification referral request pursuant to Article 4(4).

[53] By contrast, the reference to "national legislation on competition" in Articles 21(3) and 22(3) should be understood as referring to all aspects of national competition law.

[54] See Recital 34 to, and Article 4(1) of, the Merger Regulation.

68. Article 4(4) specifies that the undertakings concerned may make a referral request by means of reasoned submission (Form RS), "prior to the notification of a concentration within the meaning of paragraph 1". This means that the request can only be made where no Form CO has formally been submitted pursuant to Article 4(1).

69. Likewise, Article 4(5) specifies that the request may be made "prior to any notification to the competent [national] authorities". This means that the concentration in question must not have been formally notified in any EU jurisdiction for this provision to apply. Even one notification anywhere in the EU will preclude the undertakings concerned from triggering the mechanism of Article 4(5). In the Commission's view, no penalty should be imposed for non-notification of a transaction at the national level during the pendency of a request pursuant to Article 4(5).

5. The concept of a "*concentration capable of being reviewed under national competition law*" and the concept of "*competent Member State*" in Article 4(5)

70. Article 4(5) enables the undertakings concerned to request a pre-notification referral of a concentration which does not have Community dimension and which is "capable of being reviewed under the national competition laws of at least three Member States".

71. "Capable of being reviewed" or reviewable should be interpreted as meaning a concentration which falls within the jurisdiction of a Member State under its national competition law for the control of mergers. There is no need for a mandatory notification requirement, i.e. it is not necessary for the concentration to be required to be "notifiable" under national law[55].

72. Pursuant to Article 4(5)(third and fourth sub-paragraph), where at least one Member State "competent to examine the concentration under its national competition law" has expressed its disagreement with the referral, the case shall not be referred. A "competent" Member State is one where the concentration is reviewable and which therefore has the power to examine the concentration under its national competition law.

73. All Member States, and not only those "competent" to review the case, receive the Form RS. However, only Member States "competent" to review the case are counted for the purposes of Article 4(5) third and fourth sub-paragraph. Pursuant to Article 4(5) third sub-paragraph, "competent" Member States will have 15 working days from the date they receive the Form RS to express their agreement or disagreement with the referral. If they all agree the case will acquire Community dimension pursuant to Article 4(5) fifth sub-paragraph. According to Article 4(5) fourth sub-paragraph, by contrast, if even only one "competent" MS disagrees, no referral will take place from any Member State.

[55] Even in circumstances where a notification is voluntary *de jure*, the parties may in practice wish or be expected to file a notification.

74. Given the above mechanism, it is crucial to the smooth operation of Article 4(5) that *all* Member States where the case is reviewable under national competition law, and which are hence "competent" to examine the case under national competition law, are identified correctly. Form RS therefore requires the undertakings concerned to provide sufficient information to enable each and every Member State to identify whether or not it is competent to review the concentration pursuant to its own national competition law.

75. In situations where Form RS has been filled in correctly, no complications should arise. The undertakings concerned will have identified correctly all Member States which are competent to review the case. In situations, however, where the undertakings concerned have not filled in Form RS correctly, or where there is a genuine disagreement as to which Member States are "competent" to review the case, complications may arise.

    - Within the period of 15 working days provided in Article 4(5) (third sub-paragraph), a Member State which is not identified as being "competent" in Form RS may inform the Commission that it is "competent" and may, like any other "competent" Member State, express its agreement or disagreement with the referral.

    - Likewise, within the period of 15 working days provided in Article 4(5)(third sub-paragraph), a Member State which has been identified as "competent" in Form RS may inform that Commission that it is not "competent". This Member State would then be disregarded for the purposes of Article 4(5).

76. Once the period of 15 working days has expired without any disagreement having been expressed, the referral, if made, will be considered valid. This ensures the validity of Commission decisions taken under Articles 6 or 8 of the Merger Regulation following an Article 4(5) referral.

77. This is not to say, however, that undertakings concerned can abuse the system by negligently or intentionally providing incorrect information, including as regards the reviewability of the concentration in the Member States, on Form RS. As noted at para. 60 above, the Commission may take measures to rectify the situation and to deter such violations. The undertakings concerned should also be aware that, in such circumstances, where a referral has been made on the basis of incorrect or incomplete information, a Member State which believes it was competent to deal with the case but did not have the opportunity to veto the referral due to incorrect information being supplied, may request a post-notification referral.

6. Notification and Publication of Decisions

78. According to Articles 4(4)(fourth sub-paragraph), 4(5)(fourth subparagraph), 9(1) and 22(3)(second sub-paragraph), the Commission is obliged to inform the undertakings or persons concerned and all Member States of any decision taken pursuant to those provisions as to the referral of the concentration.

79. The information will be provided by means of a letter addressed to the undertakings concerned (or for Article 9.1 or 22(3) decisions, a letter addressed to the Member State concerned). All Member States will receive a copy thereof.

80. There is no requirement that such decisions be published in the Official Journal[56]. The Commissionwill, however, give adequate publicity to such decisions on DG Competition's website, subject to confidentiality requirements.

7. Article 9(6)

81. Article 9(6) provides that, when the Commission refers a notified concentration to a Member State in accordance with Article 4(4) or 9(3), the NCA concerned must deal with the case "without undue delay". Accordingly, the competent authority concerned should deal as expeditiously as possible with the case under national law.

82. In addition, Article 9(6) provides that the competent national authority shall, within 45 working days after the Commission's referral or following a notification being submitted at the national level if such is required, inform the undertakings concerned of the result of the "preliminary competition assessment" and what "further action", if any, it proposes to take. Accordingly, within 45 working days after the referral or following notification, the merging parties should be provided with sufficient information to enable them to understand the nature of any preliminary competition concerns the authority may have and be informed of the likely extent and duration of the investigation. The Member State concerned may only exceptionally suspend this time limit, where necessary information has not been provided to it by the undertakings concerned as required under its national competition law.

IV. FINAL REMARKS

83. This Notice will be the subject of periodic review, in particular following any revision of the referral provisions in the Merger Regulation. In that regard, it should be noted that, according to Article 4(6) of the Merger Regulation, the Commission must report to the Council on the operation of pre-notification referral provisions, Articles 4(4) and 4(5), by no later than 1 July, 2009

84. This Notice is without prejudice to any interpretation of the applicable Treaty and regulatory provisions by the Court of First Instance and the Court of Justice.

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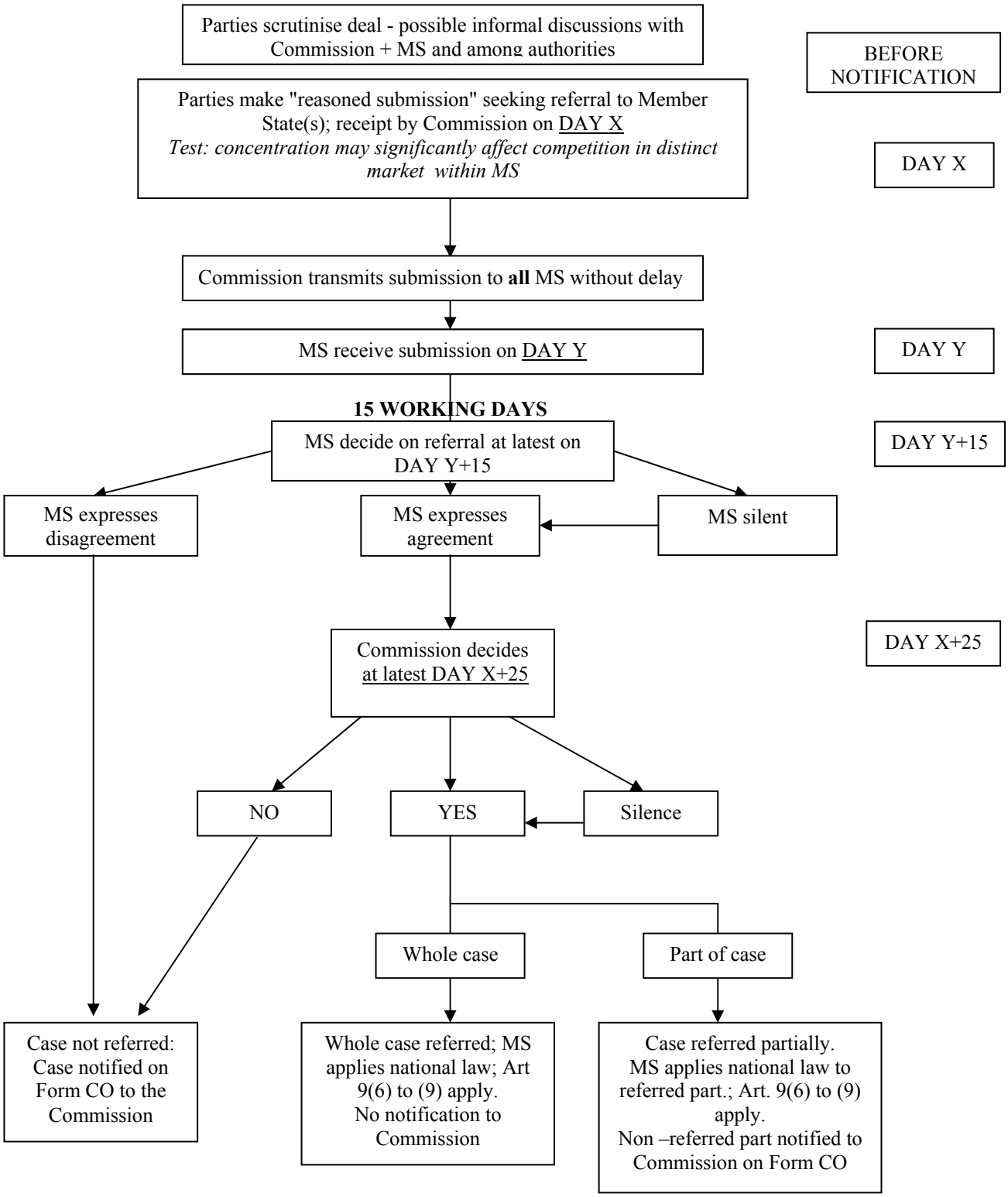
[56] Pursuant to Article 20 of the ECMR this is <u>only</u> required for decisions taken under Article 8(1)-(6), 14 and 15.

ANNEXES: Referral Charts

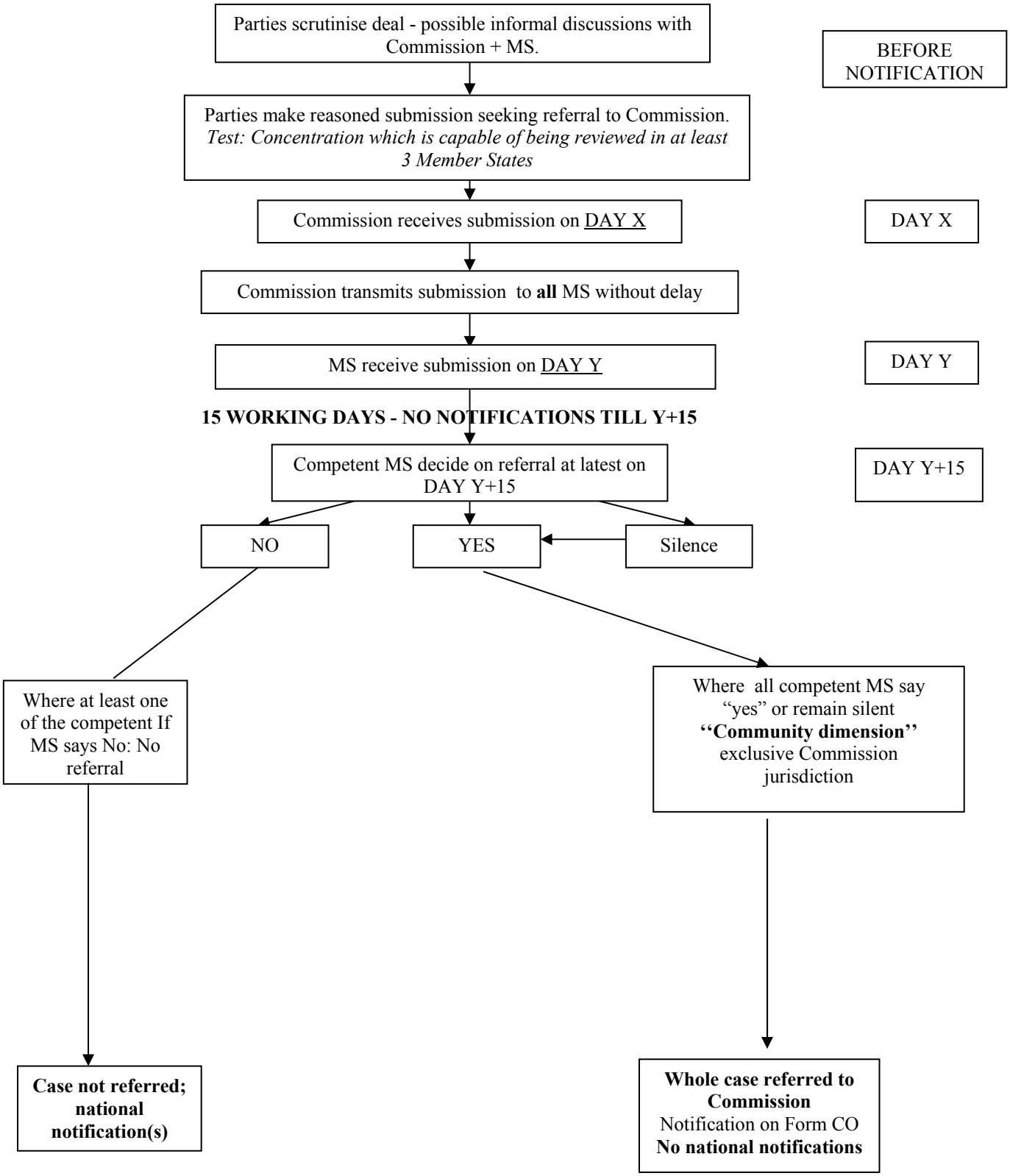
Article 4(4)

Concentration with Community Dimension



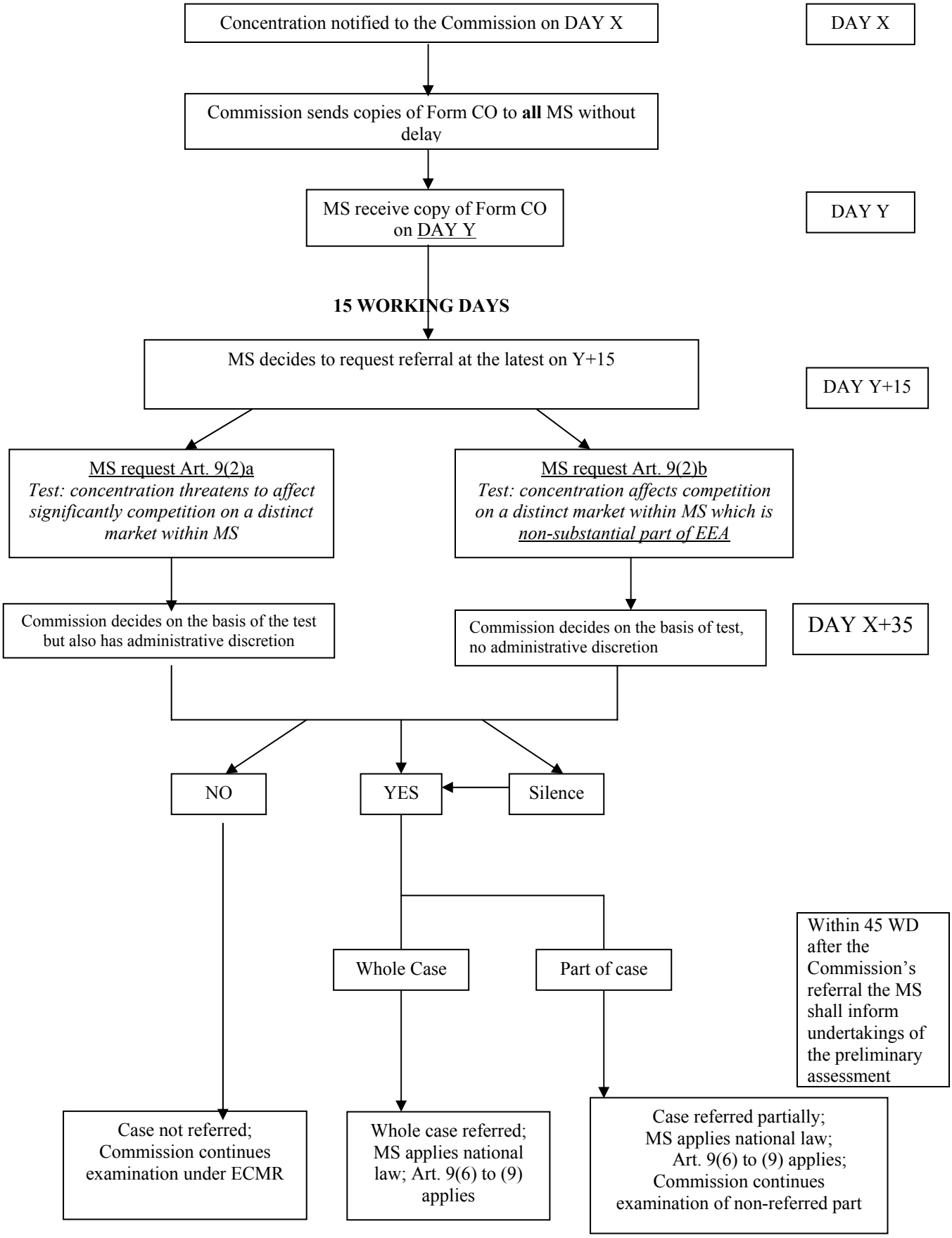
Article 4(5)

Concentration without Community Dimension reviewable in at least three MS under national law



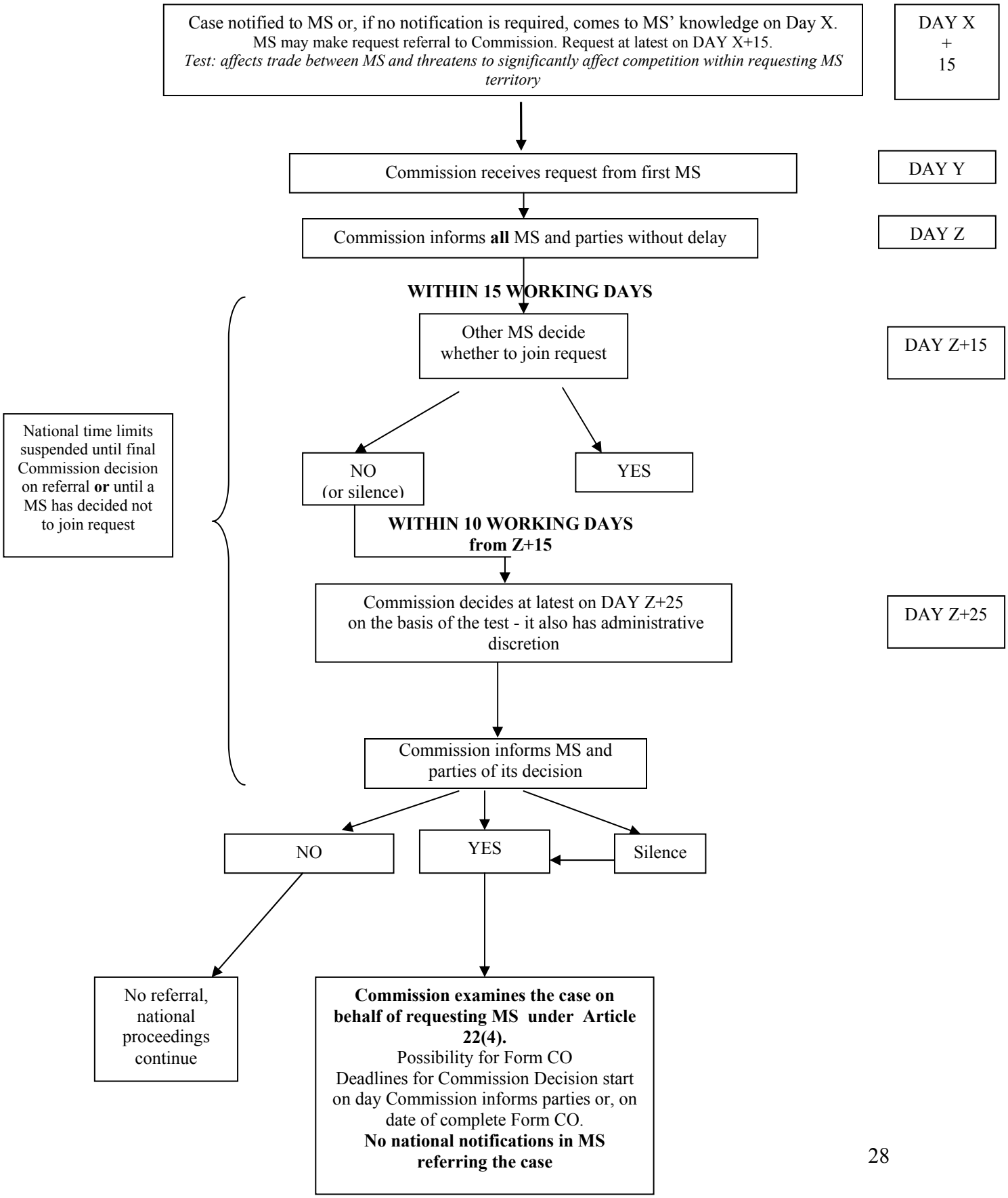
Article 9

Concentration with Community Dimension



Article 22

Concentration without Community dimension



ANNEX 17

HORIZONTAL MERGER GUIDELINES

Guidelines on the assessment of horizontal mergers under the
Council Regulation on the control of concentrations between undertakings,
O.J. 2004 No. C 31/5

Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings

(2004/C 31/03)

I. INTRODUCTION

1. Article 2 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [1] (hereinafter: the 'Merger Regulation') provides that the Commission has to appraise concentrations within the scope of the Merger Regulation with a view to establishing whether or not they are compatible with the common market. For that purpose, the Commission must assess, pursuant to Article 2(2) and (3), whether or not a concentration would significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position, in the common market or a substantial part of it.

2. Accordingly, the Commission must take into account any significant impediment to effective competition likely to be caused by a concentration. The creation or the strengthening of a dominant position is a primary form of such competitive harm. The concept of dominance was defined in the context of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (hereinafter 'Regulation No 4064/89') as:

   'a situation where one or more undertakings wield economic power which would enable them to prevent effective competition from being maintained in the relevant market by giving them the opportunity to act to a considerable extent independently of their competitors, their customers and, ultimately, of consumers' [2].

3. For the purpose of interpreting the concept of dominance in the context of Regulation No 4064/89, the Court of Justice referred to the fact that it 'is intended to apply to all concentrations with a Community dimension insofar as they are likely, because of their effect on the structure of competition within the Community, to prove incompatible with the system of undistorted competition envisaged by the Treaty' [3].

4. The creation or strengthening of a dominant position held by a single firm as a result of a merger has been the most common basis for finding that a concentration would result in a significant impediment to effective competition. Furthermore, the concept of dominance has also been applied in an oligopolistic setting to cases of collective dominance. As a consequence, it is expected that most cases of incompatibility of a concentration with the common market will continue to be based upon a finding of dominance. That concept therefore provides an important indication as to the standard of competitive harm that is applicable when determining whether a concentration is likely to impede effective competition to a significant degree, and hence, as to the likelihood of intervention [4]. To that effect, the present notice is intended to preserve the guidance that can be drawn from past decisional practice and to take full account of past case-law of the Community Courts.

5. The purpose of this notice is to provide guidance as to how the Commission assesses concentrations [5] when the undertakings concerned are actual or potential competitors on the same relevant market [6]. In this notice such mergers will be denoted 'horizontal mergers'. While the notice presents the analytical approach used by the Commission in its appraisal of horizontal mergers it cannot provide details of all possible applications of this approach. The Commission applies the approach described in the notice to the particular facts and circumstances of each case.

6. The guidance set out in this notice draws and elaborates on the Commission's evolving experience with the appraisal of horizontal mergers under Regulation No 4064/89 since its entry into force on 21 September 1990 as well as on the case-law of the Court of Justice and the Court of First Instance of the European Communities. The principles contained here will be applied and further developed and refined by the Commission in individual cases. The Commission may revise this notice from time to time in the light of future developments.

7. The Commission's interpretation of the Merger Regulation as regards the appraisal of horizontal mergers is without prejudice to the interpretation which may be given by the Court of Justice or the Court of First Instance of the European Communities.

II. OVERVIEW

8. Effective competition brings benefits to consumers, such as low prices, high quality products, a wide selection of goods and services, and innovation. Through its control of mergers, the Commission prevents mergers that would be likely to deprive customers of these benefits by significantly increasing the market power of firms. By 'increased market power' is meant the ability of one or more firms to profitably increase prices, reduce output, choice or quality of goods and services, diminish innovation, or otherwise influence parameters of competition. In this notice, the expression 'increased prices' is often used as shorthand for these various ways in which a merger may result in competitive harm [7]. Both suppliers and buyers can have market power. However, for clarity, market power will usually refer here to a supplier's market power. Where a buyer's market power is the issue, the term 'buyer power' is employed.

9. In assessing the competitive effects of a merger, the Commission compares the competitive conditions that would result from the notified merger with the conditions that would have prevailed without the merger ([8]). In most cases the competitive conditions existing at the time of the merger constitute the relevant comparison for evaluating the effects of a merger. However, in some circumstances, the Commission may take into account future changes to the market that can reasonably be predicted ([9]). It may, in particular, take account of the likely entry or exit of firms if the merger did not take place when considering what constitutes the relevant comparison ([10]).

10. The Commission's assessment of mergers normally entails:

(a) definition of the relevant product and geographic markets;

(b) competitive assessment of the merger.

The main purpose of market definition is to identify in a systematic way the immediate competitive constraints facing the merged entity. Guidance on this issue can be found in the Commission's Notice on the definition of the relevant market for the purposes of Community competition law ([11]). Various considerations leading to the delineation of the relevant markets may also be of importance for the competitive assessment of the merger.

11. This notice is structured around the following elements:

(a) The approach of the Commission to market shares and concentration thresholds (Section III).

(b) The likelihood that a merger would have anti-competitive effects in the relevant markets, in the absence of countervailing factors (Section IV).

(c) The likelihood that buyer power would act as a countervailing factor to an increase in market power resulting from the merger (Section V).

(d) The likelihood that entry would maintain effective competition in the relevant markets (Section VI).

(e) The likelihood that efficiencies would act as a factor counteracting the harmful effects on competition which might otherwise result from the merger (Section VII).

(f) The conditions for a failing firm defence (Section VIII).

12. In order to assess the foreseeable impact ([12]) of a merger on the relevant markets, the Commission analyses its possible anti-competitive effects and the relevant countervailing factors such as buyer power, the extent of entry barriers and possible efficiencies put forward by the parties. In exceptional circumstances, the Commission considers whether the conditions for a failing firm defence are met.

13. In the light of these elements, the Commission determines, pursuant to Article 2 of the Merger Regulation, whether the merger would significantly impede effective competition, in particular through the creation or the strengthening of a dominant position, and should therefore be declared incompatible with the common market. It should be stressed that these factors are not a 'checklist' to be mechanically applied in each and every case. Rather, the competitive analysis in a particular case will be based on an overall assessment of the foreseeable impact of the merger in the light of the relevant factors and conditions. Not all the elements will always be relevant to each and every horizontal merger, and it may not be necessary to analyse all the elements of a case in the same detail.

III. MARKET SHARE AND CONCENTRATION LEVELS

14. Market shares and concentration levels provide useful first indications of the market structure and of the competitive importance of both the merging parties and their competitors.

15. Normally, the Commission uses current market shares in its competitive analysis ([13]). However, current market shares may be adjusted to reflect reasonably certain future changes, for instance in the light of exit, entry or expansion ([14]). Post-merger market shares are calculated on the assumption that the post-merger combined market share of the merging parties is the sum of their pre-merger market shares ([15]). Historic data may be used if market shares have been volatile, for instance when the market is characterised by large, lumpy orders. Changes in historic market shares may provide useful information about the competitive process and the likely future importance of the various competitors, for instance, by indicating whether firms have been gaining or losing market shares. In any event, the Commission interprets market shares in the light of likely market conditions, for instance, if the market is highly dynamic in character and if the market structure is unstable due to innovation or growth ([16]).

16. The overall concentration level in a market may also provide useful information about the competitive situation. In order to measure concentration levels, the Commission often applies the Herfindahl-Hirschman Index (HHI) ([17]). The HHI is calculated by summing the squares of the individual market shares of all the firms in the market ([18]). The HHI gives proportionately greater weight to the market shares of the larger firms. Although it is best to include all firms in the calculation, lack of information about very small firms may not be important because such firms do not affect the HHI significantly. While the absolute level of the HHI can give an initial indication of the competitive pressure in the market post-merger, the change in the HHI (known as the 'delta') is a useful proxy for the change in concentration directly brought about by the merger ([19]).

Market share levels

17. According to well-established case law, very large market shares — 50 % or more — may in themselves be evidence of the existence of a dominant market position [20]. However, smaller competitors may act as a sufficient constraining influence if, for example, they have the ability and incentive to increase their supplies. A merger involving a firm whose market share will remain below 50 % after the merger may also raise competition concerns in view of other factors such as the strength and number of competitors, the presence of capacity constraints or the extent to which the products of the merging parties are close substitutes. The Commission has thus in several cases considered mergers resulting in firms holding market shares between 40 % and 50 % [21], and in some cases below 40 % [22], to lead to the creation or the strengthening of a dominant position.

18. Concentrations which, by reason of the limited market share of the undertakings concerned, are not liable to impede effective competition may be presumed to be compatible with the common market. Without prejudice to Articles 81 and 82 of the Treaty, an indication to this effect exists, in particular, where the market share of the undertakings concerned does not exceed 25 % [23] either in the common market or in a substantial part of it [24].

HHI levels

19. The Commission is unlikely to identify horizontal competition concerns in a market with a post-merger HHI below 1 000. Such markets normally do not require extensive analysis.

20. The Commission is also unlikely to identify horizontal competition concerns in a merger with a post-merger HHI between 1 000 and 2 000 and a delta below 250, or a merger with a post-merger HHI above 2 000 and a delta below 150, except where special circumstances such as, for instance, one or more of the following factors are present:

(a) a merger involves a potential entrant or a recent entrant with a small market share;

(b) one or more merging parties are important innovators in ways not reflected in market shares;

(c) there are significant cross-shareholdings among the market participants [25];

(d) one of the merging firms is a maverick firm with a high likelihood of disrupting coordinated conduct;

(e) indications of past or ongoing coordination, or facilitating practices, are present;

(f) one of the merging parties has a pre-merger market share of 50 % of more [26].

21. Each of these HHI levels, in combination with the relevant deltas, may be used as an initial indicator of the absence of competition concerns. However, they do not give rise to a presumption of either the existence or the absence of such concerns.

IV. POSSIBLE ANTI-COMPETITIVE EFFECTS OF HORIZONTAL MERGERS

22. There are two main ways in which horizontal mergers may significantly impede effective competition, in particular by creating or strengthening a dominant position:

(a) by eliminating important competitive constraints on one or more firms, which consequently would have increased market power, without resorting to coordinated behaviour (non-coordinated effects);

(b) by changing the nature of competition in such a way that firms that previously were not coordinating their behaviour, are now significantly more likely to coordinate and raise prices or otherwise harm effective competition. A merger may also make coordination easier, more stable or more effective for firms which were coordinating prior to the merger (coordinated effects).

23. The Commission assesses whether the changes brought about by the merger would result in any of these effects. Both instances mentioned above may be relevant when assessing a particular transaction.

Non-coordinated effects [27]

24. A merger may significantly impede effective competition in a market by removing important competitive constraints on one or more sellers, who consequently have increased market power. The most direct effect of the merger will be the loss of competition between the merging firms. For example, if prior to the merger one of the merging firms had raised its price, it would have lost some sales to the other merging firm. The merger removes this particular constraint. Non-merging firms in the same market can also benefit from the reduction of competitive pressure that results from the merger, since the merging firms' price increase may switch some demand to the rival firms, which, in turn, may find it profitable to increase their prices [28]. The reduction in these competitive constraints could lead to significant price increases in the relevant market.

25. Generally, a merger giving rise to such non-coordinated effects would significantly impede effective competition by creating or strengthening the dominant position of a single firm, one which, typically, would have an appreciably larger market share than the next competitor post-merger. Furthermore, mergers in oligopolistic markets ([29]) involving the elimination of important competitive constraints that the merging parties previously exerted upon each other together with a reduction of competitive pressure on the remaining competitors may, even where there is little likelihood of coordination between the members of the oligopoly, also result in a significant impediment to competition. The Merger Regulation clarifies that all mergers giving rise to such non-coordinated effects shall also be declared incompatible with the common market ([30]).

26. A number of factors, which taken separately are not necessarily decisive, may influence whether significant non-coordinated effects are likely to result from a merger. Not all of these factors need to be present for such effects to be likely. Nor should this be considered an exhaustive list.

Merging firms have large market shares

27. The larger the market share, the more likely a firm is to possess market power. And the larger the addition of market share, the more likely it is that a merger will lead to a significant increase in market power. The larger the increase in the sales base on which to enjoy higher margins after a price increase, the more likely it is that the merging firms will find such a price increase profitable despite the accompanying reduction in output. Although market shares and additions of market shares only provide first indications of market power and increases in market power, they are normally important factors in the assessment ([31]).

Merging firms are close competitors

28. Products may be differentiated ([32]) within a relevant market such that some products are closer substitutes than others ([33]). The higher the degree of substitutability between the merging firms' products, the more likely it is that the merging firms will raise prices significantly ([34]). For example, a merger between two producers offering products which a substantial number of customers regard as their first and second choices could generate a significant price increase. Thus, the fact that rivalry between the parties has been an important source of competition on the market may be a central factor in the analysis ([35]). High pre-merger margins ([36]) may also make significant price increases more likely. The merging firms' incentive to raise prices is more likely to be constrained when rival firms produce close substitutes to the products of the merging firms than when they offer less close substitutes ([37]). It is therefore less likely that a merger will significantly impede effective competition, in particular through the creation or strengthening of a dominant position, when there is a high degree of substitutability between the products of the merging firms and those supplied by rival producers.

29. When data are available, the degree of substitutability may be evaluated through customer preference surveys, analysis of purchasing patterns, estimation of the cross-price elasticities of the products involved ([38]), or diversion ratios ([39]). In bidding markets it may be possible to measure whether historically the submitted bids by one of the merging parties have been constrained by the presence of the other merging party ([40]).

30. In some markets it may be relatively easy and not too costly for the active firms to reposition their products or extend their product portfolio. In particular, the Commission examines whether the possibility of repositioning or product line extension by competitors or the merging parties may influence the incentive of the merged entity to raise prices. However, product repositioning or product line extension often entails risks and large sunk costs ([41]) and may be less profitable than the current line.

Customers have limited possibilities of switching supplier

31. Customers of the merging parties may have difficulties switching to other suppliers because there are few alternative suppliers ([42]) or because they face substantial switching costs ([43]). Such customers are particularly vulnerable to price increases. The merger may affect these customers' ability to protect themselves against price increases. In particular, this may be the case for customers that have used dual sourcing from the two merging firms as a means of obtaining competitive prices. Evidence of past customer switching patterns and reactions to price changes may provide important information in this respect.

Competitors are unlikely to increase supply if prices increase

32. When market conditions are such that the competitors of the merging parties are unlikely to increase their supply substantially if prices increase, the merging firms may have an incentive to reduce output below the combined pre-merger levels, thereby raising market prices ([44]). The merger increases the incentive to reduce output by giving the merged firm a larger base of sales on which to enjoy the higher margins resulting from an increase in prices induced by the output reduction.

33. Conversely, when market conditions are such that rival firms have enough capacity and find it profitable to expand output sufficiently, the Commission is unlikely to find that the merger will create or strengthen a dominant position or otherwise significantly impede effective competition.

34. Such output expansion is, in particular, unlikely when competitors face binding capacity constraints and the expansion of capacity is costly ([45]) or if existing excess capacity is significantly more costly to operate than capacity currently in use.

35. Although capacity constraints are more likely to be important when goods are relatively homogeneous, they may also be important where firms offer differentiated products.

Merged entity able to hinder expansion by competitors

36. Some proposed mergers would, if allowed to proceed, significantly impede effective competition by leaving the merged firm in a position where it would have the ability and incentive to make the expansion of smaller firms and potential competitors more difficult or otherwise restrict the ability of rival firms to compete. In such a case, competitors may not, either individually or in the aggregate, be in a position to constrain the merged entity to such a degree that it would not increase prices or take other actions detrimental to competition. For instance, the merged entity may have such a degree of control, or influence over, the supply of inputs ([46]) or distribution possibilities ([47]) that expansion or entry by rival firms may be more costly. Similarly, the merged entity's control over patents ([48]) or other types of intellectual property (e.g. brands ([49])) may make expansion or entry by rivals more difficult. In markets where interoperability between different infrastructures or platforms is important ([50]), a merger may give the merged entity the ability and incentive to raise the costs or decrease the quality of service of its rivals ([51]). In making this assessment the Commission may take into account, *inter alia*, the financial strength of the merged entity relative to its rivals ([52]).

Merger eliminates an important competitive force

37. Some firms have more of an influence on the competitive process than their market shares or similar measures would suggest. A merger involving such a firm may change the competitive dynamics in a significant, anti-competitive way, in particular when the market is already concentrated ([53]). For instance, a firm may be a recent entrant that is expected to exert significant competitive pressure in the future on the other firms in the market.

38. In markets where innovation is an important competitive force, a merger may increase the firms' ability and incentive to bring new innovations to the market and, thereby, the competitive pressure on rivals to innovate in that market. Alternatively, effective competition may be significantly impeded by a merger between two important innovators, for instance between two companies with 'pipeline' products related to a specific product market. Similarly, a firm with a relatively small market share may nevertheless be an important competitive force if it has promising pipeline products ([54]).

Coordinated effects

39. In some markets the structure may be such that firms would consider it possible, economically rational, and hence preferable, to adopt on a sustainable basis a course of action on the market aimed at selling at increased prices. A merger in a concentrated market may significantly impede effective competition, through the creation or the strengthening of a collective dominant position, because it increases the likelihood that firms are able to coordinate their behaviour in this way and raise prices, even without entering into an agreement or resorting to a concerted practice within the meaning of Article 81 of the Treaty ([55]). A merger may also make coordination easier, more stable or more effective for firms, that were already coordinating before the merger, either by making the coordination more robust or by permitting firms to coordinate on even higher prices.

40. Coordination may take various forms. In some markets, the most likely coordination may involve keeping prices above the competitive level. In other markets, coordination may aim at limiting production or the amount of new capacity brought to the market. Firms may also coordinate by dividing the market, for instance by geographic area ([56]) or other customer characteristics, or by allocating contracts in bidding markets.

41. Coordination is more likely to emerge in markets where it is relatively simple to reach a common understanding on the terms of coordination. In addition, three conditions are necessary for coordination to be sustainable. First, the coordinating firms must be able to monitor to a sufficient degree whether the terms of coordination are being adhered to. Second, discipline requires that there is some form of credible deterrent mechanism that can be activated if deviation is detected. Third, the reactions of outsiders, such as current and future competitors not participating in the coordination, as well as customers, should not be able to jeopardise the results expected from the coordination ([57]).

42. The Commission examines whether it would be possible to reach terms of coordination and whether the coordination is likely to be sustainable. In this respect, the Commission considers the changes that the merger brings about. The reduction in the number of firms in a market may, in itself, be a factor that facilitates coordination. However, a merger may also increase the likelihood or significance of coordinated effects in other ways. For instance, a merger may involve a 'maverick' firm that has a history of preventing or disrupting coordination, for example by failing to follow price increases by its competitors, or has characteristics that gives it an incentive to favour different strategic choices than its coordinating competitors would prefer. If the merged firm were to adopt strategies similar to those of other competitors, the remaining firms would find it easier to coordinate, and the merger would increase the likelihood, stability or effectiveness of coordination.

43. In assessing the likelihood of coordinated effects, the Commission takes into account all available relevant information on the characteristics of the markets concerned, including both structural features and the past behaviour of firms ([58]). Evidence of past coordination is important if the relevant market characteristics have not changed appreciably or are not likely to do so in the near future ([59]). Likewise, evidence of coordination in similar markets may be useful information.

Reaching terms of coordination

44. Coordination is more likely to emerge if competitors can easily arrive at a common perception as to how the coordination should work. Coordinating firms should have similar views regarding which actions would be considered to be in accordance with the aligned behaviour and which actions would not.

45. Generally, the less complex and the more stable the economic environment, the easier it is for the firms to reach a common understanding on the terms of coordination. For instance, it is easier to coordinate among a few players than among many. It is also easier to coordinate on a price for a single, homogeneous product, than on hundreds of prices in a market with many differentiated products. Similarly, it is easier to coordinate on a price when demand and supply conditions are relatively stable than when they are continuously changing ([60]). In this context volatile demand, substantial internal growth by some firms in the market or frequent entry by new firms may indicate that the current situation is not sufficiently stable to make coordination likely ([61]). In markets where innovation is important, coordination may be more difficult since innovations, particularly significant ones, may allow one firm to gain a major advantage over its rivals.

46. Coordination by way of market division will be easier if customers have simple characteristics that allow the coordinating firms to readily allocate them. Such characteristics may be based on geography; on customer type or simply on the existence of customers who typically buy from one specific firm. Coordination by way of market division may be relatively straightforward if it is easy to identify each customer's supplier and the coordination device is the allocation of existing customers to their incumbent supplier.

47. Coordinating firms may, however, find other ways to overcome problems stemming from complex economic environments short of market division. They may, for instance, establish simple pricing rules that reduce the complexity of coordinating on a large number of prices. One example of such a rule is establishing a small number of pricing points, thus reducing the coordination problem. Another example is having a fixed relationship between certain base prices and a number of other prices, such that prices basically move in parallel. Publicly available key information, exchange of information through trade associations, or information received through cross-shareholdings or participation in joint ventures may also help firms reach terms of coordination. The more complex the market situation is, the more transparency or communication is likely to be needed to reach a common understanding on the terms of coordination.

48. Firms may find it easier to reach a common understanding on the terms of coordination if they are relatively symmetric ([62]), especially in terms of cost structures, market shares, capacity levels and levels of vertical integration ([63]). Structural links such as cross-shareholding or participation in joint ventures may also help in aligning incentives among the coordinating firms ([64]).

Monitoring deviations

49. Coordinating firms are often tempted to increase their share of the market by deviating from the terms of coordination, for instance by lowering prices, offering secret discounts, increasing product quality or capacity or trying to win new customers. Only the credible threat of timely and sufficient retaliation keeps firms from deviating. Markets therefore need to be sufficiently transparent to allow the coordinating firms to monitor to a sufficient degree whether other firms are deviating, and thus know when to retaliate ([65]).

50. Transparency in the market is often higher, the lower the number of active participants in the market. Further, the degree of transparency often depends on how market transactions take place in a particular market. For example, transparency is likely to be high in a market where transactions take place on a public exchange or in an open outcry auction ([66]). Conversely, transparency may be low in a market where transactions are confidentially negotiated between buyers and sellers on a bilateral basis ([67]). When evaluating the level of transparency in the market, the key element is to identify what firms can infer about the actions of other firms from the available information ([68]). Coordinating firms should be able to interpret with some certainty whether unexpected behaviour is the result of deviation from the terms of coordination. For instance, in unstable environments it may be difficult for a firm to know whether its lost sales are due to an overall low level of demand or due to a competitor offering particularly low prices. Similarly, when overall demand or cost conditions fluctuate, it may be difficult to interpret whether a competitor is lowering its price because it expects the coordinated prices to fall or because it is deviating.

51. In some markets where the general conditions may seem to make monitoring of deviations difficult, firms may nevertheless engage in practices which have the effect of easing the monitoring task, even when these practices are not necessarily entered into for such purposes. These practices, such as meeting-competition or most-favoured-customer clauses, voluntary publication of information, announcements, or exchange of information through trade associations, may increase transparency or help competitors interpret the choices made. Cross-directorships, participation in joint ventures and similar arrangements may also make monitoring easier.

Deterrent mechanisms

52. Coordination is not sustainable unless the consequences of deviation are sufficiently severe to convince coordinating firms that it is in their best interest to adhere to the terms of coordination. It is thus the threat of future retaliation that keeps the coordination sustainable ([69]). However the threat is only credible if, where deviation by one of the firms is detected, there is sufficient certainty that some deterrent mechanism will be activated ([70]).

53. Retaliation that manifests itself after some significant time lag, or is not certain to be activated, is less likely to be sufficient to offset the benefits from deviating. For example, if a market is characterised by infrequent, large-volume orders, it may be difficult to establish a sufficiently severe deterrent mechanism, since the gain from deviating at the right time may be large, certain and immediate, whereas the losses from being punished may be small and uncertain and only materialise after some time. The speed with which deterrent mechanisms can be implemented is related to the issue of transparency. If firms are only able to observe their competitors' actions after a substantial delay, then retaliation will be similarly delayed and this may influence whether it is sufficient to deter deviation.

54. The credibility of the deterrence mechanism depends on whether the other coordinating firms have an incentive to retaliate. Some deterrent mechanisms, such as punishing the deviator by temporarily engaging in a price war or increasing output significantly, may entail a short-term economic loss for the firms carrying out the retaliation. This does not necessarily remove the incentive to retaliate since the short-term loss may be smaller than the long-term benefit of retaliating resulting from the return to the regime of coordination.

55. Retaliation need not necessarily take place in the same market as the deviation ([71]). If the coordinating firms have commercial interaction in other markets, these may offer various methods of retaliation ([72]). The retaliation could take many forms, including cancellation of joint ventures or other forms of cooperation or selling of shares in jointly owned companies.

Reactions of outsiders

56. For coordination to be successful, the actions of non-coordinating firms and potential competitors, as well as customers, should not be able to jeopardise the outcome expected from coordination. For example, if coordination aims at reducing overall capacity in the market, this will only hurt consumers if non-coordinating firms are unable or have no incentive to respond to this decrease by increasing their own capacity sufficiently to prevent a net decrease in capacity, or at least to render the coordinated capacity decrease unprofitable ([73]).

57. The effects of entry and countervailing buyer power of customers are analysed in later sections. However, special consideration is given to the possible impact of these elements on the stability of coordination. For instance, by concentrating a large amount of its requirements with one supplier or by offering long-term contracts, a large buyer may make coordination unstable by successfully tempting one of the coordinating firms to deviate in order to gain substantial new business.

Merger with a potential competitor

58. Concentrations where an undertaking already active on a relevant market merges with a potential competitor in this market can have similar anti-competitive effects to mergers between two undertakings already active on the same relevant market and, thus, significantly impede effective competition, in particular through the creation or the strengthening of a dominant position.

59. A merger with a potential competitor can generate horizontal anti-competitive effects, whether coordinated or non-coordinated, if the potential competitor significantly constrains the behaviour of the firms active in the market. This is the case if the potential competitor possesses assets that could easily be used to enter the market without incurring significant sunk costs. Anti-competitive effects may also occur where the merging partner is very likely to incur the necessary sunk costs to enter the market in a relatively short period of time after which this company would constrain the behaviour of the firms currently active in the market ([74]).

60. For a merger with a potential competitor to have significant anti-competitive effects, two basic conditions must be fulfilled. First, the potential competitor must already exert a significant constraining influence or there must be a significant likelihood that it would grow into an effective competitive force. Evidence that a potential competitor has plans to enter a market in a significant way could help the Commission to reach such a conclusion ([75]). Second, there must not be a sufficient number of other potential competitors, which could maintain sufficient competitive pressure after the merger ([76]).

Mergers creating or strengthening buyer power in upstream markets

61. The Commission may also analyse to what extent a merged entity will increase its buyer power in upstream markets. On the one hand, a merger that creates or strengthens the market power of a buyer may significantly impede effective competition, in particular by creating or strengthening a dominant position. The merged firm may be in a position to obtain lower prices by reducing its purchase of inputs. This may, in turn, lead it also to lower its level of output in the final product market, and thus harm consumer welfare ([77]). Such effects may in particular arise when upstream sellers are relatively fragmented. Competition in the downstream markets could also be adversely affected if, in particular, the merged entity were likely to use its buyer power vis-à-vis its suppliers to foreclose its rivals ([78]).

62. On the other hand, increased buyer power may be beneficial for competition. If increased buyer power lowers input costs without restricting downstream competition or total output, then a proportion of these cost reductions are likely to be passed onto consumers in the form of lower prices.

63. In order to assess whether a merger would significantly impede effective competition by creating or strengthening buyer power, an analysis of the competitive conditions in upstream markets and an evaluation of the possible positive and negative effects described above are therefore required.

V. COUNTERVAILING BUYER POWER

64. The competitive pressure on a supplier is not only exercised by competitors but can also come from its customers. Even firms with very high market shares may not be in a position, post-merger, to significantly impede effective competition, in particular by acting to an appreciable extent independently of their customers, if the latter possess countervailing buyer power ([79]). Countervailing buyer power in this context should be understood as the bargaining strength that the buyer has vis-à-vis the seller in commercial negotiations due to its size, its commercial significance to the seller and its ability to switch to alternative suppliers.

65. The Commission considers, when relevant, to what extent customers will be in a position to counter the increase in market power that a merger would otherwise be likely to create. One source of countervailing buyer power would be if a customer could credibly threaten to resort, within a reasonable timeframe, to alternative sources of supply should the supplier decide to increase prices ([80]) or to otherwise deteriorate quality or the conditions of delivery. This would be the case if the buyer could immediately switch to other suppliers ([81]), credibly threaten to vertically integrate into the upstream market or to sponsor upstream expansion or entry ([82]) for instance by persuading a potential entrant to enter by committing to placing large orders with this company. It is more likely that large and sophisticated customers will possess this kind of countervailing buyer power than smaller firms in a fragmented industry ([83]). A buyer may also exercise countervailing buying power by refusing to buy other products produced by the supplier or, particularly in the case of durable goods, delaying purchases.

66. In some cases, it may be important to pay particular attention to the incentives of buyers to utilise their buyer power ([84]). For example, a downstream firm may not wish to make an investment in sponsoring new entry if the benefits of such entry in terms of lower input costs could also be reaped by its competitors.

67. Countervailing buyer power cannot be found to sufficiently off-set potential adverse effects of a merger if it only ensures that a particular segment of customers ([85]), with particular bargaining strength, is shielded from significantly higher prices or deteriorated conditions after the merger ([86]). Furthermore, it is not sufficient that buyer power exists prior to the merger, it must also exist and remain effective following the merger. This is because a merger of two suppliers may reduce buyer power if it thereby removes a credible alternative.

VI. ENTRY

68. When entering a market is sufficiently easy, a merger is unlikely to pose any significant anti-competitive risk. Therefore, entry analysis constitutes an important element of the overall competitive assessment. For entry to be considered a sufficient competitive constraint on the merging parties, it must be shown to be likely, timely and sufficient to deter or defeat any potential anti-competitive effects of the merger.

Likelihood of entry

69. The Commission examines whether entry is likely or whether potential entry is likely to constrain the behaviour of incumbents post-merger. For entry to be likely, it must be sufficiently profitable taking into account the price effects of injecting additional output into the market and the potential responses of the incumbents. Entry is thus less likely if it would only be economically viable on a large scale, thereby resulting in significantly depressed price levels. And entry is likely to be more difficult if the incumbents are able to protect their market shares by offering long-term contracts or giving targeted pre-emptive price reductions to those customers that the entrant is trying to acquire. Furthermore, high risk and costs of failed entry may make entry less likely. The costs of failed entry will be higher, the higher is the level of sunk cost associated with entry ([87]).

70. Potential entrants may encounter barriers to entry which determine entry risks and costs and thus have an impact on the profitability of entry. Barriers to entry are specific features of the market, which give incumbent firms advantages over potential competitors. When entry barriers are low, the merging parties are more likely to be constrained by entry. Conversely, when entry barriers are high, price increases by the merging firms would not be significantly constrained by entry. Historical examples of entry and exit in the industry may provide useful information about the size of entry barriers.

71. Barriers to entry can take various forms:

(a) Legal advantages encompass situations where regulatory barriers limit the number of market participants by, for example, restricting the number of licences ([88]). They also cover tariff and non-tariff trade barriers ([89]).

(b) The incumbents may also enjoy technical advantages, such as preferential access to essential facilities, natural resources ([90]), innovation and R & D ([91]), or intellectual property rights ([92]), which make it difficult for any firm to compete successfully. For instance, in certain industries, it might be difficult to obtain essential input materials, or patents might protect products or processes. Other factors such as economies of scale and scope, distribution and sales networks ([93]), access to important technologies, may also constitute barriers to entry.

(c) Furthermore, barriers to entry may also exist because of the established position of the incumbent firms on the market. In particular, it may be difficult to enter a particular industry because experience or reputation is necessary to compete effectively, both of which may be difficult to obtain as an entrant. Factors such as consumer loyalty to a particular brand ([94]), the closeness of relationships between suppliers and customers, the importance of promotion or advertising, or other advantages relating to reputation ([95]) will be taken into account in this context. Barriers to entry also encompass situations where the incumbents have already committed to building large excess capacity ([96]), or where the costs faced by customers in switching to a new supplier may inhibit entry.

72. The expected evolution of the market should be taken into account when assessing whether or not entry would be profitable. Entry is more likely to be profitable in a market that is expected to experience high growth in the future ([97]) than in a market that is mature or expected to decline ([98]). Scale economies or network effects may make entry unprofitable unless the entrant can obtain a sufficiently large market share ([99]).

73. Entry is particularly likely if suppliers in other markets already possess production facilities that could be used to enter the market in question, thus reducing the sunk costs of entry. The smaller the difference in profitability between entry and non-entry prior to the merger, the more likely such a reallocation of production facilities.

Timeliness

74. The Commission examines whether entry would be sufficiently swift and sustained to deter or defeat the exercise of market power. What constitutes an appropriate time period depends on the characteristics and dynamics of the market, as well as on the specific capabilities of potential entrants ([100]). However, entry is normally only considered timely if it occurs within two years.

Sufficiency

75. Entry must be of sufficient scope and magnitude to deter or defeat the anti-competitive effects of the merger ([101]). Small-scale entry, for instance into some market 'niche', may not be considered sufficient.

VII. EFFICIENCIES

76. Corporate reorganisations in the form of mergers may be in line with the requirements of dynamic competition and are capable of increasing the competitiveness of industry, thereby improving the conditions of growth and raising the standard of living in the Community ([102]). It is possible that efficiencies brought about by a merger counteract the effects on competition and in particular the potential harm to consumers that it might otherwise have ([103]). In order to assess whether a merger would significantly impede effective competition, in particular through the creation or the strengthening of a dominant position, within the meaning of Article 2(2) and (3) of the Merger Regulation, the Commission performs an overall competitive appraisal of the merger. In making this appraisal, the Commission takes into account the factors mentioned in Article 2(1), including the development of technical and economic progress provided that it is to the consumers' advantage and does not form an obstacle to competition ([104]).

77. The Commission considers any substantiated efficiency claim in the overall assessment of the merger. It may decide that, as a consequence of the efficiencies that the merger brings about, there are no grounds for declaring the merger incompatible with the common market pursuant to Article 2(3) of the Merger Regulation. This will be the case when the Commission is in a position to conclude on the basis of sufficient evidence that the efficiencies generated by the merger are likely to enhance the ability and incentive of the merged entity to act pro-competitively for the benefit of consumers, thereby counteracting the adverse effects on competition which the merger might otherwise have.

78. For the Commission to take account of efficiency claims in its assessment of the merger and be in a position to reach the conclusion that as a consequence of efficiencies, there are no grounds for declaring the merger to be incompatible with the common market, the efficiencies have to benefit consumers, be merger-specific and be verifiable. These conditions are cumulative.

Benefit to consumers

79. The relevant benchmark in assessing efficiency claims is that consumers ([105]) will not be worse off as a result of the merger. For that purpose, efficiencies should be substantial and timely, and should, in principle, benefit consumers in those relevant markets where it is otherwise likely that competition concerns would occur.

80. Mergers may bring about various types of efficiency gains that can lead to lower prices or other benefits to consumers. For example, cost savings in production or distribution may give the merged entity the ability and incentive to charge lower prices following the merger. In line with the need to ascertain whether efficiencies will lead to a net benefit to consumers, cost efficiencies that lead to reductions in variable or marginal costs ([106]) are more likely to be relevant to the assessment of efficiencies than reductions in fixed costs; the former are, in principle, more likely to result in lower prices for consumers ([107]). Cost reductions, which merely result from anti-competitive reductions in output, cannot be considered as efficiencies benefiting consumers.

81. Consumers may also benefit from new or improved products or services, for instance resulting from efficiency gains in the sphere of R & D and innovation. A joint venture company set up in order to develop a new product may bring about the type of efficiencies that the Commission can take into account.

82. In the context of coordinated effects, efficiencies may increase the merged entity's incentive to increase production and reduce prices, and thereby reduce its incentive to coordinate its market behaviour with other firms in the market. Efficiencies may therefore lead to a lower risk of coordinated effects in the relevant market.

83. In general, the later the efficiencies are expected to materialise in the future, the less weight the Commission can assign to them. This implies that, in order to be considered as a counteracting factor, the efficiencies must be timely.

84. The incentive on the part of the merged entity to pass efficiency gains on to consumers is often related to the existence of competitive pressure from the remaining firms in the market and from potential entry. The greater the possible negative effects on competition, the more the Commission has to be sure that the claimed efficiencies are substantial, likely to be realised, and to be passed on, to a sufficient degree, to the consumer. It is highly unlikely that a merger leading to a market position approaching that of a monopoly, or leading to a similar level of market power, can be declared compatible with the common market on the ground that efficiency gains would be sufficient to counteract its potential anti-competitive effects.

Merger specificity

85. Efficiencies are relevant to the competitive assessment when they are a direct consequence of the notified merger and cannot be achieved to a similar extent by less anticompetitive alternatives. In these circumstances, the efficiencies are deemed to be caused by the merger and thus, merger-specific ([108]). It is for the merging parties to provide in due time all the relevant information necessary to demonstrate that there are no less anti-competitive, realistic and attainable alternatives of a non-concentrative nature (e.g. a licensing agreement, or a cooperative joint venture) or of a concentrative nature (e.g. a concentrative joint venture, or a differently structured merger) than the notified merger which preserve the claimed efficiencies. The Commission only considers alternatives that are reasonably practical in the business situation faced by the merging parties having regard to established business practices in the industry concerned.

Verifiability

86. Efficiencies have to be verifiable such that the Commission can be reasonably certain that the efficiencies are likely to materialise, and be substantial enough to counteract a merger's potential harm to consumers. The more precise and convincing the efficiency claims are, the better the Commission can evaluate the claims. Where reasonably possible, efficiencies and the resulting benefit to consumers should therefore be quantified. When the necessary data are not available to allow for a precise quantitative analysis, it must be possible to foresee a clearly identifiable positive impact on consumers, not a marginal one. In general, the longer the start of the efficiencies is projected into the future, the less probability the Commission may be able to assign to the efficiencies actually being brought about.

87. Most of the information, allowing the Commission to assess whether the merger will bring about the sort of efficiencies that would enable it to clear a merger, is solely in the possession of the merging parties. It is, therefore, incumbent upon the notifying parties to provide in due time all the relevant information necessary to demonstrate that the claimed efficiencies are merger-specific and likely to be realised. Similarly, it is for the notifying parties to show to what extent the efficiencies are likely to counteract any adverse effects on competition that might otherwise result from the merger, and therefore benefit consumers.

88. Evidence relevant to the assessment of efficiency claims includes, in particular, internal documents that were used by the management to decide on the merger, statements from the management to the owners and financial markets about the expected efficiencies, historical examples of efficiencies and consumer benefit, and pre-merger external experts' studies on the type and size of efficiency gains, and on the extent to which consumers are likely to benefit.

VIII. **FAILING FIRM**

89. The Commission may decide that an otherwise problematic merger is nevertheless compatible with the common market if one of the merging parties is a failing firm. The basic requirement is that the deterioration of the competitive structure that follows the merger cannot be said to be caused by the merger ([109]). This will arise where the competitive structure of the market would deteriorate to at least the same extent in the absence of the merger ([110]).

90. The Commission considers the following three criteria to be especially relevant for the application of a 'failing firm defence'. First, the allegedly failing firm would in the near future be forced out of the market because of financial difficulties if not taken over by another undertaking. Second, there is no less anti-competitive alternative purchase than the notified merger. Third, in the absence of a merger, the assets of the failing firm would inevitably exit the market ([111]).

91. It is for the notifying parties to provide in due time all the relevant information necessary to demonstrate that the deterioration of the competitive structure that follows the merger is not caused by the merger.

(1) Council Regulation (EC) No 139/2004 of 20 January 2004 (OJ L 24, 29.1.2004, p. 1).

(2) Case T-102/96, Gencor v Commission, [1999] ECR II-753, paragraph 200. See Joined Cases C-68/94 and C-30/95, France and others v Commission (hereinafter 'Kali and Salz'), [1998] ECR I-1375, paragraph 221. In exceptional circumstances, a merger may give rise to the creation or the strengthening of a dominant position on the part of an undertaking which is not a party to the notified transaction (see Case IV/M.1383 — Exxon/Mobil, points 225-229; Case COMP/M.2434 — Grupo Villar MIR/EnBW/Hidroelectrica del Cantabrico, points 67-71).

(3) See also Joined Cases C-68/94 and C-30/95, Kali and Salz, paragraph 170.

(4) See Recitals 25 and 26 of the Merger Regulation.

(5) The term 'concentration' used in the Merger Regulation covers various types of transactions such as mergers, acquisitions, takeovers, and certain types of joint ventures. In the remainder of this notice, unless otherwise specified, the term 'merger' will be used as a synonym for concentration and therefore cover all the above types of transactions.

(6) The notice does not cover the assessment of the effects of competition that a merger has in other markets, including vertical and conglomerate effects. Nor does it cover the assessment of the effects of a joint venture as referred to in Article 2(4) of the Merger Regulation.

(7) The expression should be understood to also cover situations where, for instance, prices are decreased less, or are less likely to decrease, than they otherwise would have without the merger and where prices are increased more, or are more likely to increase, than they otherwise would have without the merger.

(8) By analogy, in the case of a merger that has been implemented without having been notified, the Commission would assess the merger in the light of the competitive conditions that would have prevailed without the implemented merger.

(9) See, e.g. Commission Decision 98/526/EC in Case IV/M.950 — Hoffmann La Roche/Boehringer Mannheim, OJ L 234, 21.8.1998, p. 14, point 13; Case IV/M.1846 — Glaxo Wellcome/SmithKline Beecham, points 70-72; Case COMP/M.2547 — Bayer/Aventis Crop Science, points 324 et seq.

(10) See, e.g. Case T-102/96, Gencor v Commission, [1999] ECR II-753, paragraphs 247-263.

(11) OJ C 372, 9.12.1997, p. 5.

(12) See Case T-102/96, Gencor v Commission, [1999] ECR II-753, paragraph 262, and Case T-342/99, Airtours v Commission, [2002] ECR II-2585, paragraph 280.

(13) As to the calculation of market shares, see also Commission Notice on the definition of the relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, p. 3, paragraphs 54-55.

(14) See, e.g. Case COMP/M.1806 — Astra Zeneca/Novartis, points 150 and 415.

(15) When relevant, market shares may be adjusted, in particular, to account for controlling interests in other firms (See, e.g. Case IV/M.1383 — Exxon/Mobil, points 446-458; Case COMP/M.1879 — Boeing/Hughes, points 60-79; Case COMP/JV 55 — Hutchison/RCPM/ECT, points 66-75), or for other arrangements with third parties (See, for instance, as regards sub-contractors, Commission Decision 2001/769/EC in Case COMP/M.1940 — Framatome/Siemens/Cogema, OJ L 289, 6.11.2001, p. 8, point 142).

(16) See, e.g. Case COMP/M.2256 — Philips/Agilent Health Care Technologies, points 31-32, and Case COMP/M.2609 — HP/Compaq, point 39.

(17) See, e.g. Case IV/M.1365 — FCC/Vivendi, point 40; Case COMP/JV 55 — Hutchison/RCPM/ECT, point 50. If appropriate, the Commission may also use other concentration measures such as, for instance, concentration ratios, which measure the aggregate market share of a small number (usually three or four) of the leading firms in a market.

(18) For example, a market containing five firms with market shares of 40 %, 20 %, 15 %, 15 %, and 10 %, respectively, has an HHI of 2 550 ($40^2 + 20^2 + 15^2 + 15^2 + 10^2 = 2\,550$). The HHI ranges from close to zero (in an atomistic market) to 10 000 (in the case of a pure monopoly).

(19) The increase in concentration as measured by the HHI can be calculated independently of the overall market concentration by doubling the product of the market shares of the merging firms. For example, a merger of two firms with market shares of 30 % and 15 % respectively would increase the HHI by 900 ($30 \times 15 \times 2 = 900$). The explanation for this technique is as follows: Before the merger, the market shares of the merging firms contribute to the HHI by their squares individually: $(a)^2 + (b)^2$. After the merger, the contribution is the square of their sum: $(a + b)^2$, which equals $(a)^2 + (b)^2 + 2ab$. The increase in the HHI is therefore represented by 2ab.

(20) Case T-221/95, Endemol v Commission, [1999] ECR II-1299, paragraph 134, and Case T-102/96, Gencor v Commission, [1999] ECR II-753, paragraph 205. It is a distinct question whether a dominant position is created or strengthened as a result of the merger.

(21) See, e.g. Case COMP/M.2337 — Nestlé/Ralston Purina, points 48-50.

(22) See, e.g. Commission Decision 1999/674/EC in Case IV/M.1221 — Rewe/Meinl, OJ L 274, 23.10.1999, p. 1, points 98-114; Case COMP/M.2337 — Nestlé/Ralston Purina, points 44-47.

(23) The calculation of market shares depends critically on market definition. It must be emphasised that the Commission does not necessarily accept the parties' proposed market definition.

(24) Recital 32 of the Merger Regulation. However, such an indication does not apply to cases where the proposed merger creates or strengthens a collective dominant position involving the 'undertakings concerned' and other third parties (see Joined Cases C-68/94 and C-30/95, Kali and Salz, [1998] ECR I-1375, paragraphs 171 et seq.; and Case T-102/96, Gencor v Commission, [1999] ECR II-753, paragraphs 134 et seq.).

(25) In markets with cross-shareholdings or joint ventures the Commission may use a modified HHI, which takes into account such share-holdings (see, e.g. Case IV/M.1383 — Exxon/Mobil, point 256).

(26) See paragraph 17.

(27) Also often called 'unilateral' effects.

(28) Such expected reactions by competitors may be a relevant factor influencing the merged entity's incentives to increase prices.

(29) An oligopolistic market refers to a market structure with a limited number of sizeable firms. Because the behaviour of one firm has an appreciable impact on the overall market conditions, and thus indirectly on the situation of each of the other firms, oligopolistic firms are interdependent.

(30) Recital 25 of the Merger Regulation.

(31) See, in particular, paragraphs 17 and 18.

(32) Products may be differentiated in various ways. There may, for example, be differentiation in terms of geographic location, based on branch or stores location; location matters for retail distribution, banks, travel agencies, or petrol stations. Likewise, differentiation may be based on brand image, technical specifications, quality or level of service. The level of advertising in a market may be an indicator of the firms' effort to differentiate their products. For other products, buyers may have to incur switching costs to use a competitor's product.

(33) For the definition of the relevant market, see the Commission's Notice on the definition of the relevant market for the purposes of Community competition law, cited above.

(34) See for example Case COMP/M.2817 — Barilla/BPS/Kamps, point 34; Commission Decision 2001/403/EC in Case COMP/M.1672 — Volvo/Scania, OJ L 143, 29.5.2001, p. 74, points 107-148.

(35) See, e.g. Commission Decision 94/893/EC in Case IV/M.430 — Procter & Gamble/VP Schickedanz (II), OJ L 354, 21.6.1994, p. 32, Case T-290/94, Kaysersberg v Commission, [1997] II-2137, paragraph 153; Commission Decision 97/610/EC in Case IV/M.774 — Saint-Gobain/Wacker-Chemie/NOM, OJ L 247, 10.9.1997, p. 1, point 179; Commission Decision 2002/156/EC in Case COMP/M.2097 — SCA/Metsä Tissue, OJ L 57, 27.2.2002, p. 1, points 94-108; Case T-310/01, Schneider v Commission, [2002] II-4071, paragraph 418.

(36) Typically, the relevant margin (m) is the difference between price (p) and the incremental cost (c) of supplying one more unit of output expressed as a percentage of price (m = (p - c)p)).

(37) See, e.g. Case IV/M.1980 — Volvo/Renault VI, point 34; Case COMP/M.2256 — Philips Agilent/Health Care Solutions, points 33-35; Case COMP/M.2537 — Philips/Marconi Medical Systems, points 31-34.

(38) The cross-price elasticity of demand measures the extent to which the quantity of a product demanded changes in response to a change in the price of some other product, all other things remaining equal. The own-price elasticity measures the extent to which demand for a product changes in response to the change in the price of the product itself.

(39) The diversion ratio from product A to product B measures the proportion of the sales of product A lost due to a price increase of A that are captured by product B.

(40) Commission Decision 97/816/EC in Case IV/M.877 — Boeing/McDonnell Douglas, OJ L 336, 8.12.1997, p. 16, points 58 et seq.; Case COMP/M.3083 — GE/Instrumentarium, points 125 et seq.

(41) Sunk costs are costs which are unrecoverable upon exit from the market.

(42) See e.g. Commission Decision 2002/156/EC in Case IV/M.877 — Boeing/McDonnell Douglas, OJ L 336, 8.12.1997, p. 16, point 70.

(43) See, e.g. Case IV/M. 986 — Agfa Gevaert/DuPont, OJ L 211, 29.7.1998, p. 22, points 63-71.

(44) See, e.g. Case COMP/M.2187 — CVC/Lenzing, points 162-170.

(45) When analysing the possible expansion of capacity by rivals, the Commission considers factors similar to those described in Section VI on entry. See, e.g. Case COMP/M.2187 — CVC/Lenzing, points 162-173.

(46) See, e.g. Case T-221/95, Endemol v Commission, [1999] ECR II-1299, paragraph 167.

(47) See, e.g. Case T-22/97, Kesko v Commission, [1999], ECR II-3775, paragraphs 141 et seq.

(48) See, e.g. Commission Decision 2001/684/EC in Case M.1671 — Dow Chemical/Union Carbide OJ L 245, 14.9.2001, p. 1, points 107-114.

(49) See, e.g. Commission Decision 96/435/EC in Case IV/M.623 — Kimberly-Clark/Scott, OJ L 183, 23.7.1996, p. 1; Case T-114/02, Babyliss SA v Commission ('Seb/Moulinex'), [2003] ECR II-000, paragraphs 343 et seq.

(50) This is, for example, the case in network industries such as energy, telecommunications and other communication industries.

(51) Commission Decision 99/287/EC in Case IV/M.1069 — Worldcom/MCI, OJ L 116, 4.5.1999, p. 1, points 117 et seq.; Case IV/M.1741 — MCI Worldcom/Sprint, points 145 et seq.; Case IV/M.1795 — Vodafone Airtouch/Mannesmann, points 44 et seq.

(52) Case T-156/98 RJB Mining v Commission [2001] ECR II-337.

(53) Commission Decision 2002/156/EC in Case IV/M.877 — Boeing/McDonnell Douglas, OJ L 336, 8.12.1997, p. 16, point 58; Case COMP/M.2568 — Haniel/Ytong, point 126.

(54) For an example of pipeline products of one merging party likely to compete with the other party's pipeline or existing products, see, e.g. Case IV/M.1846 — Glaxo Wellcome/SmithKline Beecham, point 188.

(55) Case T-102/96, Gencor v Commission, [1999] ECR II-753, paragraph 277; Case T-342/99, Airtours v Commission, [2002] ECR II-2585, paragraph 61.

(56) This may be the case if the oligopolists have tended to concentrate their sales in different areas for historic reasons.

(57) Case T-342/99, Airtours v Commission, [2002] ECR II-2585, paragraph 62.

(58) See Commission Decision 92/553/EC in Case IV/M.190 — Nestlé/Perrier, OJ L 356, 5.12.1992, p. 1, points 117-118.

(59) See, e.g. Case IV/M.580 — ABB/Daimler-Benz, point 95.

(60) See, e.g. Commission Decision 2002/156/EC in Case COMP/M.2097 — SCA/Metsä Tissue, OJ L 57, 27.2.2002, p. 1, point 148.

(61) See, e.g. Case IV/M.1298 — Kodak/Imation, point 60.

(62) Case T-102/96, Gencor v Commission, [1999] ECR II-753, paragraph 222; Commission Decision 92/553/EC in Case IV/M.190 — Nestlé/Perrier, OJ L 356, 5.12.1992, p. 1, points 63-123.

(63) In assessing whether or not a merger may increase the symmetry of the various firms present on the market, efficiency gains may provide important indications (see also paragraph 82 of the notice).

(64) See, e.g. Commission Decision 2001/519/EC in Case COMP/M.1673 — VEBA/VIAG, OJ L 188, 10.7.2001, p. 1, point 226; Case COMP/M.2567 — Nordbanken/Postgirot, point 54.

(65) See, e.g. Case COMP/M.2389 — Shell/DEA, points 112 et seq.; and Case COMP/M.2533 — BP/E.ON, points 102 et seq.

(66) See also Commission Decision 2000/42/EC in Case IV/M.1313 — Danish Crown/Vestjyske Slagterier, OJ L 20, 25.1.2000, p. 1, points 176-179.

(67) See, e.g. Case COMP/M.2640 — Nestlé/Schöller, point 37; Commission Decision 1999/641/EC in Case COMP/M.1225 — Enso/Stora, OJ L 254, 29.9.1999, p. 9, points 67-68.

(68) See, e.g. Case IV/M.1939 — Rexam (PLM)/American National Can, point 24.

(69) See Case COMP/M.2389 — Shell/DEA, point 121, and Case COMP/M.2533 — BP/E.ON, point 111.

(70) Although deterrent mechanisms are sometimes called 'punishment' mechanisms, this should not be understood in the strict sense that such a mechanism necessarily punishes individually a firm that has deviated. The expectation that coordination may break down for a certain period of time, if a deviation is identified as such, may in itself constitute a sufficient deterrent mechanism.

(71) See, e.g. Commission Decision 2000/42/EC in Case IV/M.1313 — Danish Crown/Vestjyske Slagterier, OJ L 20, 25.1.2000, p. 1, point 177.

(72) See Case T-102/96, Gencor v Commission, [1999] ECR II-753, paragraph 281.

(73) These elements are analysed in a similar way to non-coordinated effects.

(74) See, e.g. Case IV/M.1630 — Air Liquide/BOC, points 201 et seq. For an example of a case where entry by the other merging firm was not sufficiently likely in the short to medium term (Case T-158/00, ARD v Commission, [2003] ECR II-000, paragraphs 115-127).

(75) Commission Decision 2001/98/EC in Case IV/M.1439 — Telia/Telenor, OJ L 40, 9.2.2001, p. 1, points 330-331, and Case IV/M.1681 — Akzo Nobel/Hoechst Roussel Vet, point 64.

(76) Case IV/M.1630 — Air Liquide/BOC, point 219; Commission Decision 2002/164/EC in Case COMP/M.1853 — EDF/EnBW, OJ L 59, 28.2.2002, p. 1, points 54-64.

(77) See Commission Decision 1999/674/EC in Case M.1221 — Rewe/Meinl, OJ L 274, 23.10.1999, p. 1, points 71-74.

(78) Case T-22/97, Kesko v Commission, [1999] ECR II-3775, paragraph 157; Commission Decision 2002/156/EC in Case M.877 — Boeing/McDonnell Douglas, OJ L 336, 8.12.1997, p. 16, points 105-108.

(79) See, e.g. Case IV/M.1882 — Pirelli/BICC, points 73-80.

(80) See, e.g. Case IV/M.1245 — Valeo/ITT Industries, point 26.

(81) Even a small number of customers may not have sufficient buyer power if they are to a large extent 'locked in' because of high switching costs (see Case COMP/M.2187 — CVC/Lenzing, point 223).

(82) Commission Decision 1999/641/EC in Case COMP/M.1225 — Enso/Stora, OJ L 254, 29.9.1999, p. 9, points 89-91.

(83) It may also be appropriate to compare the concentration existing on the customer side with the concentration on the supply side (Case COMP/JV 55 — Hutchison/RCPM/ECT, point 119, and Commission Decision 1999/641/EC in Case COMP/M.1225 — Enso/Stora, OJ L 254, 29.9.1999, p. 9, point 97).

(84) Case COMP/JV 55 — Hutchison/RCPM/ECT, points 129-130.

(85) Commission Decision 2002/156/EC in Case COMP/M.2097 — SCA/Metsä Tissue, OJ L 57, 27.2.2002, point 88. Price discrimination between different categories of customers may be relevant in some cases in the context of market definition (See the Commission's notice on the definition of the relevant market, cited above, at paragraph 43).

(86) Accordingly, the Commission may assess whether the various purchasers will hold countervailing buyer power, see, e.g. Commission Decision 1999/641/EC in Case COMP/M.1225 — Enso/Stora, OJ L 254, 29.9.1999, p. 9, points 84-97.

(87) Commission Decision 97/610/EC in Case IV/M.774 — Saint-Gobain/Wacker-Chemie/NOM, OJ L 247, 10.9.1997, p. 1, point 184.

(88) Case IV/M.1430 — Vodafone/Airtouch, point 27; Case IV/M.2016 — France Télécom/Orange, point 33.

(89) Commission Decision 2002/174/EC in Case COMP/M.1693 — Alcoa/Reynolds, OJ L 58, 28.2.2002, point 87.

(90) Commission Decision 95/335/EC in Case IV/M.754 — Anglo American Corp./Lonrho, OJ L 149, 20.5.1998, p. 21, points 118-119.

(91) Commission Decision 97/610/EC in Case IV/M.774 — Saint-Gobain/Wacker-Chemie/NOM, OJ L 247, 10.9.1997, p. 1, points 184-187.

(92) Commission Decision 94/811/EC in Case IV/M.269 — Shell/Montecatini, OJ L 332, 22.12.1994, p. 48, point 32.

(93) Commission Decision 98/327/EC in Case IV/M.833 — The Coca-Cola Company/Carlsberg A/S, OJ L 145, 15.5.1998, p. 41, point 74.

(94) Commission Decision 98/327/EC in Case IV/M.833 — The Coca-Cola Company/Carlsberg A/S, OJ L 145, 15.5.1998, p. 41, points 72-73.

(95) Commission Decision 2002/156/EC in Case COMP/M.2097 — SCA/Metsä Tissue, OJ L 57, 27.2.2002, p. 1, points 83-84.

(96) Commission Decision 2001/432/EC in Case IV/M.1813 — Industri Kapital Nordkem/Dyno, OJ L 154, 9.6.2001, p. 41, point 100.

(97) See, e.g. Commission Decision 98/475/EC in Case IV/M.986 — Agfa-Gevaert/Dupont, OJ L 211, 29.7.1998, p. 22, points 84-85.

(98) Case T-102/96, Gencor v Commission, [1999] ECR II-753, paragraph 237.

(99) See, e.g. Commission Decision 2000/718/EC in Case IV/M.1578 — Sanitec/Sphinx, OJ L 294, 22.11.2000, p. 1, point 114.

(100) See, e.g. Commission Decision 2002/174/EC in Case COMP/M.1693 — Alcoa/Reynolds, L 58, 28.2.2002, points 31-32, 38.

(101) Commission Decision 91/535/EEC in Case IV/M.68 — Tetra Pak/Alfa Laval, OJ L 290, 22.10.1991, p. 35, point 3.4.

(102) See Recital 4 of the Merger Regulation.

(103) See Recital 29 of the Merger Regulation.

(104) Cf. Article 2(1)(b) of the Merger Regulation.

(105) Pursuant to Article 2(1)(b), the concept of 'consumers' encompasses intermediate and ultimate consumers, i.e. users of the products covered by the merger. In other words, consumers within the meaning of this provision include the customers, potential and/or actual, of the parties to the merger.

(106) Variable costs should be viewed as those costs that vary with the level of production or sales over the relevant time period. Marginal costs are those costs associated with expanding production or sales at the margin.

(107) Generally, fixed cost savings are not given such weight as the relationship between fixed costs and consumer prices is normally less direct, at least in the short run.

(108) In line with the general principle set out in paragraph 9 of this notice.

(109) Joined Cases C-68/94 and C-30/95, Kali and Salz, paragraph 110.

(110) Joined Cases C-68/94 and C-30/95, Kali and Salz, paragraph 114. See also Commission Decision 2002/365/EC in Case COMP/M.2314 — BASF/Pantochim/Eurodiol, OJ L 132, 17.5.2002, p. 45, points 157-160. This requirement is linked to the general principle set out in paragraph 9 of this notice.

(111) The inevitability of the assets of the failing firm leaving the market in question may, in particular in a case of merger to monopoly, underlie a finding that the market share of the failing firm would in any event accrue to the other merging party. See Joined Cases C-68/94 and C-30/95, Kali and Salz, paragraphs 115-116.

ANNEX 18

BEST PRACTICES

Best Practices on the conduct of EC merger control proceedings (December 2003)
(not published in O.J.)

DG COMPETITION

Best Practices

on

the conduct of EC merger control proceedings

1. SCOPE AND PURPOSE OF THE BEST PRACTICES

1. The principal aim of these Best Practices is to provide guidance for interested parties on the day-to-day conduct of EC merger control proceedings. They are intended to foster and build upon a spirit of co-operation and better understanding between DG Competition and the legal and business community. In this regard, the Best Practices seek to increase understanding of the investigation process and thereby to further enhance the efficiency of investigations and to ensure a high degree of transparency and predictability of the review process. In particular, they aim at making the short time available in EC merger procedures as productive and efficient as possible for all parties concerned.

2. The Best Practices are built on the experience to date of DG Competition in the application of Council Regulation (EEC) No 4064/89[1] (the Merger Regulation) and replace the current Best Practices of 1999. They reflect the views and practice of DG Competition at the time of publication[2].

   The specificity of an individual case may require an adaptation of, or deviation from these Best Practices depending on the case at hand.

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[1] Council Regulation No 4064/89, OJ L 395, 30.12.1989 p. 1; corrigendum OJ L 257 of 21.9.1990, p. 13; Regulation as last amended by Regulation (EC) No 1310/97 (OJ L 180, 9. 7. 1997, p. 1, corrigendum OJ L 40, 13.2.1998, p. 17).

[2] It is to be noted that a recast Merger Regulation replacing Regulation 4064/89 will apply from 1 May 2004. The Best Practices are equally applicable under Regulation 4064/89 and will continue to be applicable, possibly with further amendments, under the recast Merger Regulation. Appropriate references to the recast Merger Regulation are made throughout the Best Practices by means of footnotes. Those references will only become applicable from 1st of May 2004.

2. RELATIONSHIP TO COMMUNITY LAW

3. These Best Practices should not be taken as a full or comprehensive account of the relevant legislative, interpretative and administrative measures which govern Community merger control. They should be read in conjunction with such measures.

4. The Best Practices do not create or alter any rights or obligations as set out in the Treaty establishing the European Community, the Merger Regulation, its Implementing Regulation[3] as amended from time to time and as interpreted by the case-law of the Community Courts. Nor do they alter the Commission's interpretative notices. The Best Practices do not apply to proceedings under Council Regulation No 17[4], to be replaced by Council Regulation No 1/2003[5] as of 1 May 2004, implementing Articles 81 and 82 of the Treaty.

3. PRE-NOTIFICATION

Purpose of pre-notification contacts

5. In DG Competition's experience the pre-notification phase of the procedure is an important part of the whole review process. As a general rule, DG Competition finds it useful to have pre-notification contacts with notifying parties even in seemingly non-problematic cases. DG Competition will therefore always give notifying parties and other involved parties the opportunity, if they so request, to discuss an intended concentration informally and in confidence prior to notification (cf. also Recital 10 Implementing Regulation).

6. Pre-notification contacts provide DG Competition and the notifying parties with the possibility, prior to notification, to discuss jurisdictional and other legal issues. They also serve to discuss issues such as the scope of the information to be submitted and to prepare for the upcoming investigation by identifying key issues and possible competition concerns (theories of harm) at an early stage.

7. Further, it is in the interests of DG Competition and the business and legal community to ensure that notification forms are complete from the outset so that declarations of incompleteness are avoided as far as possible. It is DG Competition's experience that in cases in which notifications have been declared incomplete, usually there were no or very limited pre-notification contacts. Accordingly, for this reason it is recommended that notifying parties contact DG Competition prior to notification.

8. Pre-notification discussions are held in strict confidence. The discussions are a voluntary part of the process and remain without prejudice to the handling and investigation of the case following formal notification. However, the mutual benefits

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[3] Commission Regulation (EC) No 447/98 of 1 March 1998 on the notifications, time limits and hearings provided for in the Merger Regulation, OJ L 61, 2.3.1998, p.1.

[4] OJ P 013, 21/02/1962, p. 204 – 211.

5 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 04.01.2003, p. 1-25.

for DG Competition and the parties of a fruitful pre-notification phase can only materialise if discussions are held in an open and co-operative atmosphere, where all potential issues are addressed in a constructive way.

9. In DG Competition's experience it is generally preferable that both legal advisers and business representatives, who have a good understanding of the relevant markets, are available for pre-notification discussions with the case-team. This normally results in more informed discussions on the business rationale for the transaction and the functioning of the markets in question.

Timing and extent of pre-notification contacts

10. Pre-notification contacts should preferably be initiated at least two weeks before the expected date of notification. The extent and format of the pre-notification contacts required is, however, linked to the complexity of the individual case in question. In more complex cases a more extended pre-notification period may be appropriate and in the interest of the notifying parties. In all cases it is advisable to make contact with DG Competition as soon as possible as this will facilitate planning of the case.

11. Pre-notification contacts should be launched with a submission that allows the selection of an appropriate DG Competition case-team[6]. This memorandum should provide a brief background to the transaction, a brief description of the relevant sector(s) and market(s) involved and the likely impact of the transaction on competition in general terms. It should also indicate the case language. In straightforward cases, the parties may chose to submit a draft Form CO as a basis for further discussions with DG Competition.

12. After initial contacts have been made between the case-team and the notifying parties, it will be decided, whether it will suffice for DG Competition to make comments orally or in writing on the submissions made. This would typically be considered in straightforward cases. In more complex cases and cases that raise jurisdictional or other procedural issues, one or more pre-notification meetings are normally considered appropriate.

13. The first pre-notification meeting is normally held on the basis of a more substantial submission or a first draft Form CO. This allows for a more fruitful discussion about the proposed transaction in question or potential issue in point. Subsequent meetings may cover additional information submitted or outstanding issues.

14. Any submission sent to DG Competition should be provided sufficiently ahead of meetings or other contacts in order to allow for well prepared and fruitful discussions. In this regard, preparatory briefing memoranda/ draft Form COs sent in preparation of meetings should be filed in good time before the meeting (at least three working days) unless agreed otherwise with the case team. In case of voluminous submissions and in less straightforward cases, this time may need to be extended to allow DG Competition to properly prepare for the meeting.

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[6] Case teams for new cases are normally set up in weekly DG Competition's Merger Management Meetings.

15. Irrespective of whether pre-notification meetings have taken place or not, it is advisable that the notifying parties systematically provide a substantially complete draft Form CO before filing a formal notification. DG Competition would thereafter normally require five working days to review the draft before being asked to comment, at a meeting or on the telephone, on the adequacy of the draft. In case of voluminous submissions, this time will normally be extended.

Information to be provided / preparation of the Form CO

16. The format and the timing of all prenotification submissions should be decided together with the case-team. Notifying parties are advised to fully and frankly disclose information relating to all potentially affected markets and possible competition concerns, even if they may ultimately consider that they are not affected and notwithstanding that they may take a particular view in relation to, for example, the issue of market definition. This will allow for an early market testing of alternative market definitions and/or the notifying parties' position on the market/s in question. In DG Competition's experience this approach minimises surprise submissions from third parties, and may avoid requests for additional information from the notifying parties at a late stage in the procedure and possible declarations of incompleteness under Article 4(2) of the Implementing Regulation or a decision under Article 11(5) of the Merger Regulation.

17. In addition, DG Competition recommends that notifying parties should, as early as possible in pre-notification, submit internal documents such as board presentations, surveys, analyses, reports and studies discussing the proposed concentration, the economic rationale for the concentration and competitive significance or the market context in which it takes place. Such documents provide DG Competition with an early and informed view of the transaction and its potential competitive impact and can thus allow for a productive discussion and finalisation of the Form CO.

18. Where appropriate, it is also recommended that notifying parties put forward, already at the pre-notification stage, any elements demonstrating that the merger leads to efficiency gains that they would like the Commission to take into account for the purposes of its competitive assessment of the proposed transaction. Such claims are likely to require extensive analysis. It is thus in the interests of the notifying parties to present these claims as early as possible to allow sufficient time for DG Competition to appropriately consider these elements in its assessment of a proposed transaction.

19. Pre-notification discussions provide the opportunity for the Commission and the notifying parties to discuss the amount of information to be provided in a notification. The notifying parties may in pre-notification request the Commission to waive the obligation to provide certain information that is not necessary for the examination of the case. All requests to omit any part of the information specified should be discussed in detail and any waiver has to be agreed with DG Competition prior to notification[7].

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[7] See Article 3(2) Implementing Regulation. See also Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EEC) No 4064/89, OJ C217, 29.07.2000, p. 32.

Completeness of the notification

20. Given that a notification is not considered effective until the information to be submitted in Form CO is complete in all material respects, the notifying parties and their advisers should ensure that the information contained in Form CO has been carefully prepared and verified: incorrect and misleading information is considered incomplete information[8]. In this regard, the notifying parties should take special care that the appropriate contact details are provided for customers, suppliers and competitors. If such information is not correct or provided in full it will significantly delay the investigation and therefore may lead to a declaration of incompleteness.

21. Further, to facilitate the effective and expeditious handling of their notification, notifying parties should also endeavour to provide the contact details required in Form CO electronically, at the latest on the day of notification, using the appropriate electronic form which can be provided by the case team.

22. Provided that the notifying parties follow the above described guidance, DG Competition will in principle, be prepared to confirm informally the adequacy of a draft notification at the pre-notification stage or, if appropriate, to identify in what material respects the draft Form CO is incomplete. However it has to be recognised that it will not be possible for DG Competition to exclude the fact that it may have to declare a notification incomplete in appropriate cases after notification.

23. In the event that DG Competition discovers omissions in the Form CO after formal notification, the notifying parties may be given an opportunity to urgently put right such omissions before a declaration of incompleteness is adopted. Due to the time constraints in merger procedures, the time allowed for such rectification is normally limited to 1 or 2 days. This opportunity will not be granted, however, in cases where DG Competition finds that the omissions immediately hinder the proper investigation of the proposed transaction.

Procedural questions and inter-agency co-operation

24. In addition to substantive issues, the notifying parties may in the pre-notification phase seek DG Competition's opinion on procedural matters such as jurisdictional questions.

25. Informal guidance may be provided if they are directly related to an actual, planned transaction and if sufficiently detailed background information is submitted by the notifying parties to properly assess the issue in question[9]. Further matters for pre-notification discussions include the possibility of referrals to or from national EU jurisdictions[10], parallel proceedings in other non-EU jurisdictions and the issue of

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[8] In addition, the Commission may impose fines on the notifying parties where they supply incorrect or misleading information in a notification under Article 14 (1)(b) Merger Regulation.

[9] Such informal guidance cannot be regarded as creating legitimate expectations regarding the proper interpretation of applicable jurisdictional or other rules.

[10] Such jurisdictional discussions will become particularly pertinent under the recast Merger Regulation, which becomes applicable from 1 May 2004. Pursuant to Articles 4(4) and 4(5) of the recast Merger Regulation, notifying parties may, before notification, request on the basis of a

waivers on information sharing with other jurisdictions. As regards transactions likely to be reviewed in more than one jurisdiction, DG Competition invites the notifying parties to discuss the timing of the case with a view to enhance efficiency of the respective investigations, to reduce burdens on the merging parties and third parties, and to increase overall transparency of the merger review process. In this regard, notifying parties should also have regard to the EU-US Best Practices on co-operation in merger investigations[11].

4. FACT FINDING / REQUESTS FOR INFORMATION

26. In carrying out its duties the Commission may obtain all necessary information from relevant persons, undertakings, associations of undertakings and competent authorities of Member States (see Article 11(1) Merger Regulation). That investigation normally starts after the notification of a proposed concentration. However, DG Competition may exceptionally decide that, in the interest of its investigation, market contacts could be initiated informally prior to notification. Such pre-notification contacts/enquiries would only take place if the existence of the transaction is in the public domain and once the notifying parties have had the opportunity to express their views on such measures.

27. The Commission's investigation is mainly conducted in the form of written Requests for Information (requests pursuant to Article 11 of the Merger Regulation) to customers, suppliers, competitors and other relevant parties. Such requests may also be addressed to the notifying parties. In addition to such Article 11 requests, the views of the notifying parties, other involved parties and third parties are also sought orally.

28. In the interest of an efficient investigation, DG Competition may consult the notifying parties, other involved parties or third parties on methodological issues regarding data and information gathering in the relevant economic sector. It may also seek external economic and/or industrial expertise and launch its own economic studies.

5. COMMUNICATION AND MEETINGS WITH THE NOTIFYING PARTIES, OTHER INVOLVED PARTIES AND 3RD PARTIES

29. One of the aims of these Best Practices is to enhance transparency in the day to day handling of merger cases and in particular, to ensure good communication between DG Competition, the merging parties and third parties. In this regard, DG Competition endeavours to give all parties involved in the proceeding ample opportunity for open and frank discussions and to make their points of view known throughout the procedure.

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reasoned submission, referral of a case to or from the Commission. DG Competition will be ready to discuss with notifying parties informally the possibility of such pre-notification referrals and to guide them through the pre-notification referral process.

[11] http://europa.eu.int/comm/competition/mergers/others/eu_us.pdf

5.1. State of Play meetings with notifying parties

Aim and format of the State of Play meetings

30. The objective of the State of Play meetings is to contribute to the quality and efficiency of the decision-making process and to ensure transparency and communication between DG Competition and the notifying parties. As such these meetings should provide a forum for the mutual exchange of information between DG Competition and the notifying parties at key points in the procedure. They are entirely voluntary in nature.

31. State of Play meetings may be conducted in the form of meetings at the Commission's premises, or alternatively, if appropriate, by telephone or videoconference. In order for the meetings to operate properly they should be carefully prepared on the basis of an agenda agreed in advance. Further, senior DG Competition management will normally chair the meetings.

32. The State of Play meetings will not exclude discussions and exchanges of information between the notifying parties and DG Competition at other occasions throughout the procedure as appropriate. In this regard, notifying parties are advised to inform DG Competition, as soon as possible, about any important procedural or substantive developments that may be of relevance for the assessment of the proposed transaction. Such developments may include any remedy proposals the notifying parties are offering or are considering to offer in other jurisdictions, so as to facilitate co-ordination of the timing and substance of such remedy proposals. This also concerns matters already discussed at a State of Play meeting, in respect of which the parties consider it necessary to provide additional comments.

Timing of the State of Play meetings

33. Notifying parties will normally be offered the opportunity of attending a State of Play meeting at the following five different points in the Phase I and Phase II procedure:

a) where it appears that "serious doubts" within the meaning of Article 6(1)(c) of the Merger Regulation are likely to be present a meeting will be offered <u>before the expiry of 3 weeks[12] into Phase I</u>. In addition to informing the notifying parties of the preliminary result of the initial investigation, this meeting provides an opportunity for the notifying parties to prepare the formulation of a possible remedy proposal in Phase I before expiry of the deadline provided in Article 18 of the Implementing Regulation.

b) <u>normally within 2 weeks following the adoption of the Article 6(1)(c) decision</u>. In order to prepare for this meeting, the notifying parties should provide DG Competition with their comments on the Article 6(1)(c) decision and on any documents in the Commission's file, which they may have had the opportunity to review (see below section 7.2) by way of a written memorandum in advance of the meeting. The notifying parties should contact the case team to discuss an appropriate schedule for the filing of this memorandum.

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[12] Fifteen working days under the recast Merger Regulation.

The main purpose of the post Article 6(1)(c) meeting is to facilitate the notifying parties' understanding of the Commission's concerns at an early stage of the Phase II proceedings. The meeting also serves to assist DG Competition in deciding the appropriate framework for its further investigation by discussing with the notifying parties matters such as the market definition and competition concerns outlined in the Article 6(1)(c) decision. The meeting is also intended to serve as a forum for mutually informing each other of any planned economic or other studies. The approximate timetable of the Phase II procedure may also be discussed[13].

c) before the issuing of a Statement of Objections (SO). This pre-SO meeting gives the notifying parties an opportunity to understand DG Competition's preliminary view on the outcome of the Phase II investigation and to be informed of the type of objections DG Competition may set out in the SO. The meeting may also be used by DG Competition to clarify certain issues and facts before it finalises its proposal on the issuing of a SO.

d) following the reply to the SO and the Oral Hearing. This post-SO State of Play meeting provides the notifying parties with an opportunity to understand DG Competition's position after it has considered their reply and heard them at an Oral Hearing. If DG Competition indicates that it is minded to maintain some or all of its objections, the meeting may also serve as an opportunity to discuss the scope and timing of possible remedy proposals[14].

e) before the Advisory Committee meets. The primary purpose of this meeting is to enable the notifying parties to discuss with DG Competition its views on any proposed remedies and where relevant, the results of the market testing of such remedies. It also provides the notifying parties where necessary, with the opportunity to formulate improvements to their remedies proposal[15].

5.2. Involvement of third parties

34. According to Community merger control law, third parties considered as having a “sufficient interest” in the Commission’s procedure include customers, suppliers, competitors, members of the administration or management organs of the undertakings concerned or recognised workers’ representatives of those undertakings[16]. Their important role in the Commission’s procedure is stressed in particular in Article 18(4) of the Merger Regulation and Articles 16(1) and (2) of the

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[13] Once the recast Merger Regulation becomes applicable, this post Article 6(1)(c) State of Play meeting will also serve to discuss the possibility of any extensions to the Phase II deadline pursuant to Article 10(3) of the recast Merger Regulation.

[14] It is to be noted that, under the recast Merger Regulation (Article 10(3)), the submission of remedies could lead to an automatic extension of the Phase II deadline.

[15] Modifications to remedies are only possible under those conditions set out in Article 18 of the Implementing Regulation and point 43 of the Commission’s Notice on Remedies.

[16] See Article 11 of the Implementing Regulation.

Implementing Regulation. In addition, the Commission also welcomes the views of any other interested third parties including consumer organisations[17].

35. The primary way for third parties to contribute to the Commission's investigation is by means of replies to requests for information (Article 11 Merger Regulation)[18]. However, DG Competition also welcomes any individual submission apart from direct replies to questionnaires, where third parties provide information and comments they consider relevant for the assessment of a given transaction. DG Competition may also invite third parties for meetings to discuss and clarify specific issues raised.

36. In addition, DG Competition may in the interest of the investigation in appropriate cases provide third parties that have shown a sufficient interest in the procedure with an edited version of the SO from which business secrets have been removed, in order to allow them to make their views known on the Commission's preliminary assessment. In such cases, the SO is provided under strict confidentiality obligations and restrictions of use, which the third parties have to accept prior to receipt.

37. If third parties wish to express competition concerns as regards the transaction in question or to put forward views on key market data or characteristics that deviate from the notifying parties' position, it is essential that they are communicated as early as possible to DG Competition, so that they can be considered, verified and taken into account properly. Any point raised should be substantiated and supported by examples, documents and other factual evidence. Furthermore, in accordance with Article 17(2) of the Implementing Regulation, third parties should always provide the DG Competition with a non-confidential version of their submissions at the time of filing or shortly thereafter to facilitate access to the file and other measures intended to ensure transparency for the benefit of the decision making process (see further below section 7).

5.3. "Triangular" and other meetings

38. In addition to bilateral meetings between DG Competition and the notifying parties, other involved parties or third parties, DG Competition may decide to invite third parties and the notifying parties to a "triangular" meeting where DG Competition believes it is desirable, in the interests of the fact-finding investigation, to hear the views of the notifying parties and such third parties in a single forum. Such triangular meetings, which will be on a voluntary basis and which are not intended to replace the formal oral hearing, would take place in situations where two or more opposing views have been put forward as to key market data and characteristics and the effects of the concentration on competition in the markets concerned.

39. Triangular meetings should ideally be held as early in the investigation as possible in order to enable DG Competition to reach a more informed conclusion as to the

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[17] Article 16(3) Implementing Regulation. To this effect, DG Competition has appointed a Consumer Liaison Officer responsible for contacts with consumer organisations.

[18] Article 11(7) of the recast Merger Regulation expressly provides for the Commission's competence to interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject-matter of an investigation.

relevant market characteristics and to clarify issues of substance before deciding on the issuing of an SO. Triangular meetings are normally chaired by senior DG Competition management. They are prepared in advance on the basis of an agenda established by DG Competition after consultation of all parties that agreed to attend the meeting. The preparation will normally include a mutual exchange of non-confidential submissions between the notifying parties and the third party in question sufficiently in advance of the meeting. The meeting will not require the disclosure of confidential information or business secrets, unless otherwise agreed by the parties.

6. REMEDIES DISCUSSIONS

40. As stated above, the State of Play meetings in both Phase I and Phase II, in addition to providing a forum for discussing issues related to the investigation, also serve to discuss possible remedy proposals. Detailed guidance on the requirements for such proposals is set out in the Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98[19] (the Remedies Notice). In particular, the Remedies Notice sets out the general principles applicable to remedies, the main types of commitments that have previously been accepted by the Commission, the specific requirements which proposals of remedies need to fulfil in both phases of the procedure, and guidance on the implementation of remedies. As regards the design of divestiture commitment proposals, the notifying parties are advised to take due account of the Commission's "Best Practice Guidelines on Divestiture Commitments"[20].

41. Although it is for the notifying parties to formulate suitable remedies proposals, DG Competition will provide guidance to the parties as to the general appropriateness of their draft proposal in advance of submission. In order to allow for such discussions, a notifying party should contact DG Competition in good time before the relevant deadline in Phase I or Phase II, in order to be able to address comments DG Competition may have on the draft proposal[21].

7. PROVISION OF DOCUMENTS IN THE COMMISSION'S FILE / CONFIDENTIALITY

7.1. Access to the file

42. According to Community law, the notifying parties have upon request a right to access the Commission's file after the Commission has issued an SO (see Article 18(3) of the Merger Regulation and Article 13(3) of the Implementing Regulation).

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[19] OJ C 68, 02.03.2001, p. 3-11.

[20] Available under http://europa.eu.int/comm/competition/mergers/legislation/divestiture_commitments/

[21] It is to be noted that under the recast Merger Regulation (Articles 10(1) and (3)), the submission of remedies could lead to an automatic extension of the Phase I and II deadlines.

43. Further, the notifying parties will be given the opportunity to have access to documents received after the issuing of the SO up until the consultation of the Advisory Committee.

44. Access to the file will be provided subject to the legitimate interest of the protection of third parties' business secrets and other confidential information.

7.2. Review of key documents

45. DG Competition believes in the merits of an open exchange of views with ample opportunities for the notifying parties and third parties to make their points of view known throughout the procedure. This enables DG Competition to assess the main issues arising during the investigation with as much information at its disposal as possible. In this spirit, DG Competition's objective will be to provide the notifying parties with the opportunity of reviewing and commenting on "key documents" obtained by the Commission. Such documents would comprise substantiated submissions of third parties running counter to the notifying parties' own contentions received during Phase I and thereafter[22], including key submissions to which specific reference is made in the Article 6(1)(c) decision and market studies.

46. DG Competition will use its best endeavours to provide notifying parties in a timely fashion, with the opportunity to review such documents following the initiation of proceedings and thereafter on an *ad hoc* basis. DG Competition will respect justified requests by third parties for non-disclosure of their submissions prior to the issuing of the SO relating to genuine concerns regarding confidentiality, including fears of retaliation and the protection of business secrets.

7.3. Confidentiality Rules

47. In accordance with Article 287 of the EC Treaty and Article 17(1) of the Implementing Regulation, the Commission will, throughout its investigation, protect confidential information and business secrets contained in submissions provided by all parties involved in EC merger proceedings. Given the short legal deadlines of EC merger procedures, parties are encouraged to clarify as soon as possible any queries related to confidentiality claims with members of the case team. Guidance on what is considered to be business secrets or other confidential information is provided in the Commission's Notice on Access to file[23].

8. RIGHT TO BE HEARD AND OTHER PROCEDURAL RIGHTS

48. The right of the parties concerned to be heard before a final decision affecting their interests is taken is a fundamental principle of Community law. That right is also set

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[22] This would in particular include substantiated "complaints" contending that the notified transaction may give rise to competition concerns. The word "complaint" is to be understood in the non-technical sense of the term as no formal complaints procedure exists in merger cases.

[23] OJ C 23, 23/01/97, p. 3.

out in the Merger Regulation (Article 18) and the Implementing Regulation (Articles 14-16). These Best Practices do not alter any such rights under Community law.

49. Any issues related to the right to be heard and other procedural issues, including access to the file, time limits for replying to the SO and the objectivity of any enquiry conducted in order to assess the competition impact of commitments proposed in EC merger proceedings can be raised with the Hearing Officer, in accordance with Commission Decision of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings[24].

9. FUTURE REVIEW

50. These Best Practices may be revised to reflect changes to legislative, interpretative and administrative measures or due to case law of the European Courts, which govern EC merger control or any experience gained in applying such framework. DG Competition further intends to engage, on a regular basis, in a dialogue with the business and legal community on the experience gained through the application of the Merger Regulation in general, and these Best Practices in particular.

[24] Official Journal L 162, 19/06/2001 p. 21–24. The text can also be found at: http://europa.eu.int/comm/competition/hearings/officers/

wilmerhale.com