European Commission
Competition

# EU Competition Law
# Rules Applicable to Merger Control

Situation as at 1 April 2010

COMPETITION HANDBOOKS

European Commission

# EU Competition Law

## Rules Applicable to Merger Control

**Situation as at 1 April 2010**

COMPETITION HANDBOOKS

Brussels, 2010

# EU Competition law

## Rules applicable to Merger Control

Situation as at 1 April 2010

The texts which are reproduced in this booklet, are also available on the internet:
http://ec.europa.eu/competition/mergers/legislation/legislation.html

This booklet has been produced for the facility of the reader. Only the texts published in the Official Journal of the European Union are authentic

Luxembourg, Office for Official Publications of the European Union, 2010

ISSN – 1831-497X
ISBN – 978-92-79-15361-7
doi 10.2763/42134

© European Union, 2010.
Reproduction is authorised, provided the source is acknowledged.

*Printed in Belgium*

# Table of Contents


Page number

## A. Overview

Flowchart summarizing the procedure under the EC Merger Regulation 3

## B. Provisions of the Treaty on the functioning of the European Union (TFEU)

**B.1 Core provisions** 7

Article 101 of the TFEU

Article 102 of the TFEU

Article 106 of the TFEU

**B.2 Other relevant provisions** 9

Article 3 of the TFEU

Article 14 of the TFEU

Article 103 of the TFEU

Article 104 of the TFEU

Article 105 of the TFEU

Article 119 of the TFEU

Article 346 of the TFEU

## C. General rules

### Framework Legislation

**C.1 Council Regulation (EC) No 139/2004** of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24/1, 29 January 2004 15

### Implementing Regulation (IR)

**C.2 Commission Regulation (EC) No 802/2004** of 7 April 2004 implementing Council Regulation (EC) No 139/2004 (published in OJ L 133, 30.04.2004, p.1) amended by Commission Regulation (EC) No 1033/2008 of 20 October 2008 (published in OJ L 279, 22.10.2008, p. 3) – Consolidated version of 23 October 2008 37

**Annex I: Form CO** relating to the notification of a concentration pursuant to Regulation (EC) No 139/2004, consolidated with amendments introduced by Commission Regulation (EC) No 1033/2008 – Consolidated version of 23 October 2008 51

**Annex II: Short Form CO** for the notification of a concentration pursuant to Regulation (EC) No 139/2004, consolidated with amendments introduced by Commission Regulation (EC) No 1033/2008 – Consolidated version of 23 October 2008 67

Page number

**Annex III**: **Form RS Reasoned Submission** (Form RS), Regulation (EC) No 139/2004, consolidated with amendments introduced by Commission Regulation (EC) No 1033/2008 – Consolidated version of 23 October 2008 78

**Annex IV: Form RM** relating to the information concerning commitments submitted pursuant to article 6(2) and article 8(2) of Regulation (EC) No 139/2004, introduced by Commission Regulation (EC) No 1033/2008 – Consolidated version of 23 October 2008 89

## D. Notices and Guidelines

**D.1 Commission Consolidated Jurisdictional Notice** under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 95, 16 April 2008, p.1 95

**D.2 Commission Notice on a simplified procedure** for treatment of certain concentrations under Council Regulation (EC) No 139/2004, OJ C 56, 5 March 2005, p. 32 143

**D.3 Commission Notice on case referral** in respect of concentrations, OJ C 56, 5 March 2005, p. 2 147

**D.4 Commission Notice on the definition of the relevant market** for the purposes of Community competition law, OJ C 372, 9 December 1997, p. 5 169

**D.5 Guidelines on the assessment of horizontal mergers** under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5 February 2004, p. 5 178

**D.6 Guidelines on the assessment of non-horizontal mergers** under the Council Regulation on the control of concentrations between undertakings, OJ C 265, 18 October 2008, p. 6 192

**D.7 Commission Notice on remedies** acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJ C 267, 22 October 2008, p. 1 212

**D.8 Commission Notice on restrictions** directly related and necessary to concentrations, OJ C 56, 5 March 2005, p. 24 239

**D.9 Commission Decision 2001/462 of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings**, OJ L 162, 19 June 2001, p. 21 247

**D.10 Commission Notice on the rules for access to the Commission file** in case pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, OJ C 325, 22 December 2005, p. 7 251

## E. EEA Agreement

**E.1 Articles 53-65 of the EEA Agreement of 1 August 2007** 263

**E.2 Protocol 24 of the EEA Agreement of 30 January 2010** 268

**E.3 Explanation of case referral under the EEA Agreement** 273

Page number

## F. International Cooperation


**F.1 Cooperation between the European Union and the United States:** Best practices on cooperation in merger cases 279

**F.2 International Competition Network:** Commission waiver model of confidentiality in merger investigations 284


## G. Best Practice Guidelines


**G.1 DG Competition Best Practices on the conduct of merger control proceedings**, 20 January 2004 289

**G.2 Best Practice Guidelines: the Commission's model texts for divestiture commitments and the trustee mandate** under the EC Merger Regulation, 2 May 2003 301

**G.3 Commission Model Text for Divestiture Commitments**, 2 May 2003 310

**G.4 Commission Model Text for Trustee Mandate**, 2 May 2003 323


## H. Practical Information


**H.1 Market share ranges in non-confidential versions of merger decisions** 339

**H.2 Format of notifications and Form RS - Communication pursuant to Article 3(2) of Commission Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings,** OJ C 251, 17 October 2006, p. 2 340

**H.3 Address of delivery - Communication pursuant to Article 23(1) of Commission Regulation (EC) No 802/2004,** OJ C 139, 19 May 2004, p. 2 342

**H.4 Case allocation request** 343

**H.5 Merger correspondence** 345

# A. OVERVIEW

# Procedure for controlling merger operations between enterprises

## Legal base: Council Regulation (EC) No 139/2004

***When to notify?***

**Either** following
- conclusion of the agreement
- announcement of a public bid
- acquisition of control

**Or**
after manifestation of good faith intent to do so

**Notification**

- Mandatory for all concentrations with a Community dimension [1]
- Such concentrations shall not be implemented either before its notification or until it has been declared compatible with the common market pursuant to a Commission decision, or on the basis of a presumption (certain exemptions for public bids).

***Phase I deadline commences***

- On the date when the complete notification is received by the Commission

**Phase I: Initial Examination**

- Detailed appraisal via: request for information, interviews, inspections carried out by the competent Authorities of the Member States and the Commission
- Member States can request referral within 15 working days of notification.

***Phase I deadlines***

Article 6 decision to be taken
- within 25 working days after receipt of the complete notification
- unless increased to 35 working days if a Member State makes a 9(2) request, or
- unless increased to 35 working days if the undertakings concerned offer commitments

**Article 6: decision**

- 6(1)a : the concentration does not fall within the scope of the Merger Regulation
- 6(1)b : the concentration does not raise serious doubts as to its compatibility with the common market: approval
- 6(1)c : the concentration raises serious doubts: phase 2 of procedure

***Phase II deadline commences***

- On the date of the Article 6(1)c decision

**Phase II: Initiation of proceedings**

- Detailed appraisal via: request for information, interviews, inspections carried out by the competent Authorities of the Member States and the Commission
- Declaration of incompatibility is preceded by the issuing of a statement of objections, with a right for the parties to access the file and to request a formal oral hearing
- Advisory Committee of Member States: meeting and delivery of opinion

***Phase II deadlines***

Article 8 decision to be taken

- within **90** working days of initiation of proceedings, **or**
- within **105** working days if the notifying parties offer commitments later than 55 working days from initiation of proceedings.

Extension of up to 20 working days upon request by, or with the agreement of, the notifying parties: maximum duration of phase II = **125** working days

**Article 8: final decision**

- 8(1): approval in case of compatibility with the common market
- 8(2): approval with conditions and obligations rendering the concentration compatible with the common market
- 8 (3):prohibition in case of incompatibility with the common market
- 8(4): dissolution of the merger in case of premature implementation or implementation in breach of a condition for clearance
- 8(5): interim measures
- 8(6): revocation of a clearance decision in case of incorrect information or breach of obligation.

***Two months from the date of the decision to lodge an appeal***

***Possibility:*** **Review by the European Court of First Instance and ultimately by the European Court of Justice**

[1] **A concentration has a Community dimension, if**

- the combined aggregate worldwide turnover (from ordinary activities and after turnover taxes) of all the undertakings concerned (in the case of the acquisition of parts of 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(s)) is more than EUR 5 000 million **(**special rules apply to banks), **and**
- 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.

**In case these thresholds are not met a concentration has nevertheless Community dimension, if**

- the combined aggregate world-wide turnover of all the undertakings concerned is more than EUR 2 500 million, **and**
- in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million, **and**
- in each of at least three Member States included for the purpose of the second point above, the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million, **and**
- 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.

# B. PROVISIONS OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION (TFEU)

# PROVISIONS OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION ("TFEU")

## B.1. Core provisions

### *Article 101 (ex Article 81 TEC)*

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

— any agreement or category of agreements between undertakings,

— any decision or category of decisions by associations of undertakings,

— any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

### *Article 102 (ex Article 82 TEC)*

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

### *Article 106 (ex Article 86 TEC)*

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.

3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

## B.2. Other provisions

### *Article 3*

1. The Union shall have exclusive competence in the following areas:

(a) customs union;

(b) the establishing of the competition rules necessary for the functioning of the internal market;

(c) monetary policy for the Member States whose currency is the euro;

(d) the conservation of marine biological resources under the common fisheries policy;

(e) common commercial policy.

2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

### *Article 14 (ex Article 16 TEC)*

Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services.

### *Article 103 (ex Article 83 TEC)*

1. The appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament. 2. The regulations or directives referred to in paragraph 1 shall be designed in particular:

(a) to ensure compliance with the prohibitions laid down in Article 101(1) and in Article 102 by making provision for fines and periodic penalty payments;

(b) to lay down detailed rules for the application of Article 101(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other;

(c) to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 101 and 102;

(d) to define the respective functions of the Commission and of the Court of Justice of the European Union in applying the provisions laid down in this paragraph;

(e) to determine the relationship between national laws and the provisions contained in this Section or adopted pursuant to this Article.

### *Article 104 (ex Article 84 TEC)*

Until the entry into force of the provisions adopted in pursuance of Article 103, the authorities in Member States shall rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the internal market in accordance with the law of their country and with the provisions of Article 101, in particular paragraph 3, and of Article 102.

### *Article 105 (ex Article 85 TEC)*

1. Without prejudice to Article 104, the Commission shall ensure the application of the principles laid down in Articles 101 and 102. On application by a Member State or on its own initiative, and in cooperation with the competent authorities in the Member States, which shall give it their assistance, the Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.

2. If the infringement is not brought to an end, the Commission shall record such infringement of the principles in a reasoned decision. The Commission may publish its decision and authorise Member States to take the measures, the conditions and details of which it shall determine, needed to remedy the situation.

3. The Commission may adopt regulations relating to the categories of agreement in respect of which the Council has adopted a regulation or a directive pursuant to Article 103(2)(b).

### *Article 119 (ex Article 4 TEC)*

1. For the purposes set out in Article 3 of the Treaty on European Union, the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition.

2. Concurrently with the foregoing, and as provided in the Treaties and in accordance with the procedures set out therein, these activities shall include a single currency, the euro, and the definition and conduct of a single monetary policy and exchange-rate policy the primary objective of both of which shall be to maintain price stability and, without prejudice to this objective, to support the general economic policies in the Union, in accordance with the principle of an open market economy with free competition.

3. These activities of the Member States and the Union shall entail compliance with the following guiding principles: stable prices, sound public finances and monetary conditions and a sustainable balance of payments.

### *Article 346 (ex Article 296 TEC)*

1. The provisions of the Treaties shall not preclude the application of the following rules:

(a) no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security;

(b) any Member State may take such measures as it considers 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; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes.

2. The Council may, acting unanimously on a proposal from the Commission, make changes to the list, which it drew up on 15 April 1958, of the products to which the provisions of paragraph 1(b) apply.

# C. GENERAL RULES

I

*(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 |

**This document is meant purely as a documentation tool and the institutions do not assume any liability for its contents**

►B **COMMISSION REGULATION (EC) No 802/2004**

**of ►C1 21 April 2004 ◄**

**implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings**

**(Text with EEA relevance)**

(OJ L 133, 30.4.2004, p. 1)

Amended by:

| | | Official Journal | | |
|---|---|---|---|---|
| | | No | page | date |
| ►M1 | Commission Regulation (EC) No 1792/2006 of 23 October 2006 | L 362 | 1 | 20.12.2006 |
| ►M2 | Commission Regulation (EC) No 1033/2008 of 20 October 2008 | L 279 | 3 | 22.10.2008 |

Corrected by:

►C1 Corrigendum, OJ L 172, 6.5.2004, p. 9 (802/2004)

▼B

# COMMISSION REGULATION (EC) No 802/2004

## of ►C1 21 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

([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.

▼B

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.

(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 infor-

▼B

mation. 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.

▼B

2. One original and ►M1 37 ◄ 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

▼B

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.

▼B

*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.

▼B

*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

▼B

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*.

▼B

*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.

▼B

*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.

▼B

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.

▼M2

4. If persons, undertakings or associations of undertakings fail to comply with paragraphs 2 or 3, the Commission may assume that the documents or statements concerned do not contain confidential information.

▼B

## 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

▼B

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.

▼M2

1a. In addition to the requirements set out in paragraph 1, the undertakings concerned shall, at the same time as offering commitments pursuant to Article 6(2) or Article 8(2) of Regulation (EC) No 139/2004, submit one original and 10 copies of the information and documents prescribed by the Form RM relating to remedies (Form RM) as set out in Annex IV to this Regulation. The information submitted shall be correct and complete.

▼B

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.

▼M2

*Article 20a*

**Trustees**

1. The commitments offered by the undertakings concerned pursuant to Article 6(2) or Article 8(2) of Regulation (EC) No 139/2004 may include, at the own expense of the undertakings concerned, the appointment of an independent trustee (or trustees) assisting the Commission in overseeing the parties' compliance with the commitments or having a mandate to implement the commitments. The trustee may be appointed by the parties, after the Commission has approved its identity, or by the Commission. The trustee shall carry out its tasks under the supervision of the Commission.

2. The Commission may attach such trustee-related provisions of the commitments as conditions and obligations pursuant to Article 6(2) or Article 8(2) of Regulation (EC) No 139/2004.

▼B

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.

▼B

*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.

▼B

*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

▼M2

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 802/2004 (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. Your attention is drawn to the corresponding provisions of the Agreement on the European Economic Area (hereinafter referred to as 'the EEA Agreement') ([2]).

▼B

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) ([3]) are assessed by the European Commission in a single procedure (the 'one stop shop' principle). ►M2 Mergers which do not meet the turnover thresholds may fall within the competence of the Member States' and/or the EFTA 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 ([4]). 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 ([5]).

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.

([1]) Council Regulation (EC) No 139/2004 of 20 January 2004 (OJ L 24, 29.1.2004, p. 1).

([2]) See in particular Article 57 of the EEA Agreement, point 1 of Annex XIV to the EEA Agreement, Protocols 21 and 24 to the EEA Agreement, as well as Protocol 4 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (hereinafter referred to as the 'Surveillance and Court 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.

([3]) 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.

([4]) See Article 10(1) of the EC Merger Regulation.

([5]) See Article 10(3) of the EC Merger Regulation.

▼B

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 ([1]).

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.

([1]) See Article 4(2) of the EC Merger Regulation.

▼B

(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 ►M1 37 ◄ 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*

▼B

*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.

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]) 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).

▼B

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.

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.

([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.

▼B

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;

(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.

▼B

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 **(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.

(1) ►M2 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 significantly impede effective competition in the territories of the EFTA States or a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position. ◄

(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.

▼B

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;

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.

[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.

▼B

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. ([1])

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.

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 ([2]). These are vertical relationships.

([1]) See Commission Notice on the definition of the relevant market for the purposes of Community competition law.

([2]) 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.

▼B

On the basis of the above definitions and market share thresholds, provide the following information: (1)

— 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 (2) or when they belong to a range of products that is generally purchased by the same set of customers for the same end use (3);

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.

SECTION 7

**Information on affected markets**

For each affected relevant product market, for each of the last three financial years (4):

(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

(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 information would be appropriate for certain affected markets, or for certain other markets (as described under IV).

(2) 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.

(3) 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.

(4) Without prejudice to Article 4(2) of the Implementing Regulation.

▼B

(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) ([1]). 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 ([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;

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;

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.

---

([1]) 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.

([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 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.

([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.

▼B

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;

---

[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.

▼B

(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;

(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:

▼B

(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.

**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 ([2]) 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 ([3]).

For each claimed efficiency, provide:

([1]) Research and development intensity is defined as research development expenditure as a proportion of turnover.

([2]) 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.

([3]) For further guidance on the assessment of efficiencies, see the Commission Notice on the assessment of horizontal mergers.

▼B

(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? ([1])

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.

▼M2

(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, and, where applicable, the corresponding provisions of the EEA Agreement ([2]), give your reasons.

▼B

(c) ►M2 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) of the EC Treaty and, where applicable, the corresponding provisions of the EEA Agreement ([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.

([1]) For market definitions refer to Section 6.
([2]) See Article 53(1) of the EEA Agreement.
([3]) See Article 53(3) of the EEA Agreement.

▼B

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:

▼B

*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.

▼M2

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 802/2004 (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. Your attention is also drawn to the corresponding provisions of the Agreement on the European Economic Area (hereinafter referred to as 'the EEA Agreement') ([2]).

▼B

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.

([1]) Council Regulation (EC) No 139/2004 of 20 January 2004 (OJ L 24, 29.1.2004, p. 1).

([2]) See in particular Article 57 of the EEA Agreement, point 1 of Annex XIV to the EEA Agreement, Protocols 21 and 24 to the EEA Agreement, as well as Protocol 4 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (hereinafter referred to as the 'Surveillance and Court 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.

▼B

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 ([1]); 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.

1.2. **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;

▼M2

— a Member State or an EFTA State expresses substantiated competition concerns about the notified concentration within 15 working days of receipt of the copy of the notification; or

▼B

— 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]) 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.

▼B

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.

(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

([1]) See Article 4(2) of the EC Merger Regulation.

▼B

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 ►M1 37 ◄ 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.

▼B

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.

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

([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).

▼B

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.

▼B

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

(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.

▼B

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. 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 (2)**

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 (3) 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.

(1) ►M2 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 significantly impede effective competition in the territories of the EFTA States or a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position. ◄

(2) See Articles 3(3), 3(4) and 3(5) and Article 5(4) of the EC Merger Regulation.

(3) See Section 6.III for the definition of reportable markets.

▼B

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. ([1])

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.

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: ([2])

([1]) See Commission Notice on the definition of the relevant market for the purposes of Community competition law.

([2]) 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.

▼B

7.1. 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;

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? ([2])

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.

▼M2

(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, and, where applicable, the corresponding provisions of the EEA Agreement ([3]), give your reasons.

▼B

(c) ►M2 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) of the EC Treaty and, where applicable, the corresponding provisions of the EEA Agreement ([4]) 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.

([1]) The value and volume of a market should reflect output less exports plus imports for the geographic areas under consideration.
([2]) For market definitions refer to Section 6.
([3]) See Article 53(1) of the EEA Agreement.
([4]) See Article 53(3) of the EEA Agreement.

▼B

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:

▼B

*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

▼M2

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') ([1]).

Your attention is drawn to the EC Merger Regulation and to Commission Regulation (EC) No 802/2004 (hereinafter referred to as 'the EC Merger Implementing Regulation'), to which this Form RS is annexed. 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. Your attention is also drawn to the corresponding provisions of the Agreement on the European Economic Area (hereinafter referred to as 'the EEA Agreement') ([2]).

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 or EFTA State/s regarding the adequacy of the scope and type of information on which they intend to base their reasoned submission.

▼B

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). ►M2 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 and the EFTA States may consider making a post-notification referral rectifying any referral made at pre-notification. ◄

In particular you should note that:

([1]) Council Regulation (EC) No 139/2004 of 20 January 2004 (OJ L 24, 29.1.2004, p. 1).

([2]) See in particular Article 57 of the EEA Agreement, point 1 of Annex XIV to the EEA Agreement, Protocols 21 and 24 to the EEA Agreement, as well as Protocol 4 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (hereinafter referred to as the 'Surveillance and Court 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.

▼B

(a) ►M2 In accordance with Articles 4(4) and (5) of the EC Merger Regulation, the Commission is obliged to transmit reasoned submissions to the Member States and the EFTA States without delay. The time limits for considering a reasoned submission will begin upon receipt of the submission by the relevant Member State/s or EFTA State/s. ◄ 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. ►M2 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 and EFTA State/s should also be provided. ◄

▼M2

(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' or EFTA 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 EFTA 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 or EFTA State authority or authorities before deciding whether to accede to such a request.

▼B

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.

▼M2

In order to facilitate treatment of Form RS by Member State and EFTA 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/s or (an) EFTA State/s, the requesting parties are strongly encouraged to include a copy of the request in the language/s of the Member State/s and EFTA State/s to which referral is being requested.

▼B

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 ►M1 37 ◄ 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**

▼M2

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.

▼B

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

[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 Surveillance and Court Agreement.

▼B

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;

1.2.2. the nature of undertaking's business;

(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.

▼B

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).

([1]) See Section 4 for the definition of affected markets.

▼B

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.

▼M2

2.4.2. Provide a breakdown of the EFTA-wide turnover achieved by the undertakings concerned, indicating, where applicable, the EFTA State, if any, in which more than two-thirds of this turnover is achieved.

▼B

SECTION 3

**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:

3.1. all undertakings or persons controlling these parties, directly or indirectly;

3.2. all undertakings active on any affected market [2] 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 [3].

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).

[1] See Article 3(3), 3(4) and 3(5) and Article 5(4).
[2] See Section 4 for the definition of affected markets.
[3] See Commission Notice on the definition of the relevant market for the purposes of Community competition law.

▼B

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**

▼M2

For the purposes of the 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:

▼B

(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:

▼M2

4.1. Identify each affected market within the meaning of Section III:

(a) at the EEA, Community or EFTA level;

(b) in the case of a request for referral pursuant to Article 4(4) of the EC Merger Regulation, at the level of each individual Member State or EFTA State;

(c) in the case of a request for referral pursuant to Article 4(5) of the EC Merger Regulation, at the level of each Member State or EFTA State identified at Section 6.3.1 of this Form as capable of reviewing the concentration.

▼B

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**

▼M2

For each affected relevant product market, for the last financial year,

([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.

▼M2

(a) for the EEA territory, for the Community as a whole and for the EFTA States as a whole;

(b) in the case of a request for referral pursuant to Article 4(4) of the EC Merger Regulation, individually for each Member State/EFTA State where the parties to the concentration do business; and

(c) in the case of a request for referral pursuant to Article 4(5) of the EC Merger Regulation, individually for each Member State/EFTA 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

▼B

(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;

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 ([4]) 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

([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.

([4]) 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.

▼B

market which is downstream or upstream from that of the joint venture or in a neighbouring market closely related to this market? ([1])

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

▼M2

6.2.1. Identify the Member State/s and EFTA State/s which, pursuant to Article 4(4) of the EC Merger Regulation, you submit should examine the concentration, indicating whether or not you have made informal contact with this Member State/s and/or EFTA State/s.

▼B

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.

▼M2

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 and EFTA 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/s and EFTA State/s to which referral is requested presents all the characteristics of a distinct market within the meaning of Article 4(4) of the EC Merger Regulation.

▼B

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).

▼M2

6.2.5. In the event of a Member State/s and/or EFTA State/s becoming competent to review the whole or part of the case following a referral pursuant to Article 4(4) of the EC Merger Regulation, do you consent to the information contained in this Form being relied upon by the Member State/s and/or EFTA State/s in question for the purpose of its/their national proceedings relating to that case or part thereof? YES or NO

▼B

*Sub-section 6.3*

ARTICLE 4(5) REFERRAL

▼M2

6.3.1. For each Member State and/or EFTA 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 and/or EFTA State.

Is the concentration capable of being reviewed under the national competition law of each of the following Member States and/or

([1]) For market definitions refer to Section 4.

▼M2

EFTA States? You must reply for each Member State and/or EFTA State. Only indicate YES or NO for each Member State and/or EFTA State. Failure to indicate YES or NO for any Member State and/or EFTA State shall be deemed to constitute an indication of YES for that Member State and/or EFTA State.

| | | |
|---|---|---|
| Belgium: | YES | NO |
| Bulgaria: | YES | NO |
| Czech Republic: | YES | NO |
| Denmark: | YES | NO |
| Germany: | YES | NO |
| Estonia: | YES | NO |
| Ireland: | YES | NO |
| Greece: | YES | NO |
| Spain: | YES | NO |
| France: | YES | NO |
| Italy: | YES | NO |
| Cyprus: | YES | NO |
| Latvia: | YES | NO |
| Lithuania: | YES | NO |
| Luxembourg: | YES | NO |
| Hungary: | YES | NO |
| Malta: | YES | NO |
| Netherlands: | YES | NO |
| Austria: | YES | NO |
| Poland: | YES | NO |
| Portugal: | YES | NO |
| Romania: | YES | NO |
| Slovenia: | YES | NO |
| Slovakia: | YES | NO |
| Finland: | YES | NO |
| Sweden: | YES | NO |
| United Kingdom: | YES | NO |
| Iceland: | YES | NO |
| Norway: | YES | NO |
| Liechtenstein: | YES | NO |

6.3.2. For each Member State and/or EFTA 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 law.

6.3.3. 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 and/or EFTA State.

———————

▼B

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 under-

▼B

takings, 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:

▼M2

*ANNEX IV*

**Form RM relating to the information concerning commitments submitted pursuant to Article 6(2) and Article 8(2) of Regulation (EC) No 139/2004**

FORM RM RELATING TO REMEDIES

INTRODUCTION

This form specifies the information and documents to be submitted by the undertakings concerned at the same time as offering commitments pursuant to Article 6(2) or Article 8(2) of Regulation (EC) No 139/2004. The information requested is necessary to allow the Commission to examine whether the commitments are capable of rendering the concentration compatible with the common market in that they will prevent a significant impediment to effective competition. The Commission may dispense with the obligation to provide any particular information in respect of the commitments offered, including documents, or with any other requirement laid down in this form where it considers that compliance with those obligations or requirements is not necessary for the examination of the commitments offered. The level of information required will vary according to the type and structure of the remedy proposed. For example, carve-out remedies will typically require more detailed information than divestitures of stand-alone businesses. The Commission is available to discuss the scope of the information required with the parties upfront. If you consider that any particular information requested by this Form may not be necessary for the Commission's assessment, you may approach the Commission asking to dispense with certain requirements, giving adequate reasons why that information is not relevant.

SECTION 1

**Description of the commitment**

1.1. Provide detailed information on

(i) the object of the commitments offered, and

(ii) the conditions for their implementation.

1.2. Where the commitments offered consist in the divestiture of a business, Section 5 provides for the specific information required.

SECTION 2

**Suitability to remove competition concerns**

2. Provide information showing the suitability of the commitments offered to remove the significant impediment of effective competition identified by the Commission.

SECTION 3

**Deviation from Model Texts**

3. Identify any deviations of the commitments offered from the pertinent Model Commitments texts published by the Commission's services, as revised from time-to-time, and explain the reasons for the deviations.

SECTION 4

**Summary of the commitments**

4. Provide a non-confidential summary of the nature and scope of the commitments offered and why, in your view, they are suitable to remove any significant impediment to effective competition. The Commission may use this summary for the market test of the commitments offered with third parties.

SECTION 5

**Information on a business to be divested**

5. Where the commitments offered consist in the divestiture of a business, provide the following information and documents.

▼M2

*General information on the business to be divested*

The following information should be provided as to the current operation of the business to be divested and changes already planned for the future:

5.1. Describe the business to be divested generally, including the entities belonging to it, their registered place of business and place of management, other locations for production or provisions of services, the general organisational structure and any other relevant information relating to the administrative structure of the business to be divested.

5.2. State whether there are and describe any legal obstacles for the transfer of the business to be divested or the assets, including third party rights and administrative approvals required.

5.3. List and describe the products manufactured or services provided, in particular their technical and other characteristics, the brands involved, the turnover generated with each of these products or services, and any innovations or new products or services planned.

5.4. Describe the level on which the essential functions of the business to be divested are operated if they are not operated on the level of the business to be divested itself, including such functions as research and development, production, marketing and sales, logistics, relations with customers, relations with suppliers, IT systems, etc. The description should contain the role performed by those other levels, the relations with the business to be divested and the resources (personnel, assets, financial resources, etc.) involved in the function.

5.5. Describe in detail the links between the business to be divested and other undertakings controlled by the notifying parties (irrespective of the direction of the link), such as:

— supply, production, distribution, service or other contracts,

— shared tangible or intangible assets,

— shared or seconded personnel,

— shared IT systems or other systems, and

— shared customers.

5.6. Describe in general terms all relevant tangible and intangible assets used and/or owned by the business to be divested, including, in any case, IP rights and brands.

5.7. Submit an organisational chart identifying the number of personnel currently working in each of the functions of the business to be divested and a list of those employees who are indispensable for the operation of the business to be divested, describing their functions.

5.8. Describe the customers of the business to be divested, including a list of customers, a description of the corresponding records available, and provide the total turnover generated by the business to be divested with each of these customers (in EUR and as percentage of the total turnover of business to be divested).

5.9. Provide financial data for the business to be divested, including the turnover and the EBITDA achieved in the last two years, and the forecast for the next two years.

5.10. Identify and describe any changes that have occurred in the last two years, in the organisation of the business to be divested or in the links with other undertakings controlled by the notifying parties.

5.11. Identify and describe any changes, planned for the next two years, in the organisation of the business to be divested or in the links with other undertakings controlled by the notifying parties.

*General information on the business to be divested as described in the commitments*

5.12. Describe any areas where the business to be divested as set out in the commitments offered differs from the nature and scope of the business as currently operated.

▼M2

*Acquisition by a suitable purchaser*

5.13. Explain the reasons why, in your view, the business will be acquired by a suitable purchaser in the time-frame proposed in the commitments offered.

# D. NOTICES AND GUIDELINES

II

*(Information)*

# INFORMATION FROM EUROPEAN UNION INSTITUTIONS AND BODIES

# COMMISSION

## Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings

(2008/C 95/01)

CONTENTS

*Page*

A. INTRODUCTION ..... 4

B. THE CONCEPT OF CONCENTRATION ..... 4

I. Mergers between previously independent undertakings ..... 5

II. Acquisition of control ..... 5

1. Concept of control ..... 5

1.1 Person or undertaking acquiring control ..... 5

1.2 Means of control ..... 7

1.3 Object of control ..... 9

1.4 Change of control on a lasting basis ..... 10

1.5 Interrelated transactions ..... 12

1.5.1 Relation between Article 3 and Article 5(2) second subparagraph ..... 12

1.5.2 Interdependent transactions under Article 3 ..... 12

1.5.3 Series of transactions in securities ..... 14

1.5.4 Article 5(2) subparagraph 2 ..... 15

1.6 Internal restructuring ..... 15

1.7 Concentrations involving State-owned undertakings ..... 15

2. Sole control ..... 16

Page

3. Joint control ... 17

3.1 Equality in voting rights or appointment to decision-making bodies ... 18

3.2 Veto rights ... 18

3.3 Joint exercise of voting right ... 19

3.4 Other considerations related to joint control ... 21

III. Changes in the quality of control ... 21

1. Entry of controlling shareholders ... 22

2. Reduction in the number of shareholders ... 23

IV. Joint Ventures — the concept of full-functionality ... 23

1. Sufficient resources to operate independently on a market ... 24

2. Activities beyond one specific function for the parents ... 24

3. Sale/purchase relations with the parents ... 24

4. Operation on a lasting basis ... 26

5. Changes in the activities of the joint venture ... 27

V. Exceptions ... 27

VI. Abandonment of concentrations ... 29

VII. Changes of transactions after a Commission authorisation decision ... 30

C. COMMUNITY DIMENSION ... 30

I. Thresholds ... 30

II. Notion of undertaking concerned ... 31

1. General ... 31

2. Mergers ... 31

3. Acquisition of control ... 31

III. Relevant date for establishing jurisdiction ... 35

IV. Turnover ... 35

1. The concept of turnover ... 35

2. Ordinary activities ... 36

3. 'Net' turnover ... 37

3.1 Deduction of rebates and taxes ... 37

3.2 The treatment of 'internal' turnover ... 37

4. Turnover calculation and financial accounts ... 37

4.1 The general rule ... 37

4.2 Adjustments after the date of the last audited accounts ... 38

*Page*

5. Attribution of turnover under Article 5(4) ..... 39

5.1 Identification of undertakings whose turnover is taken into account ..... 39

5.2 Allocation of turnover of the undertakings identified ..... 42

5.3 Allocation of turnover in case of investment funds ..... 42

5.4 Allocation of turnover for State-owned undertakings ..... 43

V. Geographic allocation of turnover ..... 43

VI. Conversion of turnover into euro ..... 45

VII. Provisions for credit and other financial institutions and insurance undertakings ..... 45

1. Scope of application ..... 45

2. Calculation of turnover ..... 46

2.1 Calculation of turnover of credit and financial institutions (other than financial holding companies) ..... 46

2.1.1 General ..... 46

2.1.2 Turnover of leasing companies ..... 46

2.2 Insurance undertakings ..... 47

2.3 Financial holding companies ..... 47

## A. INTRODUCTION

(1) The purpose of this Notice is to provide guidance as to jurisdictional issues under Council Regulation (EC) No 139/2004, OJ L 24, 29.1.2003, page 1 (the Merger Regulation) ([1]). This formal guidance 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 control of concentrations.

(2) This Notice replaces the Notice on the concept of concentration ([2]), the Notice on the concept of full-function joint ventures ([3]), the Notice on the concept of undertakings concerned ([4]) and the Notice on calculation of turnover ([5]).

(3) This Notice deals with the concepts of a concentration and of a full-function joint venture, undertakings concerned and the calculation of turnover as set out in Articles 1, 3 and 5 of the Merger Regulation. Issues concerning referrals are dealt with in the Notice on referrals ([6]). The Commission's interpretation of Articles 1, 3 and 5 in the present Notice 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.

(4) The guidance set out in this Notice reflects the Commission's experience in applying the recast Merger Regulation and the former Merger Regulation since the latter entered into force on 21 September 1990. The general principles governing the issues dealt with in this Notice have not been changed by the entry into force of Regulation (EC) No 139/2004, but where changes have occurred, the Notice deals with them explicitly. The principles contained in the Notice will be applied and further developed by the Commission in individual cases.

(5) According to Article 1, the Merger Regulation only applies to operations that satisfy two conditions. First, there must be a concentration of two or more undertakings within the meaning of Article 3 of the Merger Regulation. Secondly, the turnover of the undertakings concerned, calculated in accordance with Article 5, must satisfy the thresholds set out in Article 1 of the Regulation. The notion of a concentration (including the particular requirements for joint ventures), as the first condition, is dealt with under Part B; the identification of undertakings concerned and the calculation of their turnover as relevant for the second condition are dealt with under Part C.

(6) The Commission addresses the question of its jurisdiction over a concentration in decisions according to Article 6 of the Merger Regulation ([7]).

## B. THE CONCEPT OF CONCENTRATION

(7) According to Article 3(1) of the Merger Regulation, a concentration only covers operations where a change of control in the undertakings concerned occurs on a lasting basis. Recital 20 in the preamble to the Merger Regulation further explains that the concept of concentration is intended to relate to operations which bring about a lasting change in the structure of the market. Because the test in Article 3 is centred on the concept of control, the existence of a concentration is to a great extent determined by qualitative rather than quantitative criteria.

([1]) Where it is necessary in this Notice to distinguish between Regulation 139/2004 and Council Regulation (EEC) No 4064/89 (OJ L 395, 30.12.1989, corrected version in OJ L 257, 21.9.1990, p. 13, Regulation 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), the former will be referred to as the 'recast Merger Regulation' whereas the latter will be referred to as the 'former Merger Regulation'. Articles without reference refer to the recast Merger Regulation.

([2]) OJ C 66, 2.3.1998, p. 5.

([3]) OJ C 66, 2.3.1998, p. 1.

([4]) OJ C 66, 2.3.1998, p. 14.

([5]) OJ C 66, 2.3.1998, p. 25.

([6]) OJ C 56, 5.3.2005, p. 2.

([7]) See also opinion of AG Kokott in Case C-202/06 Cementbouw v Commission of 26 April 2007, paragraph 56 (not yet reported).

(8) Article 3(1) of the Merger Regulation defines two categories of concentrations:

— 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 I and II below.

## I. MERGERS BETWEEN PREVIOUSLY INDEPENDENT UNDERTAKINGS

(9) 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. ([8])

(10) 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 ([9]). This may arise in particular where two or more undertakings, while retaining their individual legal personalities, establish contractually a common economic management ([10]) or the structure of a dual listed company ([11]). If this leads to a *de facto* amalgamation of the undertakings concerned into a single economic unit, the operation is considered to be a merger. A prerequisite for the determination of such a *de facto* merger is the existence of a permanent, single economic management. Other relevant factors may include internal profit and loss compensation or a revenue distribution as between the various entities within the group, and their joint liability or external risk sharing. The *de facto* amalgamation may be solely based on contractual arrangements ([12]), but it can also be reinforced by cross-shareholdings between the undertakings forming the economic unit.

## II. ACQUISITION OF CONTROL

### 1. **Concept of control**

#### 1.1. ***Person or undertaking acquiring control***

(11) 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 several undertakings acting jointly.

([8]) See, for example, Case COMP/M. 1673 — Veba/VIAG of 13 June 2000; Case COMP/M.1806 — AstraZeneca/Novartis of 26 July 2000; Case COMP/M.2208 — Chevron/Texaco of 26 January 2001; and Case IV/M.1383 — Exxon/Mobil of 29 September 1999. A merger in the meaning of Article 3(1)(a) is not deemed to occur if a target company is merged with a subsidiary of the acquiring company to the effect that the parent company acquires control of the target undertaking under Article 3(1)(b), see Case COMP/M.2510 — Cendant/Galileo of 24 September 2001.

([9]) In determining the previous independence of undertakings, the issue of control may be relevant as the merger might otherwise only be an internal restructuring within the group. In this specific context, the assessment of control also follows the general concept set out below and includes *de jure* as well as *de facto* control.

([10]) This could apply for example in the case of a 'Gleichordnungskonzern' in German law, certain 'Groupements d'Intérêt Economique' in French law, and the amalgamation of partnerships, as in Case IV/M.1016 — Price Waterhouse/Coopers&Lybrand of 20 May 1998.

([11]) Case IV/M.660 — RTZ/CRA of 7 December 1995; Case COMP/M.3071 — Carnival Corporation/P&O Princess II of 24 July 2002.

([12]) See Case IV/M.1016 — Price Waterhouse/Coopers&Lybrand of 20 May 1998; Case COMP/M.2824 — Ernst & Young/Andersen Germany of 27 August 2002.

*Person controlling another undertaking*

(12) 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 control another undertaking) and undertakings. The term 'person' in this context extends to public bodies ([13]) and private entities, as well as natural persons. Acquisitions of control by natural persons are only considered to bring about a lasting change in the structure of the undertakings concerned if those natural persons carry out further economic activities on their own account or if they control at least one other undertaking ([14]).

*Acquirer of control*

(13) Control is normally acquired by persons or undertakings which are the holders of the rights or are entitled to rights conferring control under the contracts concerned (Article 3(3)(a)). However, there are also 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 has the power to exercise the rights conferring control through this person or undertaking, i.e. the latter is formally the holder of the rights, but acts only as a vehicle. 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(3)(b)). The Court of First Instance concluded from this provision that control held by commercial companies can be attributed to their exclusive shareholder, their majority shareholders or to those jointly controlling the companies since these companies comply in any event with the decisions of those shareholders ([15]). A controlling shareholding which is held by different entities in a group is normally attributed to the undertaking exercising control over the different formal holders of the rights. In other cases, the evidence needed to establish this type of indirect control may include, either separately or in combination and to be assessed on a case-by-case basis, factors such as shareholdings, contractual relations, source of financing or family links ([16]).

*Acquisition of control by investment funds*

(14) Specific issues may arise in the case of acquisitions of control by investment funds. The Commission will analyse structures involving investment funds on a case-by-case basis, but some general features of such structures can be set out on the basis of the Commission's past experience.

(15) Investment funds are often set up in the legal form of limited partnerships, in which the investors participate as limited partners and normally do not exercise control, either individually or collectively. The investment funds usually acquire the shares and voting rights which confer control over the portfolio companies. Depending on the circumstances, control is normally exercised by the investment company which has set up the fund as the fund itself is typically a mere investment vehicle; in more exceptional circumstances, control may be exercised by the fund itself. The investment company usually exercises control by means of the organisational structure, *e.g.* by controlling the general partner of fund partnerships, or by contractual arrangements, such as advisory agreements, or by a combination of both. This may be the case even if the investment company itself does not own the company acting as a general partner, but their shares are held by natural persons (who may be linked to the investment company) or by a trust. Contractual arrangements with the investment company, in particular advisory agreements,

([13]) 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 Treuhandanstalt in Case IV/M.308 — Kali und Salz/MDK/Treuhand, of 14 December 1993. See, however, recital 22 of the Merger Regulation.

([14]) Case IV/M.82 — Asko/Jakobs/Adia of 16 May 1991 including a private individual as undertaking concerned.; Case COMP/M3762 — Apax/Travelex of 16 June 2005 in which a private individual acquiring joint control was not considered an undertaking concerned.

([15]) Judgment in Case T-282/02 Cementbouw v Commission, paragraph 72, [2006] ECR II-319.

([16]) See Case M.754 — Anglo American Corporation/Lonrho of 23 April 1997.

will become even more important if the general partner does not have any own resources and personnel for the management of the portfolio companies, but only constitutes a company structure whose acts are performed by persons linked to the investment company. In these circumstances, the investment company normally acquires indirect control within the meaning of Article 3(1)(b) and 3(3)(b) of the Merger Regulation, and has the power to exercise the rights which are directly held by the investment fund. ([17])

### 1.2. *Means of control*

(16) Control is defined by Article 3(2) of the Merger Regulation as the possibility of exercising decisive influence on an undertaking. It is therefore not necessary to show that the decisive influence is or will be actually exercised. However, the possibility of exercising that influence must be effective. ([18]) Article 3(2) further provides that the possibility of exercising decisive influence on an undertaking can exist on the basis of rights, contracts or any other means, either separately or in combination, and having regard to the considerations of fact and law involved. A concentration therefore may occur on a legal or a *de facto* basis, may take the form of sole or joint control, and extend to the whole or parts of one or more undertakings (cf. Article 3(1)(b)).

*Control by the acquisition of shares or assets*

(17) Whether an operation gives rise to an acquisition of control therefore depends on a number of legal and/or factual elements. The most common means for the acquisition of control is the acquisition of shares, possibly combined with a shareholders' agreement in cases of joint control, or the acquisition of assets.

*Control on a contractual basis*

(18) Control can also be acquired on a contractual basis. In order to confer control, the contract must lead to a similar control of the management and the resources of the other undertaking as in the case of acquisition of shares or assets. In addition to transferring control over the management and the resources, such contracts must be characterised by a very long duration (ordinarily without a possibility of early termination for the party granting the contractual rights). Only such contracts can result in a structural change in the market. ([19]) Examples of such contracts are organisational contracts under national company law ([20]) or other types of contracts, *e.g.* in the form of agreements for the lease of the business, giving the acquirer control over the management and the resources despite the fact that property rights or shares are not transferred. In this respect, Article 3(2)(a) specifies that control may also be constituted by a right to use the assets of an undertaking. ([21]) Such contracts may also lead to a situation of joint control if both the owner of the assets as well as the undertaking controlling the management enjoy veto rights over strategic business decisions. ([22])

([17]) This structure also has an effect on how the turnover is calculated in situations involving investment funds, see paragraphs 189ff.

([18]) Judgment in Case T-282/02 Cementbouw v Commission, paragraph 58, [2006] ECR II-319

([19]) In Case COMP/M.3858 — Lehman Brothers/SCG/Starwood/Le Meridien of 20 July 2005 the management agreements had a duration of 10-15 years; in Case COMP/M.2632 — Deutsche Bahn/ECT International/United Depots/JV of 11 February 2002 the contract had a duration of 8 years.

([20]) Examples of such specific contracts under national company law are the 'Beherrschungsvertrag' in German law or the '*Contrato de subordinação*' in Portuguese law; such contracts do not exist in all Member States.

([21]) See Case COMP/M.2060 — Bosch/Rexroth of 12 January 2001 concerning a control contract (Beherrschungsvertrag) in combination with a business lease; Case COMP/M.3136 — GE/Agfa NDT of 5 December 2003 concerning a specific contract to transfer control over entrepreneurial resources, management and risks; Case COMP/M.2632 — Deutsche Bahn/ECT International/United Depots/JV of 11 February 2002 concerning a business lease.

([22]) Case COMP/M.3858 — Lehman Brothers/SCG/Starwood/Le Meridien of 20 July 2005; see also case IV/M.126 — Accor/Wagon-Lits of 28 April 1992 in the context of Article 5(4)(b) of the Merger Regulation.

*Control by other means*

(19) In line with these considerations, franchising agreements as such do not normally confer control over the franchisee's business on the franchisor. The franchisee usually exploits the entrepreneurial resources on its own account even if essential parts of the assets may belong to the franchisor ([23]). Furthermore, purely financial agreements, such as sale-and-lease-back transactions with arrangements for a buyback of the assets at the end of the term, do not normally constitute a concentration as they do not change control over the management and the resources.

(20) Furthermore, control can also be established by any other means. Purely economic relationships may play a decisive role for the acquisition of control. 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 ([24]). In such a situation, the Commission will carefully analyse whether such economic links, combined with other links, are sufficient to lead to a change of control on a lasting basis ([25]).

(21) There may be an acquisition of control even if it is not the declared intention of the parties or if the acquirer is only passive and the acquisition of control is triggered by action of third parties. Examples are situations where the change of control results from the inheritance of a shareholder or where the exit of a shareholder triggers a change of control, in particular a change from joint to sole control ([26]). Article 3(1)(b) covers such scenarios in specifying that control may also be acquired 'by any other means'.

*Control and national company law*

(22) National legislation within a Member State may provide specific rules on the structure of bodies representing the organization of decision-making within an undertaking. While such legislation may confer some power of control upon persons other than the shareholders, in particular on representatives of employees, the concept of control under the Merger Regulation is not related to such a means of influence as the Merger Regulation focuses on decisive influence enjoyed on the basis of rights, assets or contracts or equivalent *de facto* means. Restrictions in the articles of association or in general law concerning the persons eligible to sit on the board, such as a provisions requiring the appointment of independent members or excluding persons holding office or employment in the parent companies, do not exclude the existence of control as long as the shareholders decide the composition of the decision-making bodies ([27]). Similarly, despite provisions of national law foreseeing that decisions of a company must be taken by its company organs in its interests, those persons holding the voting rights have the power to adopt those decisions and therefore have the possibility to exercise decisive influence on the company ([28]).

([23]) Case M.940 — UBS/Mister Minit, in the context of Article 5(4)(b) of the Merger Regulation. For the treatment of franchising relationships in the competitive assessment, see Case COMP/M.4220 — Food Service Project/Tele Pizza of 6 June 2006. The situation in Case IV/M.126 — Accor/Wagon-Lits of 28 April 1992 has to be distinguished from franchising agreements. In this case, again in the context of Article 5(4)(b), the hotel company had a right to manage also hotels in which it only owned a minority stake as it had entered into long-term hotel management agreements giving it decisive influence over the day-to-day operations of these hotels, including decisions on budgetary matters.

([24]) See Case IV/M.794 — Coca-Cola/Amalgamated Beverages GB of 22 January 1997; Case IV/ECSC.1031 — US/Sollac/Bamesa of 28 July 1993; Case IV/M.625 — Nordic Capital/Transpool of 23 August 1995; for the criteria see also Case IV/M.697 — Lockheed Martin Corporation/Loral Corporation, of 27 March 1996.

([25]) See Case IV/M.258 — CCIE/GTE, of 25 September 1992 where the Commission did not find control due to the temporary nature of the commercial agreements involved.

([26]) See Case COMP/M.3330 — RTL/M6 of 12 March 2004; Case COMP/M.452 — Avesta (II) of 9 June 1994.

([27]) Judgment in Case T-282/02 Cementbouw v Commission, paragraphs 70, 73, 74 [2006] ECR II-319.

([28]) Judgment in Case T-282/02 Cementbouw v Commission, paragraphs 79 [2006] ECR II-319.

*Control in other areas of legislation*

(23) The concept of control under the Merger Regulation may be different from that applied in specific areas of Community and national legislation concerning, for example, prudential rules, taxation, air transport or the media. The interpretation of 'control' in other areas is therefore not necessarily decisive for the concept of control under the Merger Regulation

### 1.3. ***Object of control***

(24) The Merger Regulation provides in Article 3(1)(b), (2) that the object of control can be one or more, or also parts of, undertakings which constitute legal entities, or the assets of such entities, or only some of these assets. The acquisition of control over assets can only be considered a concentration if those assets constitute the whole or a part of an undertaking, *i.e.* a business with a market presence, to which a market turnover can be clearly attributed ([29]). The transfer of the client base of a business can fulfil these criteria if this is sufficient to transfer a business with a market turnover ([30]). A transaction confined to intangible assets such as brands, patents or copyrights may also be considered to be a concentration if those assets constitute a business with a market turnover. In any case, the transfer of licences for brands, patents or copyrights, without additional assets, can only fulfil these criteria if the licences are exclusive at least in a certain territory and the transfer of such licences will transfer the turnover-generating activity ([31]). For non-exclusive licences it can be excluded that they may constitute on their own a business to which a market turnover is attached.

(25) Specific issues arise in cases where an undertaking outsources in-house activities, such as the provision of services or the manufacturing of products, to a service provider. Typical cases are the outsourcing of IT services to specialised IT companies. Outsourcing contracts can take several forms; their common characteristic is that the outsourcing service supplier shall provide those services to the customer which the latter has performed in-house before. Cases of simple outsourcing do not involve any transfer of assets or employees to the outsourcing service suppliers, but it is usually the case that any assets or employees are retained by the customer. Such an outsourcing contract is akin to a normal service contract and even if the outsourcing service supplier acquires a right to direct those assets and employees of the customer, no concentration arises if the assets and employees will be used exclusively to service the customer.

(26) The situation may be different if the outsourcing service supplier, in addition to taking over a certain activity which was previously provided internally, is transferred the associated assets and/or personnel. A concentration only arises in these circumstances if the assets constitute the whole or part of an undertaking, i.e. a business with access to the market. This requires that the assets previously dedicated to in-house activities of the seller will enable the outsourcing service supplier to provide services not only to the outsourcing customer but also to third parties, either immediately or within a short period after the transfer. This will be the case if the transfer relates to an internal business unit or a subsidiary already engaged in the provision of services to third parties. If third parties are not yet supplied, the assets transferred in the case of manufacturing should contain production facilities, the product know-how (it is sufficient if the assets transferred allow the build-up of such capabilities in the near future) and, if there is no existing market access, the means for the purchaser to develop a market access within a short period

([29]) See, *e.g.*, Case COMP/M. 3867 — Vattenfall/Elsam and E2 Assets of 22 December 2005.

([30]) Case COMP/M.2857 — ECS/IEH of 23 December 2002.

([31]) In addition, the granting of licences and the transfer of patent licences will only constitute a concentration if this is done on a lasting basis. In this respect, similar considerations as set out above in paragraph 18 for the acquisition of control by (long-term) agreements apply.

of time (e.g. including existing contracts or brands) ([32]). As regards the provision of services, the assets transferred should include the required know-how (e.g. the relevant personnel and intellectual property) and those facilities which allow market access (such as, *e.g.*, marketing facilities) ([33]). The assets transferred therefore have to include at least those core elements that would allow an acquirer to build up a market presence in a time-frame similar to the start-up period for joint ventures as set out below under paragraphs 97, 100. As in the case of joint ventures, the Commission will take account of substantiated business plans and general market features for assessing this.

(27) If the assets transferred do not allow the purchaser to at least develop a market presence, it is likely that they will be used only for providing services to the outsourcing customer. In such circumstances, the transaction will not result in a lasting change in the market structure and the outsourcing contract is again similar to a service contract. The transaction will not constitute a concentration. The specific requirements under which a joint venture for the provision of outsourcing services is qualified as a concentration are assessed in the present Notice in the section on full-function joint ventures.

### 1.4. *Change of control on a lasting basis*

(28) Article 3(1) of the Merger Regulation defines the concept of a concentration in such a manner as to cover operations only if they bring about a lasting change in the control of the undertakings concerned and, as recital 20 adds, in the structure of the market. The Merger Regulation therefore does not deal with transactions resulting only in a temporary change of control. However, a change of control on a lasting basis is not excluded by the fact that the underlying agreements are entered into for a definite period of time, provided those agreements are renewable. A concentration may arise even in cases in which agreements envisage a definite end-date, if the period envisaged is sufficiently long to lead to a lasting change in the control of the undertakings concerned ([34]).

(29) The question whether an operation results in a lasting change in the market structure is also relevant for the assessment of several operations occurring in succession, where the first transaction is only transitory in nature. Several scenarios can be distinguished in this respect.

(30) In one scenario, several undertakings come together solely for the purpose of acquiring another company on the basis of an agreement to divide up the acquired assets according to a pre-existing plan immediately upon completion of the transaction. In such circumstances, in a first step, the acquisition of the entire target company is carried out by one or several undertakings. In a second step, the acquired assets are divided among several undertakings. The question is then whether the first transaction is to be considered as a separate concentration, involving an acquisition of sole control (in the case of a single purchaser) or of joint control (in the case of a joint purchase) of the entire target undertaking, or whether only the acquisitions in the second step constitute concentrations, whereby each of the acquiring undertakings acquires its relevant part of the target undertaking.

([32]) See Case COMP/M.1841 — Celestica/IBM of 25 February 2000; Case COMP/M.1849 — Solectron/Ericsson of 29 February 2000; Case COMP/M.2479 — Flextronics/Alcatel — of 29 June 2001; Case COMP/M.2629 — Flextronics/Xerox of 12 November 2001.

([33]) See, in the context of joint ventures, Case IV/M.560 — EDS/Lufthansa of 11 May 1995; Case COMP/M.2478 — IBM Italia/Business Solutions/JV of 29 June 2001.

([34]) See, in cases of joint ventures, Case COMP/M.2903 — DaimlerChrysler/Deutsche Telekom/JV of 30 April 2003 where a period of 12 years was considered sufficient; Case COMP/M.2632 — Deutsche Bahn/ECT International/United Depots/JV of 11 February 2002 with a contract duration of 8 years. In Case COMP/M.3858 Lehman Brothers/Starwood/Le Meridien of 20 July 2005, the Commission considered a minimum period of 10-15 years sufficient, but not a period of three years. The acquisition of control by the acquisition of shares or assets is not normally confined to a definite period of time and is therefore assumed to lead to a change of control on a lasting basis. Only in the scenarios set out in paragraphs 29 ff., will an acquisition of control by shares or assets be exceptionally considered to be transitory in nature and thus not to lead to a lasting change in the control of the undertakings concerned.

(31) The Commission considers that the first transaction does not constitute a concentration, and examines the acquisitions of control by the ultimate acquirers, provided a number of conditions are met: First, the subsequent break-up must be agreed between the different purchasers in a legally binding way. Second, there must not be any uncertainty that the second step, the division of the acquired assets, will take place within a short time period after the first acquisition. The Commission considers that normally the maximum time-frame for the division of the assets should be one year ([35]).

(32) If both conditions are met, the first acquisition does not result in a structural change on a lasting basis. There is no effective concentration of economic power between the acquirer(s) and the target company as a whole since the acquired assets are not held in an undivided way on a lasting basis, but only for the time necessary to carry out the immediate split-up of the acquired assets. In those circumstances, only the acquisitions of the different parts of the undertaking in the second step will constitute concentrations, whereby each of these acquisitions by different purchasers will constitute a separate concentration. This is irrespective of whether the first acquisition is carried out by only one undertaking ([36]) or jointly by the undertakings which are also involved in the second step. ([37]) In any case, it must be noted that the scope of a clearance decision will only allow for a takeover of the entire target if the break-up can proceed within a short time-frame afterwards and the different parts of the target undertaking are directly sold on to the respective ultimate buyer.

(33) However, if these conditions are not fulfilled, in particular if it is not certain that the second step will proceed within a short time-frame after the first acquisition, the Commission will consider the first transaction as a separate concentration, involving the entire target undertaking. This, *e.g.*, is the case if the first transaction may also proceed independently of the second transaction ([38]) or if a longer transitory period is needed to divide up the target undertaking ([39]).

(34) A second scenario is an operation leading to joint control for a starting-up period but, according to legally binding agreements, this joint control will be converted to sole control by one of the shareholders. As the joint control situation may not constitute a lasting change of control, the whole operation may be considered to be an acquisition of sole control. In the past, the Commission accepted that such a start-up period could last up to three years ([40]). Such a period seems to be too long to exclude that the joint control scenario has an impact on the structure of the market. The period therefore should, in general, not exceed one year and the joint control period should be only transitory in nature ([41]). Only such a relatively short period will make it unlikely that the joint control period will have a distinct impact on the market structure and can therefore be considered as not leading to a change in control on a lasting basis.

(35) In a third scenario, an undertaking is 'parked' with an interim buyer, often a bank, on the basis of an agreement on the future onward sale of the business to an ultimate acquirer. The interim buyer generally acquires shares 'on behalf' of the ultimate acquirer, which often bears the major part of the economic risks and may also be granted specific rights. In such circumstances, the first transaction is only undertaken to facilitate the second transaction and the first buyer is directly linked to the ultimate acquirer. Contrary to the situation described in the first scenario in paragraphs 30-33, no other ultimate

([35]) See, e.g., Cases COMP/M. Case No COMP/M.3779 — Pernod Ricard/Allied Domecq of 24 June 2005 and COMP/M.3813 — Fortune Brands/Allied Domecq of 10 June 2005, where the split-up of the assets was foreseen to become effective within 6 months after the acquisition.

([36]) For a first acquisition by only one undertaking see Case COMP/M.3779 — Pernod Ricard/Allied Domecq of 24 June 2005 and Case COMP/M.3813 — Fortune Brands/Allied Domecq/Pernod Ricard of 10 June 2005; Case COMP/M.2060 — Bosch/Rexroth of 12 January 2001.

([37]) For a joint acquisition see Case COMP/M.1630 — Air Liquide/BOC of 18 January 2000; Case COMP/M.1922 — Siemens/Bosch/Atecs of 11 August 2000; Case COMP/M.2059 — Siemens/Dematic/VDO Sachs of 29 August 2000.

([38]) See Case COMP/M.2498 — UPM-Kymmene/Haindl of 21 November 2001 and Case COMP/M.2499 — Norske Skog/Parenco/Walsum of 21 November 2001.

([39]) Case COMP/M.3372 — Carlsberg/Holsten of 16 March 2004.

([40]) Case IV/M.425 — British Telecom/Santander of 28 March 1994.

([41]) See Case M.2389 — Shell/DEA of 20 December 2001 where the ultimate acquirer of sole control had a strong influence in the operational management during the joint control period; Case M.2854 — RAG/Degussa of 18 November 2002 where the transitional period was designed to facilitate internal post-merger restructuring.

acquirer is involved, the target business remains unchanged, and the sequence of transactions is initiated alone by the sole ultimate acquirer. From the date of the adoption of this Notice, the Commission will examine the acquisition of control by the ultimate acquirer, as provided for in the agreements entered into by the parties. The Commission will consider the transaction by which the interim buyer acquires control in such circumstances as the first step of a single concentration comprising the lasting acquisition of control by the ultimate buyer.

### 1.5. *Interrelated transactions*

#### 1.5.1. Relation between Article 3 and Article 5(2) second subparagraph

(36) Several transactions can be treated as a single concentration under the Merger Regulation either according to the general rule of Article 3 — as the transactions are interdependent — or according to the specific provision of Article 5(2) second subparagraph.

(37) Article 5(2) second subparagraph governs a different question from that referred to by Article 3 of the Merger Regulation. Article 3 defines the existence of a 'concentration' in general and material terms, but does not directly determine the question of the Commission's competence in respect of concentrations. Article 5 intends to specify the scope of the Merger Regulation, in particular by defining the turnover to be taken into account for the purpose of determining whether a concentration has Community dimension, and Article 5(2) second subparagraph allows the Commission in this respect to consider two or more concentrative transactions to constitute a single concentration for the purposes of calculating the turnover of the undertakings concerned. The assessment whether, in application of Article 3, a number of transactions give rise to a single concentration or whether those transactions must be regarded as giving rise to a number of concentrations, is thereby logically precedent to the question addressed in Article 5(2) second subparagraph ([42]).

#### 1.5.2. Interdependent transactions under Article 3

(38) The general and teleological definition of a concentration set out in Article 3(1) — the result being control of one or more undertakings — implies that it makes no difference whether control was acquired by one or several legal transactions, provided that the end result constitutes a single concentration. Two or more transactions constitute a single concentration for the purposes of Article 3 if they are unitary in nature. It should therefore be determined whether the result leads to conferring one or more undertakings direct or indirect economic control over the activities of one or more other undertakings. For the assessment, the economic reality underlying the transactions is to be identified and thus the economic aim pursued by the parties. In other words, in order to determine the unitary nature of the transactions in question, it is necessary, in each individual case, to ascertain whether those transactions are interdependent, in such a way that one transaction would not have been carried out without the other ([43]).

(39) Recital 20 to the Merger Regulation explains in this respect that it is appropriate to treat as a single concentration transactions that are closely connected in that they are linked by condition. The requirement that the transactions are interdependent as set out by the Court of First Instance in the *Cementbouw* judgment ([44]) thereby corresponds to the explanation set out in recital 20 that the transactions are linked by condition.

(40) This general approach reflects, on the one hand, that under the Merger Regulation transactions which stand or fall together according to the economic objectives pursued by the parties should also be analysed in one procedure. In these circumstances, the change of the market structure is brought about by these transactions together. On the other hand, if different transactions are not interdependent and if the parties would proceed with one of the transactions if the other ones would not succeed, it seems appropriate to assess these transactions individually under the Merger Regulation.

([42]) Judgment in Case T-282/02 Cementbouw v Commission, paragraphs 113-119 [2006] ECR II-319.
([43]) Judgment in Case T-282/02 Cementbouw v Commission, paragraphs 104-109 [2006] ECR II-319.
([44]) Judgment in Case T-282/02 Cementbouw v Commission, paragraphs 106-109 [2006] ECR II-319.

(41) However, several transactions, even if linked by condition upon each other, can only be treated as a single concentration, if control is acquired ultimately by the same undertaking(s). Only in these circumstances two or more transactions can be considered to be unitary in nature and therefore to constitute a single concentration for the purposes of Article 3 ([45]). This excludes de-mergers of joint ventures by which different parts of an undertaking are split between its former parent companies. The Commission will consider those transactions as separate concentrations ([46]). The same applies to transactions where two (or more) companies exchange assets in transactions involving de-mergers of joint ventures or assets swaps. Although the parties will normally consider those transactions as interdependent, the purpose of the Merger Regulation requires a separate assessment of the results of each of the transactions: Several undertakings acquire control of different assets; a separate combination of resources takes place for each of the acquiring undertakings; and the impact on the market of each of those acquisitions of control needs to be analysed separately under the Merger Regulation.

(42) The acquisition of different degrees of control (for example joint control of one business and sole control of another business) raises specific questions. 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 ([47]). Those transactions constitute only one concentration if they are interdependent and if the undertaking acquiring sole control is also acquiring joint control. In any case, such a scenario is considered to constitute one concentration where a corporate entity is acquired to which both the solely controlled and the jointly controlled undertaking belong. On the basis of the interpretation in recital 20, the situation where the same undertaking acquires sole and joint control of other undertakings based on interdependent agreements is not to be treated differently. These transactions, if they are interdependent, therefore constitute a single concentration.

*Requirement of conditionality of transactions*

(43) The required conditionality implies that none of the transactions would take place without the others and they therefore constitute a single operation ([48]). Such conditionality is normally demonstrated if the transactions are linked *de jure*, *i.e.* the agreements themselves are linked by mutual conditionality. If *de facto* conditionality can be satisfactorily demonstrated, it may also suffice for treating the transactions as a single concentration. This requires an economic assessment of whether each of the transactions necessarily depends on the conclusion of the others ([49]). Further indications of the interdependence of several transactions may be the statements of the parties themselves or the simultaneous conclusion of the relevant agreements. A conclusion of *de facto* interconditionality of several transactions will be difficult to reach in the absence of their simultaneity. A pronounced lack of simultaneity of legally interconditional transactions may likewise put into doubt their true interdependence.

(44) The principle that several transactions can be treated as a single concentration under the mentioned conditions only applies if the result is that control of one or more undertakings is acquired by the same person(s) or undertaking(s). First, this may be the case if a single business or undertaking is acquired via several legal transactions. Second, also the acquisition of control of several undertakings — which could constitute concentrations in themselves — can be linked in such a way that it constitutes a single concentration. However, it is not possible under the Merger Regulation to link different legal transactions which only partly concern the acquisition of control of undertakings, but partly also the acquisition of

([45]) This also covers situations where an undertaking sells a business to a purchaser and then acquirers the seller including the business sold, see Case COMP/M.4521 — LGI/Telenet of 26 February 2007.

([46]) See parallel cases COMP/M.3293 — Shell/BEB and COMP/M.3294 — ExxonMobil/BEB of 20 November 2003; case IV/M.197 — Solvay/Laporte of 30 April 1992.

([47]) See Case IV/M.409 ABB/Renault Automation of 9 March 1994.

([48]) Judgment in Case T-282/02 Cementbouw v Commission, paragraphs 127 et seq. [2006] ECR II-319.

([49]) Judgment in Case T-282/02 Cementbouw v Commission, paragraphs 131 et seq. [2006] ECR II-319. See Case COMP/M.4521 — LGI/Telenet of 26 February 2007, where the interdependence was based on the fact that two transactions were decided and carried out simultaneously and that, according to the economic aims of the parties, each of the transactions would not have been carried out without the other.

other assets, such as non-controlling minority stakes in other companies. It would not be in line with the general framework and the purpose of the Merger Regulation if different transactions, linked by conditionality, were assessed as a whole under the Merger Regulations if only some of these transactions lead to a change in control of a given target.

*Acquisition of a single business*

(45) A single concentration may therefore exist if the same purchaser(s) acquire control of a single business, *i.e.* a single economic entity, via several legal transactions if those are inter-conditional. This is the case irrespective of whether the business is acquired in a corporate structure, consisting of one or several companies, or whether various assets are acquired which form a single business, *i.e.* a single economic entity managed for a common commercial purpose to which all the assets contribute. Such a business may comprise majority and minority stakes in companies as well as tangible and intangible assets. If several legal transactions which are interdependent are required to transfer such a business, these transactions constitute one concentration ([50]).

*Parallel and serial acquisitions of control*

(46) For the treatment of several acquisitions of control as a single concentration, several scenarios have arisen in the Commission's past decisional practice. One such scenario is a parallel acquisition of control, i.e. undertaking A acquires control of undertaking B and C in parallel from separate sellers on condition that A is not obliged to buy either and neither seller is obliged to sell, unless both transactions proceed ([51]). Another scenario is a serial acquisition of control, i.e. undertaking A acquires control of undertaking B conditional on B's prior or simultaneous acquisition of undertaking C, as illustrated by the Kingfisher case ([52]).

*Serial acquisition of sole/joint control*

(47) In the same way as the Kingfisher scenario, the Commission approaches cases where, in a serial transaction, an undertaking agrees to acquire first sole control of a target undertaking, with a view to directly selling on parts of the acquired stake in the target to another undertaking, finally resulting in joint control of both acquirers over the target company. If both acquisitions are inter-conditional, the two transactions constitute a single concentration and only the acquisition of joint control, as the final result of the transactions, will be considered by the Commission ([53]).

1.5.3. Series of transactions in securities

(48) Recital 20 of the Merger Regulation further explains that a single concentration will also arise in cases where control over one undertaking is acquired by a series of transactions in securities from one or several sellers taking place within a reasonably short period of time. The concentration in these scenarios is not limited to the acquisition of the 'one and decisive' share, but will cover all the acquisitions of securities which take place in the reasonably short period of time.

([50]) See Case IV/M.470 — Gencor/Shell of 29 August 1994; COMP/M.3410 — Total/Gaz de France of 8 October 2004; Case IV/M.957 — L'Oreal/Procasa/Cosmetique Iberica/Albesa of 19 September 1997; Case IV/M.861 — Textron/Kautex of 18 December 1996 where all the assets were also used in the same product market. The same considerations apply if a joint venture is created by several companies, forming a single business, see Case M.4048 — Sonae Industria/Tarkett of 12 June 2006 where the interdependence of transactions establishing, respectively, a production and a distribution joint venture was necessary in order to demonstrate that there was a single concentration that would create a full-function joint venture.

([51]) Case COMP/M.2926 — EQT/H&R/Dragoco — of 16 September 2002; the same considerations apply to the question when several mergers constitute one concentration in the meaning of Article 3(1)(a), Case COMP/M. 2824 — Ernst & Young/Andersen Germany of 27 August 2002.

([52]) Case IV/M.1188 — Kingfisher/Wegert/ProMarkt of 18 June 1998; case COMP/M.2650 — Haniel/Cementbouw/JV (CVK) of 26 June 2002.

([53]) Case COMP/M.2420 — Mitsui/CVRD/Caemi of 30 October 2001.

1.5.4. Article 5(2) subparagraph 2

(49) Article 5(2) subparagraph 2 provides a specific rule which allows the Commission to consider successive transactions occurring in a fixed period of time a single concentration for the purposes of calculating the turnover of the undertakings concerned. The purpose of this provision is to ensure that the same persons do not break a transaction down into series of sales of assets over a period of time, with the aim of avoiding the competence conferred on the Commission by the Merger Regulation ([54]).

(50) If two or more transactions (each of them bringing about an acquisition of control) take place within a two-year period between the same persons or undertakings, they shall be qualified as a single concentration ([55]), irrespective of whether or not those transactions relate to parts of the same business or concern the same sector. This does not apply where the same persons or undertakings are joined by other persons or undertakings for only some of the transactions involved. It is sufficient if the transactions, although not carried out between the same companies, are carried out between companies belonging to the same respective groups. The provision also applies to two or more transactions between the same persons or undertakings if they are carried out simultaneously. Whenever they lead to acquisitions of control by the same undertaking, such simultaneous transactions between the same parties form a single concentration even if they are not conditional upon each other ([56]). However, Article 5(2) subparagraph 2 would not appear to apply to different transactions at least one of which involves an undertaking concerned which is distinct from the common seller(s) and buyer(s). In situations involving two transactions where one transaction results in sole control and the other in joint control, Article 5(2) subparagraph 2 therefore does not apply unless the other jointly controlling parent(s) in the latter transaction are the seller(s) of the solely controlling stake in the former transaction.

### 1.6. *Internal restructuring*

(51) A concentration within the meaning of the Merger Regulation is limited to changes in control. An internal restructuring within a group of companies does not constitute a concentration. This applies, e.g., to increases in shareholdings not accompanied by changes of control or to restructuring operations such as a merger of a dual listed company into a single legal entity or a merger of subsidiaries. A concentration could only arise if the operation leads to a change in the quality of control of one undertaking and therefore is no longer purely internal.

### 1.7. *Concentrations involving State-owned undertakings*

(52) An exceptional situation exists where both the acquiring and acquired undertakings are companies owned by the same State (or by the same public body or municipality). 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. Where the undertakings were formerly part of different economic units having an independent power of decision, the operation will be deemed to constitute a concentration and not an internal restructuring ([57]). However, where the different economic units will continue to have an independent power of decision also after the operation, the operation is only to be regarded as an internal restructuring, even if the shares of the undertakings, constituting different economic units, should be held by a single entity, such as a pure holding company ([58]).

([54]) Judgment in Case T-282/02 Cementbouw v Commission, paragraph 118 [2006] ECR II-319.

([55]) See Case COMP/M.3173 — E.ON/Fortum Burghausen/Smaland/Endenderry of 13 June 2003. This also applies to situations where sole control is acquired whereby only parts of the undertaking were previously jointly controlled by the acquiring undertaking, case COMP/M. 2679 — EdF/TXU/Europe/24 Seven of 20 December 2001.

([56]) Case IV/M.1283 — Volkswagen/RollsRoyce/Cosworth of 24 August 1998.

([57]) Case IV/M.097 — Péchiney/Usinor, of 24 June 1991; Case IV/M.216 — CEA Industrie/France Telecom/SGS-Thomson, of 22 February 1993; Case IV/M.931 — Neste/IVO of 2 June 1998. See also recital 22 of the Merger Regulation.

([58]) Specific issues concerning the calculation of turnover for state-owned companies are dealt with in paragraphs 192-194.

(53) However, 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 ([59]).

## 2. **Sole control**

(54) Sole control is acquired if one undertaking alone can exercise decisive influence on an undertaking. Two general situations in which an undertaking has sole control can be distinguished. First, the solely controlling undertaking enjoys the power to determine the strategic commercial decisions of the other undertaking. This power is typically achieved by the acquisition of a majority of voting rights in a company. Second, a situation also conferring sole control 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 (the so-called negative sole control). In these circumstances, a single shareholder possesses the same level of influence as that usually enjoyed by an individual shareholder which jointly-controls a company, *i.e.* the power to block the adoption of strategic decisions. In contrast to the situation in a jointly controlled company, there are no other shareholders enjoying the same level of influence and the shareholder enjoying negative sole control does not necessarily have to cooperate with specific other shareholders in determining the strategic behaviour of the controlled undertaking. Since this shareholder can produce a deadlock situation, the shareholder acquires decisive influence within the meaning of Article 3(2) and therefore control within the meaning of the Merger Regulation ([60]).

(55) Sole control can be acquired on a *de jure* and/or *de facto* basis.

*De jure sole control*

(56) Sole control is normally acquired on a legal basis where an undertaking acquires a majority of the voting rights of a company. 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. Where the company statutes require a supermajority for strategic decisions, the acquisition of a simple majority of the voting rights may not confer the power to determine strategic decisions, but may be sufficient to confer a blocking right on the acquirer and therefore negative control.

(57) Even in the case of a minority shareholding, sole control may occur on a legal basis in situations where specific rights are attached to this shareholding. These may be preferential shares to which special rights are attached 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. 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 on the basis of the organisational structure (e.g. as a general partner in a limited partnership which often does not even have a shareholding).

(58) A typical situation of negative sole control occurs where one shareholder holds 50 % in an undertaking whilst the remaining 50 % is held by several other shareholders (assuming this does not lead to positive sole control on a *de facto* basis), or where there is a supermajority required for strategic decisions which in fact confers a veto right upon only one shareholder, irrespective of whether it is a majority or a minority shareholder ([61]).

([59]) Case IV/M.493 — Tractebel/Distrigaz II, of 1 September 1994.

([60]) Since this shareholder is the only undertaking acquiring a controlling influence, only this shareholder is obliged to submit a notification under the Merger Regulation.

([61]) See consecutive Cases COMP/M.3537 — BBVA/BNL of 20 August 2004 and M.3768 — BBVA/BNL of 27 April 2005; Case M.3198 — VW-Audi/VW-Audi Vertriebszentren of 29 July 2003; Case COMP/M.2777 — Cinven Limited/Angel Street Holdings of 8 May 2002; Case IV/M.258 — CCIE/GTE, of 25 September 1992. In Case COMP/M.3876 — Diester Industrie/Bunge/JV of 30 September 2005, there was the specific situation that a joint venture held a stake in a company by which it had negative sole control over this company.

*De facto sole control*

(59) A minority shareholder may also be deemed to have sole control on a *de facto* basis. This is in particular the case where the shareholder is highly likely to achieve a majority at the shareholders' meetings, given the level of its shareholding and the evidence resulting from the presence of shareholders in the shareholders' meetings in previous years ([62]). Based on the past voting pattern, the Commission will carry out a prospective analysis and take into account foreseeable changes of the shareholders' presence which might arise in future following the operation ([63]). The Commission will further analyse the position of other shareholders and assess their role. Criteria for such an assessment are in particular whether the remaining shares are widely dispersed, whether other important shareholders have structural, economic or family links with the large minority shareholder or whether other shareholders have a strategic or a purely financial interest in the target company; these criteria will be assessed on a case-by-case basis ([64]). Where, on the basis of its shareholding, the historic voting pattern at the shareholders' meeting and the position of other shareholders, a minority shareholder is likely to have a stable majority of the votes at the shareholders' meeting, then that large minority shareholder is taken to have sole control ([65]).

(60) 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 ([66]). However, in exceptional circumstances an option, together with other elements, may lead to the conclusion that there is *de facto* sole control ([67]).

*Sole control acquired by other means than voting rights*

(61) Apart from the acquisition of sole control on the basis of voting rights, the considerations outlined in section 1.2 concerning the acquisition of sole control by purchase of assets, by contract, or by any other means also apply.

## 3. **Joint control**

(62) 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 upon a specific shareholder the power 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 and that they are required to cooperate ([68]).

(63) As in the case of sole control, the acquisition of joint control can also be established on a *de jure* 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).

([62]) Case IV/M.343 — Société Générale de Belgique/Générale de Banque, of 3 August 1993; Case COMP/M.3330 — RTL/M6 of 12 March 2004; Case IV/M.159 — Mediobanca/Generali of 19 December 1991.

([63]) See Case COMP/M.4336 — MAN/Scania of 20 December 2006 as regards the question whether Volkswagen had acquired control of MAN.

([64]) Case IV/M.754 — Anglo American/Lonrho of 23 April 1997; Case IV/M.025 — Arjomari/Wiggins Teape, of 10 February 1990.

([65]) See also Case COMP/M.2574 — Pirelli/Edizione/Olivetti/Telecom Italia of 20 September 2001; Case IV/M.1519 — Renault/Nissan of 12 May 1999.

([66]) Judgment in Case T 2/93, Air France v Commission [1994] ECR II-323. Even though an option does normally not in itself lead to a concentration, it can be taken into account for the substantive assessment in a related concentration, see Case COMP/M.3696 — E.ON/MOL of 21 December 2005, at paragraphs 12-14, 480, 762 *et subseq.*

([67]) Case IV/M.397 — Ford/Hertz of 7 March 1994.

([68]) See also Judgment in Case T-282/02 Cementbouw v Commission, paragraphs 42, 52, 67 [2006] ECR II-319.

### 3.1. *Equality in voting rights or appointment to decision-making bodies*

(64) 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 ([69]). 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.

### 3.2. *Veto rights*

(65) 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 ([70]). 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.

(66) 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 ([71]).

(67) In contrast, veto rights which confer joint control typically include decisions on 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.

(68) 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.

([69]) Case COMP/M.3097 — Maersk Data/Eurogate IT; Global Transport Solutions JV of 12 March 2003; Case IV/M.272 — Matra/CAP Gemini Sogeti, of 17 March 1993.

([70]) Case T 2/93, Air France v Commission [1994] ECR II-323; Case IV/M.010 — Conagra/Idea, of 3 May 1991.

([71]) Case IV/M.062 — Eridania/ISI, of 30 July 1991.

*Appointment of senior management and determination of budget*

(69) Very important are the veto rights concerning decisions on the appointment and dismissal of the senior management and the approval of the budget. The power to co-determine the structure of the senior management, such as the members of the board, usually 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*

(70) The business plan normally provides details of the aims of a company together with the measures to 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*

(71) 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*

(72) Apart from the typical veto rights mentioned above, there exist a number of other possible 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 characterized 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*

(73) 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 strategic commercial policy, to the appointment of senior management or to the budget or business plan cannot be regarded as giving joint control to its owner ([72]).

### 3.3. ***Joint exercise of voting rights***

(74) 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

([72]) Case IV/M.295 — SITA-RPC/SCORI, of 19 March 1993.

these voting rights. This can result from a legally binding agreement to this effect, or it may be established on a *de facto* basis.

(75) The legal means to ensure the joint exercise of voting rights can be in the form of a (jointly controlled) 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).

(76) 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. The greater the number of parent companies involved in such a joint venture, however, the more remote is the likelihood of this situation occurring.

(77) Indicative for such a commonality of interests is a high degree of mutual dependency as between the parent companies to reach the strategic objectives of the joint venture. This is in particular the case when 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) ([73]). In these circumstances, the parent companies may be able to block the strategic decisions of the joint venture and, thus, they can operate the joint venture successfully only with each other's agreement on the strategic decisions even if there is no express provision for any veto rights. The parent companies will therefore be required to cooperate ([74]). Further factors are decision making procedures which are tailored in such a way as to allow the parent companies to exercise joint control even in the absence of explicit agreements granting veto rights or other links between the minority shareholders related to the joint venture ([75]).

(78) Such a scenario may not only occur in a situation where two or more minority shareholders jointly control an undertaking on a de facto basis, but also where there is high degree of dependency of a majority shareholder on a minority shareholder. This may be the case where the joint venture economically and financially depends on the minority shareholder or where only the minority shareholder has the required know-how for, and will play a major role in, the operation of the joint undertaking whereas the majority shareholder is a mere financial investor ([76]). In such circumstances, the majority shareholder will not be able to enforce its position, but the joint venture partner may be able to block strategic decisions so that both parent undertakings will be required to cooperate permanently. This leads to a situation of *de facto* joint control which prevails over a pure *de jure* assessment according to which the majority shareholder could have been considered to have sole control.

(79) These criteria apply to the formation of a new joint venture as well as to acquisitions of minority shareholdings, together conferring joint control. In case of acquisitions of shareholdings, there is a higher probability of a commonality of interests if the shareholdings are acquired by means of concerted action. However, an acquisition by way of a concerted action is not alone sufficient for the purposes of establishing *de facto* joint control. In general, a common interest as financial investors (or creditors) of a company in a return on investment does not constitute a commonality of interests leading to the exercise of *de facto* joint control.

([73]) Case COMP/JV.55 Hutchison/RCPM/ECT of 3 July 2001; see also Case IV/M.553 — RTL/Veronica/Endemol of 20 September 1995.

([74]) Judgment in Case T-282/02 Cementbouw v Commission, paragraphs 42, 52, 67 [2006] ECR II-319.

([75]) Case COMP/JV.55 Hutchison/RCPM/ECT of 3 July 2001. See also Case IV/M.553 — RTL/Veronica/Endemol of 20 September 1995.

([76]) Case IV/M. 967 — KLM/Air UK of 22 September 1997; Case COMP/M.4085 — Arcelor/Oyak/Erdemir of 13 February 2006.

(80) 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 (or a certain group thereof) will jointly control the undertaking ([77]). 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, where these fall short of strategic veto rights. 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.

### 3.4. *Other considerations related to joint control*

*Unequal role of the parent companies*

(81) 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 on the basis of equality in voting rights or rights of appointment to decision making bodies or of veto rights related to strategic issues. Without this, there would be sole control.

*Casting vote*

(82) For joint control to exist, there should not be a casting vote for one parent company only as this would lead to sole control of the company enjoying the casting vote. However, there can be joint control when this casting vote is in practice of limited relevance and effectiveness. This may be the case when the casting vote can be exercised only after a series of stages of arbitration and attempts at reconciliation or in a very limited field or if the exercise of the casting vote triggers a put option implying a serious financial burden or if the mutual interdependence of the parent companies would make the exercise of the casting vote unlikely ([78]).

## III. CHANGES IN THE QUALITY OF CONTROL

(83) The Merger Regulation covers operations resulting in the acquisition of sole or joint control, including operations leading to changes in the quality of control. First, such a change in the quality of control, resulting in a concentration, occurs if there is a change between sole and joint control. Second, a change in the quality of control occurs between joint control scenarios before and after the transaction if there is an increase in the number or a change in the identity of controlling shareholders. However, there is no change in the quality of control if a change from negative to positive sole control occurs. Such a change affects neither the incentives of the negatively controlling shareholder nor the nature of the control structure, as the controlling shareholder did not necessarily have to cooperate with specific shareholders at the time when it enjoyed negative control. In any case, mere changes in the level of shareholdings of the same controlling shareholders, without changes of the powers they hold in a company and of the composition of the control structure of the company, do not constitute a change in the quality of control and therefore are not a notifiable concentration.

([77]) Case IV/JV.12 — Ericsson/Nokia/Psion/Motorola of 22 December 1998.

([78]) Case COMP/M.2574 — Pirelli/Edizione/Olivetti/Telecom Italia of 20 September 2001; Case IV/M.553 — RTL/Veronica/Endemol of 20 September 1995; Case IV/M.425 — British Telecom/Banco Santander, of 28 March 1994.

(84) These changes in the quality of control will be discussed in two categories: first, an entrance of one or more new controlling shareholders irrespective of whether or not they replace existing controlling shareholders and, second, a reduction of the number of controlling shareholders.

### 1. **Entry of controlling shareholders**

(85) An entry of new controlling shareholders leading to a joint control scenario can either result from a change from sole to joint control, or from the entry of an additional shareholder or a replacement of an existing shareholder in an already jointly controlled undertaking.

(86) A move from sole control to joint control is considered a notifiable operation as this changes the quality of control of the joint venture. First, there is a new acquisition of control for the shareholder entering the controlled undertaking. Second, only the new acquisition of control makes the controlled undertaking to a joint venture which changes decisively also the situation for the remaining controlling undertaking under the Merger Regulation: In the future, it has to take into account the interests of one or more other controlling shareholder(s) and it is required to cooperate permanently with the new shareholder(s). Before, it could either determine the strategic behaviour of the controlled undertaking alone (in the case of sole control) or was not forced to take into account the interests of specific other shareholders and was not forced to cooperate with those shareholders permanently.

(87) The entry of a new shareholder in a jointly controlled undertaking — either in addition to the already controlling shareholders or in replacement of one of them — also constitutes a notifiable concentration, although the undertaking is jointly controlled before and after the operation ([79]). First, also in this scenario there is a shareholder newly acquiring control of the joint venture. Second, the quality of control of the joint venture is determined by the identity of all controlling shareholders. It lies in the nature of joint control that, since each shareholder alone has a blocking right concerning strategic decisions, the jointly controlling shareholders have to take into account each others interests and are required to cooperate for the determination of the strategic behaviour of the joint venture ([80]). The nature of joint control therefore does not exhaust itself in a pure mathematical addition of the blocking rights exercised by several shareholders, but is determined by the composition of the jointly controlling shareholders. One of the most obvious scenarios leading to a decisive change in the nature of the control structure of a jointly controlled undertaking is a situation where in a joint venture, jointly controlled by a competitor of the joint venture and a financial investor, the financial investor is replaced by another competitor. In these circumstances, the control structure and the incentives of the joint venture may entirely change, not only because of the entry of the new controlling shareholder, but also due to the change in the behaviour of the remaining shareholder. The replacement of a controlling shareholder or the entry of a new shareholder in a jointly controlled undertaking therefore constitutes a change in the quality of control ([81]).

([79]) See, *e.g.*, Case COMP/M.3440 — ENI/EDP/GdP of 9 December 2004.

([80]) Judgment in Case T-282/02 Cementbouw v Commission, paragraph 67 [2006] ECR II-319.

([81]) Generally, it should be noted that the Commission will not assess as a separate concentration the indirect replacement of a controlling shareholder in a joint control scenario which takes place via an acquisition of control of one of its parent undertakings. The Commission will assess any changes occurring in the competitive situation of the joint venture in the framework of the overall acquisition of control of its parent undertaking. In those circumstances, the other controlling shareholders in the joint venture will therefore not be undertakings concerned by the concentration which relates to its parent undertaking.

(88) However, the entry of new shareholders only results in a notifiable concentration if one or several shareholders acquire sole or joint control by virtue of the operation. The entry of new shareholders may lead to a situation where joint control can neither be established on a *de jure* basis nor on a *de facto* basis as the entry of the new shareholder leads to the consequence that changing coalitions between minority shareholders are possible ([82]).

### 2. **Reduction in the number of shareholders**

(89) A reduction in the number of controlling shareholders constitutes a change in the quality of control and is thus to be considered as a concentration if the exit of one or more controlling shareholders results in a change from joint to sole control. Decisive influence exercised alone is substantially different from decisive influence exercised jointly, since in the latter case the jointly controlling shareholders have to take into account the potentially different interests of the other party or parties involved ([83]).

(90) Where the operation involves a reduction in the number of jointly controlling shareholders, without leading to a change from joint to sole control, the transaction will normally not lead to a notifiable concentration.

## IV. JOINT VENTURES — THE CONCEPT OF FULL-FUNCTIONALITY

(91) Article 3(1)(b) provides that a concentration shall be deemed to arise where control is acquired by *one or more* undertakings of the whole or parts of another undertaking. The new acquisition of another undertaking by several jointly controlling undertakings therefore constitutes a concentration under the Merger Regulation. As in the case of the acquisition of sole control of an undertaking, such an acquisition of joint control will lead to a structural change in the market even if, according to the plans of the acquiring undertakings, the acquired undertaking would no longer be considered full-function after the transaction (*e.g.* because it will sell exclusively to the parent undertakings in future). Thus, a transaction involving several undertakings acquiring joint control of another undertaking or parts of another undertaking, fulfilling the criteria set out in paragraph 24, from third parties will constitute a concentration according to Article 3(1) without it being necessary to consider the full-functionality criterion ([84]).

(92) Article 3(4) provides in addition that the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity (so called full-function joint ventures) shall constitute a concentration within the meaning of the Merger Regulation. The full-functionality criterion therefore delineates the application of the Merger Regulation for the creation of joint ventures by the parties, irrespective of whether such a joint venture is created as a 'greenfield operation' or whether the parties contribute assets to the joint venture which they previously owned individually. In these circumstances, the joint venture must fulfil the full-functionality criterion in order to constitute a concentration.

(93) The fact that a joint venture may be a full-function undertaking and therefore economically autonomous from an operational viewpoint does not mean that it enjoys autonomy as regards the adoption of its strategic decisions. Otherwise, a jointly controlled undertaking could never be considered a full-function joint venture and therefore the condition laid down in Article 3(4) would never be complied with ([85]). It is therefore sufficient for the criterion of full-functionality if the joint venture is autonomous in operational respect.

([82]) Case IV/JV.12 — Ericsson/Nokia/Psion/Motorola of 22 December 1998.

([83]) See Case IV/M023 — ICI/Tioxide, of 28 November 1990; see also paragraph 5 (d) of the Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004.

([84]) These considerations do not apply to Article 2(4) in the same way. Whereas the interpretation of Article 3, paragraphs (1) and (4) relates to the applicability of the Merger Regulation to joint ventures, Article 2(4) relates to the substantive analysis of joint ventures. The 'creation of a joint venture constituting a concentration pursuant to Article 3', as provided for in Article 2(4), comprises the acquisition of joint control according to Article 3, paragraphs (1) and (4).

([85]) Judgment in Case T-282/02 Cementbouw v Commission, paragraph 62 [2006] ECR II-319.

### 1. Sufficient resources to operate independently on a market

(94) Full function character essentially 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 ([86]). The personnel do not necessarily need to be employed by the joint venture itself. If it is standard practice in the industry where the joint venture is operating, it may be sufficient if third parties envisage the staffing under an operational agreement or if staff is assigned by an interim employment agency. The secondment of personnel by the parent companies may also be sufficient if this is done either only for a start-up period or if the joint venture deals with the parent companies in the same way as with third parties. The latter case requires that the joint venture deals with the parents at arm's length on the basis of normal commercial conditions and that the joint venture is also free to recruit its own employees or to obtain staff via third parties.

### 2. Activities beyond one specific function for the parents

(95) A joint venture is not full-function if it only takes over one specific function within the parent companies' business activities without its own access to or presence on 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 ([87]).

(96) A frequent example where this question arises are joint ventures involved in the holding of real estate property, which are typically set up for tax and other financial reasons. As long as the purpose of the joint venture is limited to the acquisition and/or holding of certain real estate for the parents and based on financial resources provided by the parents, it will not usually be considered to be full-function, as it lacks an autonomous, long term business activity on the market and will typically also lack the necessary resources to operate independently. This has to be distinguished from joint ventures that are actively managing a real estate portfolio and who act on their own behalf on the market, which typically indicates full-functionality ([88]).

### 3. Sale/purchase relations with the parents

(97) 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 results in substantial sales or purchases between the parent companies and the joint venture. The fact that, for an

([86]) Case IV/M.527 — Thomson CSF/Deutsche Aerospace, of 2 December 1994 — intellectual rights, Case IV/M.560 EDS/Lufthansa of 11 May 1995 — outsourcing, Case IV/M.585 — Voest Alpine Industrieanlagenbau GmbH/Davy International Ltd, of 7 September 1995 — joint venture's right to demand additional expertise and staff from its parent companies, Case IV/M.686 — Nokia/Autoliv, of 5 February 1996, 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, joint venture's intended assets will be transferred to leasing company and leased by joint venture.

([87]) Case IV/M.102 — TNT/Canada Post etc. of 2 December 1991.

([88]) See Case IV/M.929 — DIA/Veba Immobilien/Deutschbau of 23 June 1997; Case COMP/M. 3325 — Morgan Stanley/Glick/Canary Wharf of 23 January 2004.

initial start-up period only, the joint venture relies almost entirely on sales to or purchases from its parent companies does not normally affect its full-function character. Such a start-up period may be necessary in order to establish the joint venture on a market. But the period will normally not exceed a period of three years, depending on the specific conditions of the market in question ([89]).

*Sales to the parents*

(98) 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 and can be considered economically autonomous from an operational viewpoint. In this respect the relative proportion of sales made to its parents compared with the total production of the joint venture is an important factor. Due to the particularities of each individual case, it is impossible to define a specific turnover ratio which distinguishes full-function from other joint ventures. If the joint venture achieves more than 50 % of its turnover with third parties, this will typically be an indication of full-functionality. Below this indicative threshold, a case-by-case analysis is required, whereby, for the finding of operational autonomy, the relationship between the joint venture and its parents must be truly commercial in character. For this purpose, it is to be demonstrated that the joint venture will supply its goods or services to the purchaser who values them most and will pay most and that the joint venture will also deal with its parents' companies at arm's length on the basis of normal commercial conditions ([90]). Under these circumstances, *i.e.* if the joint venture will treat its parent companies in the same commercial way as third parties, it may be sufficient that at least 20 % of the joint venture's predicted sales will go to third parties. However, the greater the proportion of sales likely to be made to the parents, the greater will be the need for clear evidence of the commercial character of the relationship.

(99) For the determination of the proportion between sales to the parents and to third parties, the Commission will take past accounts and substantiated business plans into account. However, especially where substantial third-party sales cannot be readily foreseen, the Commission will base its finding also on the general market structure. This may be a relevant factor as well for the assessment whether the joint venture will deal with its parents on an arm's length basis.

(100) These issues frequently arise with regard to outsourcing agreements, where an undertaking creates a joint venture with a service provider ([91]) which will carry out functions that were previously dealt with by the undertaking in-house. The JV typically cannot be considered to be full-function in these scenarios: it provides its services exclusively to the client undertaking, and it is dependent for its services on input from the service provider. The fact that the joint venture's business plan often at least does not exclude that the joint venture can provide its services to third parties does not alter this assessment, as in the typical outsourcing setup any third party revenues are likely to remain ancillary to the joint venture's main activities for the client undertaking. However, this general rule does not exclude that there are outsourcing situations where the joint venture partners, for example for reasons of economies of scale, set up a joint venture with the perspective of significant market access. This could qualify the joint venture as full function if significant third-party sales are foreseen and if the relationship between the joint venture and its parent will be truly commercial in character and if the joint venture deals with its parents on the basis of normal commercial conditions.

([89]) Case IV/M.560 — EDS/Lufthansa of 11 May 1995; Case IV/M.686 Nokia/Autoliv of 5 February 1996; to be contrasted with Case IV/M.904 — RSB/Tenex/Fuel Logistics of 2 April 1997 and Case IV/M.979 — Preussag/Voest-Alpine of 1 October 1997. A special case exists where sales by the joint venture to its parent are caused by a legal monopoly downstream of the joint venture, see Case IV/M.468 — Siemens/Italtel of 17 February 1995, or where the sales to a parent company consist of by-products, which are of minor importance to the joint venture, see Case IV/M.550 — Union Carbide/Enichem of 13 March 1995.

([90]) Case IV/M.556 — Zeneca/Vanderhave of 9 April 1996; Case IV/M.751 — Bayer/Hüls of 3 July 1996.

([91]) The question under which circumstances an outsourcing arrangement qualifies as a concentration is dealt with in paragraphs 25ff. of this Notice.

*Purchases from the parents*

(101) 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.

*Trade markets*

(102) 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 and service 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 ([92]).

### 4. **Operation on a lasting basis**

(103) 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 ([93]). 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 ([94]), or where the agreement provides for the possible continuation of the joint venture beyond this period.

(104) 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.

(105) A joint venture also lacks the sufficient operations on a lasting basis at a stage where there are decisions of third parties outstanding that are of an essential core importance for starting the joint venture's business activity. Only decisions that go beyond mere formalities and the award of which is typically uncertain qualify for these scenarios. Examples are the award of a contract (*e.g.*, in public tenders), licences (*e.g.*, in the telecoms sector) or access rights to property (*e.g.*, exploration rights for oil and gas). Pending the decision on such factors, it is unclear whether the joint venture will become operational at all. Thus, at that stage the joint venture cannot be considered to perform economic functions on a lasting

([92]) Case IV/M.788 — AgrEVO/Marubeni of 3 September 1996.

([93]) Case IV/M.891 — Deutsche Bank/Commerzbank/J.M. Voith of 23 April 1997.

([94]) See Case COMP/M.2903 — DaimlerChrysler/Deutsche Telekom/JV of 30 April 2003 where a period of 12 years was considered sufficient; Case COMP/M.2632 — Deutsche Bahn/ECT International/United Depots/JV of 11 February 2002 with a contract duration of 8 years. In Case COMP/M.3858 Lehman Brothers/Starwood/Le Meridien of 20 July 2005, the Commission considered a minimum period of 10-15 years sufficient, but not a period of three years.

basis and consequently does not qualify as full function. However, once a decision has been taken in favour of the joint venture in question, this criterion is fulfilled and a concentration arises ([95]).

### 5. Changes in the activities of the joint venture

(106) The parents may decide to enlarge the scope of the activities of the joint venture in the course of its lifetime. This will be considered as a new concentration that may trigger a notification requirement if this enlargement entails the acquisition of the whole or part of another undertaking from the parents that would, considered in isolation, qualify as a concentration as explained in paragraph 24 of this Notice ([96]).

(107) A concentration may also arise if the parent companies transfer significant additional assets, contracts, know-how or other rights to the joint venture and these assets and rights constitute the basis or nucleus of an extension of the activities of the joint venture into other product or geographic markets which were not the object of the original joint venture, and if the joint venture performs such activities on a full-function basis. As the transfer of the assets or rights shows that the parents are the real players behind the extension of the joint venture's scope, the enlargement of the activities of the joint venture can be considered in the same way as the creation of a new joint venture within the meaning of Article 3(4) ([97]).

(108) If the scope of a joint venture is enlarged without additional assets, contracts, know-how or rights being transferred, no concentration will be deemed to arise.

(109) A concentration arises if a change in the activity of an existing non-full-function joint venture occurs so that a full-function joint venture within the meaning of Article 3(4) is created. The following examples may be given: a change of the organisational structure of a joint venture so that it fulfils the full functionality criterion ([98]); a joint venture that used to supply only the parent companies, which subsequently starts a significant activity on the market; or scenarios, as described in paragraph 105 above, where a joint venture can only start its activity on the market once it has essential input (such as a licence for a joint venture in the telecoms sector). Such a change in the activity of the joint venture will frequently require a decision by its shareholders or its management. Once the decision is taken that leads to the joint venture meeting the full functionality criterion, a concentration arises.

## V. EXCEPTIONS

(110) Article 3(5) sets out three exceptional situations where the acquisition of a controlling interest does not constitute a concentration under the Merger Regulation.

(111) 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;

([95]) Subject to the other criteria mentioned in this chapter of the Notice.

([96]) See Case COMP/M.3039 — Soprol/Céréol/Lesieur of 30 January 2003.

([97]) The triggering event for the notification in such a case will be the agreement or other legal act underlying the transfer of the assets, contracts, know-how or other rights.

([98]) Case COMP/M.2276 — The Coca-Cola Company/Nestlé/JV of 27 September 2001.

— 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 the 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.

(112) Second, 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));

(113) Third, a concentration does not arise where a financial holding company within the meaning of Article 5(3) of the Council Directive 78/660/EEC ([99]) acquires control. The notion of 'financial holding company' is thus limited to companies whose sole purpose it is to acquire holdings in other undertakings without involving themselves directly or indirectly in the management of those undertakings, the foregoing without prejudice to their rights as shareholders. Such investment companies must be further structured in a way that compliance with these limitations can be supervised by an administrative or judicial authority. The Merger Regulation provides for an additional condition for this exception to apply: such companies may exercise the voting rights in the other undertakings only to maintain the full value of those investments and not to determine directly or indirectly the strategic commercial conduct of the controlled undertaking.

(114) The exceptions under Article 3(5) of the Merger Regulation only apply to a very limited field. First, these exceptions only apply if the operation would otherwise be a concentration in its own right, but not if the transaction is part of a broader, single concentration, in circumstances in which the ultimate acquirer of control would not fall within the terms of Article 3(5) (see e.g. paragraph 35 above). Second, the exceptions under Article 3(5)(a) and (c) only apply to acquisitions of control by way of purchase of securities, not to acquisitions of assets.

(115) The exceptions do not apply to typical investment fund structures. According to their objectives, these funds usually do not limit themselves in the exercise of the voting rights, but adopt decisions to appoint the members of the management and the supervisory bodies of the undertakings or to even restructure those undertakings. This would not be compatible with the requirement under both Article 3(5)(a) and (c) that the acquiring companies do not exercise the voting rights with a view to determine the competitive conduct of the other undertaking ([100]).

(116) The question may arise whether an operation to rescue an undertaking before or from insolvency proceedings constitutes a concentration under the Merger Regulation. Such 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. Where such an operation meets the criteria for joint

([99]) 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, OJ L 222, 14.8.1978, p. 11, as last amended by Directive 2003/51/EC of 18 June 2003, OJ L 178, 17.7.2003, p. 16. 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. The limitations imposed on the activities of these companies must be such that compliance with them can be supervised by an administrative or judicial authority'.

([100]) Case IV/M.669 — Charterhouse/Porterbrook, of 11 December 1995.

control, as outlined above, it will normally be considered to be a concentration ([101]). 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. In a similar way as set out for investment funds, 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.

## VI. ABANDONMENT OF CONCENTRATIONS

(117) A concentration ceases to exist and the Merger Regulation ceases to be applicable if the undertakings concerned abandon the concentration.

(118) In this respect, the revised Merger Regulation 139/2004 introduced a new provision related to the closure of procedures concerning the control of concentrations without a final decision after the Commission has initiated proceedings under Article 6(1)(c), first sentence. That sentence reads as follows: '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'. Prior to the initiation of proceedings, such requirements do not apply.

(119) As a general principle, the requirements for the proof of the abandonment must correspond in terms of legal form, intensity etc. to the initial act that was considered sufficient to make the concentration notifiable. In case the parties proceed from that initial act to a strengthening of their contractual links during the procedure, for example by concluding a binding agreement after the transaction was notified on the basis of a good faith intention, the requirements for the proof of the abandonment must correspond also to the nature of the latest act.

(120) In line with this principle, in case of implementation of the concentration prior to a Commission decision, the re-establishment of the *status quo ante* has to be shown. The mere withdrawal of the notification is not considered as sufficient proof that the concentration has been abandoned in the sense of Article 6(1)(c). Likewise, minor modifications of a concentration which do not affect the change in control or the quality of that change, cannot be considered as an abandonment of the original concentration ([102]).

— Binding agreement: proof of the legally binding cancellation of the agreement in the form envisaged by the initial agreement (i.e. usually a document signed by all the parties) will be required. Expressions of intention to cancel the agreement or not to implement the notified concentration, as well as unilateral declarations by (one of) the parties will not be considered sufficient ([103]).

— Good faith intention to conclude an agreement: In case of a letter of intent or memorandum of understanding reflecting such good faith intention, documents proving that this basis for the good faith intention has been cancelled will be required. As for possible other forms that indicated the good faith intention, the abandonment must reverse this good faith intention and correspond in terms of form and intensity to the initial expression of intent.

— Public announcement of a public bid or of the intention to make a public bid: a public announcement terminating the bidding procedure or renouncing to the intention to make a public bid will be required. The format and public reach of this announcement must be comparable to the initial announcement.

([101]) Case IV/M.116 — Kelt/American Express, of 28 August 1991.

([102]) This paragraph does not prejudge the assessment whether the modification requires submitting additional information to the Commission under Article 5(3) of Regulation (EC) No 802/2004.

([103]) See Case COMP/M.4381 — JCI/VB/FIAMM of 10 May 2007, paragraph 15, where only one party did no longer wished to implement an agreement, whereas the other party still considered the agreement to be binding and enforceable.

— Implemented concentrations: In case the concentration has been implemented prior to a Commission decision, the parties will be required to show that the situation prevailing before the implementation of the concentration has been re-established.

(121) It is for the parties to submit the necessary documentation to meet these requirements in due time.

### VII. CHANGES OF TRANSACTIONS AFTER A COMMISSION AUTHORISATION DECISION

(122) In some cases, parties may wish not to implement the concentration in the form foreseen after authorisation of the concentration by the Commission. The question arises whether the Commission's authorisation decision still covers the changed structure of the transaction.

(123) Broadly speaking, if, before implementation of the authorised concentration, the transactional structure is changed from an acquisition of control, falling under Article 3(1)(b), to a merger according to Article 3(1)(a), or *vice versa*, then the change in the transactional structure is considered a different concentration under the Merger Regulation and a new notification is required ([104]). However, less significant modifications of the transaction, for example minor changes in the shareholding percentages which do not affect the change in control or the quality of that change, changes in the offer price in the case of public bids or changes in the corporate structure by which the transaction is implemented without effects on the relevant control situation under the Merger Regulation, are considered as being covered by the Commission's authorisation decision.

## C. **COMMUNITY DIMENSION**

### I. THRESHOLDS

(124) A two fold test defines the operations to which the Merger Regulation applies. The first test is that the operation must be a concentration within the meaning of Article 3. The second comprises the turnover thresholds contained in Article 1, designed to identify those operations which have an impact upon the Community and can be deemed to be of 'Community dimension'. 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.

(125) Two sets of thresholds are set out in Article 1 to establish whether the operation has a Community dimension. Article 1(2) establishes three different criteria: 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.

(126) This second set of thresholds, contained in Article 1(3), is designed to tackle those concentrations which fall short of achieving Community dimension under Article 1(2), but would have a substantial impact in at least three Member States leading to multiple notifications under national competition rules of those Member States. For this purpose, Article 1(3) provides for lower turnover thresholds, both worldwide and Community-wide, and for a minimum level of activities of the undertakings concerned, jointly and individually, in at least three Member States. Similarly to Article 1(2), Article 1(3) also contains a two-thirds rule excluding predominantly domestic concentrations ([105]).

([104]) See cases COMP/M.2706 — Carnival Corporation/P&O Princess of 11 April 2002 and COMP/M.3071 — Carnival Corporation/P&O Princess of 10 February 2003. In such circumstances, the identity of the notifying parties changes, as both parties to a merger must notify, whereas only the party acquiring control must do so. However, if the parties implement an acquisition of control over a target company and only *subsequently* decide to merge with the newly acquired subsidiary, this would be regarded as an internal restructuring that does not give rise to a change in control and would thus not fall within the terms of Article 3 of the Merger Regulation.

([105]) A concentration is further deemed to have a Community dimension if it is referred to the Commission under Article 4(5) of the Merger Regulation. These cases are dealt with in the Commission Notice on Case Referral in respect of concentrations, OJ C 56, 5.3.2005, p. 2.

(127) The thresholds as such are designed to govern 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. The thresholds are purely quantitative, since they are only based on turnover calculation instead of market share or other criteria. They pursue the objective 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.

(128) Whereas Article 1 sets out the numerical thresholds to establish jurisdiction, the purpose of Article 5 is to explain how turnover should be calculated to ensure that the resulting figures are a true representation of economic reality.

## II. NOTION OF UNDERTAKING CONCERNED

### 1. **General**

(129) From the point of view of determining jurisdiction, the undertakings concerned are those participating in a concentration, i.e. a merger or an acquisition of control as foreseen in Article 3(1). The individual and aggregate turnover of those undertakings will be decisive in determining whether the thresholds are met.

(130) Once the undertakings concerned have been identified in a given transaction, their turnover for the purposes of determining jurisdiction is to be calculated according to the rules set out in Article 5. Article 5(4) sets out detailed criteria to identify undertakings whose turnover may be attributed to the undertaking concerned because of certain direct or indirect links with the latter. The legislator's intention was to lay down concrete rules which, seen together, can be taken to establish the notion of a 'group' for the purposes of the turnover thresholds in the Merger Regulation. The term 'group' will be used in the following sections exclusively to refer to the collection of undertakings whose relations with an undertaking concerned come within the terms of one or more of the sub-paragraphs of Article 5(4) of the Merger Regulation.

(131) 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 elsewhere in the Merger Regulation and in Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (hereinafter referred to as the 'Implementing Regulation') ([106]) 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 IV of the Implementing Regulation, along with their respective rights and duties.

### 2. **Mergers**

(132) In a merger the undertakings concerned are each of the merging entities.

### 3. **Acquisition of control**

(133) 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 undertakings acquiring sole or joint control. On the acquired side, there can be one or more undertakings as a whole or parts thereof. As a general rule, each of these undertakings will be an undertaking concerned within the meaning of the Merger Regulation.

*Acquisition of sole control*

(134) Acquisition of sole control of the whole undertaking is the most straightforward case of acquisition of control. The undertakings concerned will be the acquiring undertaking and the target undertaking.

([106]) OJ L 133, 30.4.2004, p. 1.

(135) Where the target undertaking is acquired by a group through one of its subsidiaries, the undertakings concerned are the target undertaking and the acquiring subsidiary if this is not a mere acquisition vehicle. However, even though the subsidiary is normally the undertaking concerned for the purpose of calculating turnover, the turnover of all undertakings with which the undertaking concerned has the links as specified in Article 5(4) shall be included in the threshold calculations. In this respect, the group is considered to be a single economic unit and the different companies belonging to the same group cannot be considered as different undertakings concerned for jurisdictional purposes under the Merger Regulation. The actual notification can be made by the subsidiary concerned or by its parent company.

*Acquisition of parts of an undertaking and staggered operations — Article 5(2)*

(136) 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 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 the transaction with those of the acquirer and not on the remaining business of the seller. In this case, the undertakings concerned will be the acquirer(s) and the acquired part(s) of the target undertaking, but the remaining businesses of the seller will be ignored.

(137) The second subparagraph of Article 5(2) includes a special provision on staggered operations or follow-up deals. The previous concentrations (within two years) involving the same parties become (re)notifiable with the most recent transaction, provided this constitutes a concentration, if the thresholds are met whether for one or more of the transactions taken in isolation or cumulatively. In this case, the undertakings concerned are the acquirer(s) and the different acquired part(s) of the target company taken as a whole.

*Change from joint to sole control*

(138) If the acquisition of control occurs by way of a change from joint control to sole control, one shareholder normally acquires the stake previously held by the other shareholder(s). In this situation, the undertakings concerned are the acquiring shareholder and the joint venture. As is the case for any other seller, the 'exiting' shareholder is not an undertaking concerned ([107]).

*Acquisition of joint control*

(139) In the case of acquisition of joint control of a newly-created undertaking, 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). The same rule applies where one undertaking contributes a pre-existing subsidiary or a business (over which it previously exercised sole control) to a newly created joint venture. In these circumstances, each of the jointly-controlling undertakings is considered an undertaking concerned whereas any company or business contributed to the joint venture is not an undertaking concerned, and its turnover is part of the turnover of the initial parent company.

(140) The situation is different if undertakings newly acquire joint control of a pre-existing undertaking or business. The undertakings concerned are each of the undertakings acquiring joint control on the one hand, and the pre-existing acquired undertaking or business on the other.

(141) The acquisition of a company with a view to immediately split up the assets is, as explained above in paragraph 32, mostly not considered as an acquisition of joint control of the entire target company, but as the acquisition of sole control by each of the ultimate acquirers of the respective parts of the target company. In line with the considerations for the acquisition of sole control, undertakings concerned are the acquiring undertakings and the acquired parts in each of the transactions.

([107]) Case IV/M.023 — ICI/Tioxide, of 28 November 1990.

*Changes of controlling shareholders in cases of joint control of an existing joint venture*

(142) A notifiable concentration may arise, as explained above, where a change in the quality of control occurs in a joint control structure due to the entrance of new controlling shareholders, irrespective of whether or not they replace existing controlling shareholders.

(143) In the case where one or more shareholders acquire control, either by entry or by substitution of one or more shareholders, in a situation of joint control both before and after the operation, the undertakings concerned are the shareholders (both existing and new) who exercise joint control and the joint venture itself ([108]). On the one hand, similar to the acquisition of joint control of an existing company, the joint venture itself can be considered as an undertaking concerned as it is an already pre-existing undertaking. On the other hand, as set out above, the entry of a new shareholder is not only in itself a new acquisition of control, but also leads to a change in the quality of control for the remaining controlling shareholders as the quality of control of the joint venture is determined by the identity and composition of the controlling shareholders and therefore also by the relationship between them. Furthermore, the Merger Regulation considers a joint venture as a combination of the economic resources of the parent companies, together with the joint venture if it already generates turnover on the market. For these reasons, the newly entering controlling shareholders are undertakings concerned alongside with the remaining controlling shareholders. Due to the change of the quality in control, all of them are considered to undertake an acquisition of control.

(144) As Article 4(2) first sentence of the Merger Regulation foresees that all acquisitions of joint control shall be notified jointly by the undertakings acquiring joint control, existing and new shareholders in principle have to notify concentrations arising from such changes in joint control scenarios jointly.

*Acquisition of control by a joint venture*

(145) In transactions where a joint venture acquires control of another company, the question arises whether or not the joint venture should be regarded as the 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. This question may be decisive for jurisdictional purposes ([109]). Whereas, in principle, the undertaking concerned is the joint venture as the direct participant in the acquisition of control, there may be circumstances where companies set up 'shell' companies and the parent companies will individually be considered as undertakings concerned. In this type of situation, the Commission will look at the economic reality of the operation to determine which are the undertakings concerned.

(146) Where the acquisition is carried out by a full-function joint venture, with the features set out above, and already operates on the same market, the Commission will normally consider the joint venture itself and the target undertaking to be the undertakings concerned (and not the joint venture's parent companies).

([108]) See Case IV/M.376 — Synthomer/Yule Catto, of 22 October 1993.

([109]) Assume the following scenario: The target company has an aggregate Community turnover of less than EUR 250 million, and the acquiring parties are two (or more) undertakings, each with a Community turnover exceeding EUR 250 million. If the target is acquired by a 'shell' company set up between the acquiring undertakings, there would only be one undertaking (the 'shell' company) with a Community turnover exceeding EUR 250 million, and thus one of the cumulative threshold conditions for Community jurisdiction, namely, the existence of at least two undertakings with a Community turnover exceeding EUR 250 million, would not be fulfilled. Conversely, if instead of acting through a 'shell' company, the acquiring undertakings acquire the target undertaking 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).

(147) Conversely, where the joint venture can be regarded as a mere 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 or has not yet started to operate, where an existing joint venture has no 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. In those cases, the parent companies are regarded as undertakings concerned.

*Break-up of joint ventures and exchange of assets*

(148) When two (or more) undertakings break up a joint venture and split the assets (constituting businesses) between them, this will normally be considered as more than one acquisition of control, as explained above in paragraph 41. For example, undertakings A and B form a joint venture and subsequently split it up, in particular with a new asset configuration. The break-up of the joint venture involves a change from joint control over the joint venture's entire assets to sole control over the divided assets by each of the acquiring undertakings ([110]).

(149) For each break-up operation, and in line with the consideration to the acquisition of sole control, the undertakings concerned will be, on the one hand, the acquiring party and, on the other, the assets that this undertaking will acquire.

(150) Similar to the break-up scenario is the situation where two (or more) companies exchange assets constituting a business on each side. In this case, each acquisition of control is considered an independent acquisition of sole control. The undertakings concerned will be, for each transaction, the acquiring companies and the acquired undertaking or assets.

*Acquisitions of control by natural persons*

(151) Control may also be acquired by natural persons, within the meaning of Article 3 of the Merger Regulation, if those persons themselves carry out further economic activities (and are therefore classified as economic undertakings in their own right) or if they control one or more other economic undertakings. In such a situation, the undertakings concerned are the target undertaking and the individual acquirer (with the turnover of the undertaking(s) controlled by that natural person being included in the calculation of the natural person's turnover to the extent that the terms of Article 5(4) are satisfied) ([111]).

(152) An acquisition of control of an undertaking by its managers is also an acquisition by natural persons, and paragraph 151 above is also relevant. However, the managers may pool their 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 guidance given above in paragraphs 145-147 on acquisitions of control by a joint venture also applies here.

([110]) See parallel cases COMP/M.3293 — Shell/BEB and COMP/M.3294 — ExxonMobil/BEB of 20 November 2003; Case IV/M.197 — Solvay/Laporte of 30 April 1992.

([111]) See Case IV/M.082 — Asko/Jacobs/Adia, of 16 May 1991 where a private individual with other economic activities acquired joint control of an undertaking and was considered an undertaking concerned.

*Acquisition of control by a State-owned undertaking*

(153) As described above, a merger or an acquisition of control arising between two undertakings owned by the same State (or the same public body) may constitute a concentration if the undertakings were formerly part of different economic units having an independent power of decision. If this is the case, both of them will qualify as undertakings concerned although both are owned by the same State ([112]).

## III. RELEVANT DATE FOR ESTABLISHING JURISDICTION

(154) The legal situation for establishing the Commission's jurisdiction has been changed under the recast Merger Regulation. Under the former Merger Regulation, the relevant date was the triggering event for a notification according to Article 4(1) of this Regulation — the conclusion of a final agreement or the announcement of a public bid or the acquisition of a controlling interest — or, at the latest, the time when the parties were obliged to notify (i.e. one week after a triggering event for a notification) ([113]).

(155) Under the recast Merger Regulation, there is no longer an obligation for the parties to notify within a certain time-frame (provided the parties do not implement the planned concentration before notification). Moreover, according to Article 4(1) second subparagraph, the undertakings concerned can already notify the transaction on the basis of 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. At the time of the notification at the latest, the Commission — as well as national competition authorities — must be able to determine their jurisdiction. Article 4(1) subparagraph 1 of the Merger Regulation provides, generally, that concentrations shall be notified following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest. The dates of these events are therefore still decisive under the recast Merger Regulation in order to determine the relevant date for establishing jurisdiction, if a notification does not occur before such events on the basis of a good faith intention or an announced intention ([114]).

(156) The relevant date for establishing Community jurisdiction over a concentration is therefore the date of the conclusion of the binding legal agreement, the announcement of a public bid or the acquisition of a controlling interest or the date of the first notification, whichever date is earlier ([115]). Regarding the date of notification, a notification to either the Commission or to a Member State authority is relevant. The relevant date needs in particular to be considered for the question whether acquisitions or divestitures which occur after the period covered by the relevant account, but before the relevant date, require adaptations to those accounts according to the principles set out in paragraphs 172 and 173.

## IV. TURNOVER

### 1. **The concept of turnover**

(157) The concept of turnover as used in Article 5 of the Merger Regulation comprises 'the amounts derived […] from the sale of products and the provision of services'. Those amounts generally appear in company accounts under the heading 'sales'. In the case of products, turnover can be determined without difficulty, namely by identifying each commercial act involving a transfer of ownership.

([112]) See recital 22 of the Merger Regulation, directly related to the calculation of turnover of a state-owned undertaking concerned in the context of Article 5(4).

([113]) See Case COMP/M.1741 — MCI Worldcom/Sprint of 28 June 2000.

([114]) The alternative possibility that turnover should be defined on the latest date when the relevant parties are obliged to notify (seven days after the 'triggering event' under the former Merger Regulation) cannot be retained under the recast merger Regulation, because there is no deadline for notification.

([115]) See also opinion of AG Kokott in Case C-202/06 Cementbouw v Commission of 26 April 2007, paragraph 46 (not yet reported). Only the recast merger Regulation has provided for the possibility to take into account the first notification if this is earlier than the date of the conclusion of the binding legal agreement, the announcement of a public bid or the acquisition of a controlling interest, see fn. 35 of the opinion.

(158) In the case of services, the method of calculating turnover in general does not differ from that used in the case of products: the Commission takes into consideration the total amount of sales. However, the calculation of the amounts derived from the provision of services may be more complex as this depends on the exact service provided and the underlying legal and economic arrangements in the sector in question. Where one undertaking provides the entire service directly 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.

(159) In other areas, this general principle may have to be adapted to the specific conditions of the service provided. In certain sectors of activity (such as package holidays and advertising), the service may be sold through intermediaries ([116]). Even if the intermediary invoices the entire amount to the final customer, the turnover of the undertaking acting as an intermediary consists solely of the amount of its commission. For package holidays, the entire amount paid by the final customer is then allocated to the tour operator which uses the travel agency as distribution network. In the case of advertising, only the amounts received (without the commission) are considered to constitute the turnover of the TV channel or the magazine since media agencies, as intermediaries, do not constitute the distribution channel for the sellers of advertising space, but are chosen by the customers, *i.e.* those undertakings wishing to place advertising.

(160) The examples mentioned show that, due to the diversity of services, many different situations may arise and the underlying legal and economic relations have to be carefully analysed. Similarly, specific situations for the calculation of turnover may arise in the areas of credit, financial services and insurance. These issues will be dealt with in Section VI.

### 2. **Ordinary activities**

(161) Article 5(1) provides that the amounts to be included in the calculation of turnover should correspond to the 'ordinary activities' of the undertakings concerned. This is the turnover achieved from the sale of products or the provision of services in the normal course of its business. It generally excludes those items which are listed under the headers 'financial income' or 'extraordinary income' in the company's accounts. Such extraordinary income may be derived from the sale of businesses or of fixed assets. However, company accounts do not necessarily delineate the revenues derived from ordinary activities in the way required for the purposes of turnover calculation under the Merger Regulation. In some cases, the qualification of the items in the accounts may have to be adapted to the requirements of the Merger Regulation ([117]).

(162) The revenues do not necessarily have to be derived from the customer of the products or services. With regard to aid granted to undertakings by public bodies, any aid has 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. The aid is therefore an income of the undertaking from the sale of products or provision of services in addition to the price paid by the consumer ([118]).

(163) Specific issues have arisen for the calculation of turnover of a business unit which only had internal revenues in the past. This may in particular apply for transactions involving the outsourcing of services by transfer of a business unit. If such a transaction constitutes a concentration on the basis of the considerations outlined in paragraphs 25 ff. of this Notice, the Commission's practice is that the turnover should normally be calculated on the basis of the previously internal turnover or of publicly quoted

([116]) An undertaking will normally not act as an intermediary if it sells products via a commercial act which involves a transfer of ownership, Judgment in Case T-417/05, Endesa v Commission, paragraph 213, [2006] ECR II-2533.

([117]) In Case IV/M.126 — Accor/Wagons-Lits, of 28 April 1992, the Commission decided to consider certain income from car-hire activities as revenues from ordinary activities although they were included as 'other operating proceeds' in Wagons-Lits' profit and loss account.

([118]) 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 specialised in the crushing of grain.

prices where such prices exist (e.g. in the oil industry). Where the previously internal turnover does not appear to correspond to a market valuation of the activities in question (and, thus, to the expected future turnover on the market), the forecast revenues to be received on the basis of an agreement with the former parent may be a suitable proxy.

### 3. 'Net' turnover

(164) The turnover to be taken into account is 'net' turnover, after deduction of a number of components specified in the Regulation. The aim is to adjust turnover in such a way as to enable it to reflect the real economic strength of the undertaking.

#### 3.1. *Deduction of rebates and taxes*

(165) Article 5(1) provides for the 'deduction of sales rebates and of value added tax and other taxes directly related to turnover'. 'Sales rebates' mean all rebates or discounts which are granted by the undertakings to their customers and which have a direct influence on the amounts of sales.

(166) As regards the deduction of taxes, the Merger Regulation refers to VAT and 'other taxes directly related to turnover'. The concept of 'taxes directly related to turnover' refers to indirect taxation linked to turnover, such as, for example, taxes on alcoholic beverages or cigarettes.

#### 3.2. *The treatment of 'internal' turnover*

(167) 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.* the group to which the undertaking concerned belongs. 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 in the form of market turnover. 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.

(168) Article 5(5)(a) of the Merger Regulation applies the principle that double counting is to be avoided specifically to the situation where two or more undertakings concerned in a concentration jointly have the rights or powers listed in Article 5(4)(b) in another company. According to this provision, 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 undertaking connected with any one of them in the sense of Article 5(4)) should be excluded. As regards joint ventures between undertakings concerned and third parties, insofar as their turnover is taken into account according to Article 5(4)(b) as set out in paragraph 181 below, the turnover generated by sales between the joint venture and the undertaking concerned (as well as undertakings linked to the undertaking concerned in accordance with the criteria set out in Article 5(4)) is not taken into account according to Article 5(1).

### 4. Turnover calculation and financial accounts

#### 4.1. *The general rule*

(169) The Commission seeks to base itself upon the most accurate and reliable figures available. Generally, the Commission will refer to accounts which relate to the closest financial year to the date of the transaction and which are audited under the standard applicable to the undertaking in question and compulsory for the relevant financial year ([119]). An adjustment of the audited figures should only take place if this is required by the provisions of the Merger Regulation, including the cases explained in more detail in paragraph 172.

([119]) See Case COMP/M.3986 — Gas Natural/Endesa of 15 November 2005; confirmed by Judgment in Case T-417/05, Endesa v Commission, paragraphs 128, 131, [2006] ECR II-2533.

(170) The Commission is reluctant to rely on management or any other form of provisional accounts in any but exceptional circumstances ([120]). 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, due to significant and permanent changes in the undertaking concerned, and, in particular, when the final draft figures for the most recent year have been approved by the board of management, the Commission may decide to take those figures into account.

(171) Despite the general rule, 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.

### 4.2. *Adjustments after the date of the last audited accounts*

(172) Notwithstanding the foregoing paragraphs, an adjustment must always be made to account for permanent changes in the economic reality of the undertakings concerned, such as acquisitions or divestments which are not or not fully reflected in the audited accounts. Such changes have to be taken into account in order to identify the true resources being concentrated and to better reflect the economic situation of the undertakings concerned. Those adjustments are only selective in nature and do not endanger the principle that there should be a simple and objective mechanism to determine the Commission's jurisdiction as they do not require a complete revision of the audited accounts ([121]). First, this applies to acquisitions, divestments or closure of part of its business subsequent to the date of the audited accounts. This is relevant if a company closes a transaction concerning the divestment and closure of part of its business at any time before the relevant date for establishing jurisdiction (see paragraph 154) or where such a divestment or closure of a business is a pre-condition for the operation ([122]). In this case, 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. If an agreement for the sale of part of its business is signed, but the closing of the sale (in other words, its legal implementation and the transfer of the legal title to the shares or assets acquired) has not yet occurred, such a change is not taken into account ([123]), unless the sale is a pre-condition for the notified operation. Conversely, the turnover of those businesses whose acquisition has been closed subsequent to the preparation of the most recent audited accounts, but before the relevant date for establishing jurisdiction, must be added to a company's turnover for notification purposes.

(173) Second, an adjustment may also be necessary for acquisitions, divestments or closure of part of the business which have taken place during the financial year for which the audited accounts are drawn up. If acquisitions, divestments or closure of part of the business within this period are made, the changes in the economic resources may only partly be reflected in the audited accounts of the undertaking concerned. As the turnover of the businesses acquired may be included in the accounts only from the time of their acquisition, this may not reflect the full annual turnover of the acquired business. Conversely, the turnover of the businesses divested or closed may still be included in the audited accounts up to the point in time of their actual divestment or closure. In these cases, adjustments have to be made to remove the turnover generated by the divested or closed businesses from the audited accounts until the time of de-consolidation and to add the turnover which the acquired businesses have generated in the year until the time they have been consolidated in the accounts. As a result, the turnover of the businesses divested or closed must be excluded in full and the full annual turnover of the businesses acquired must be included.

([120]) See Case COMP/M.3986 — Gas Natural/Endesa of 15 November 2005; confirmed by Judgment in Case T-417/05, Endesa v Commission, paragraphs 176, 179, [2006] ECR II-2533.

([121]) Judgment in Case T-417/05, Endesa v Commission, paragraph 209, [2006] ECR II-2533.

([122]) See Judgment in Case T-3/93, Air France v Commission, [1994] ECR II-121 paragraphs 100 et seq. in relation to Case IV/M.278 — British Airways/Dan Air; Case IV/M.588 — Ingersoll-Rand/Clark Equipment.

([123]) Case IV/M.632 — Rhône Poulenc Rorer/Fisons of 21 September 1995; Case COMP/M.1741 — MCI Worldcom/Sprint of 28 June 2000.

(174) 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.

## 5. Attribution of turnover under Article 5(4)

### 5.1. *Identification of undertakings whose turnover is taken into account*

(175) When an undertaking concerned by a concentration belongs to a group, not only the turnover of the undertaking concerned is considered, but the Merger Regulation requires to also take into account the turnover of those undertakings with which the undertaking concerned has links consisting in the rights or powers listed in Article 5(4) in order to determine whether the thresholds contained in Article 1 of the Merger Regulation are met. The aim is again to capture the total volume of the economic resources that are being combined through the operation irrespective of whether the economic activities are carried out directly by the undertaking concerned or whether they are undertaken indirectly via undertakings with which the undertaking concerned possesses the links described in Article 5(4).

(176) The Merger Regulation does not delineate the concept of a group in a single abstract definition, but sets out in Article 5(4)(b) certain rights or powers. If an undertaking concerned directly or indirectly has such links with other companies, those are to be regarded as part of its group for purposes of turnover calculation under the Merger Regulation.

(177) 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:

(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 undertaking's affairs;

(c) those undertakings which have in an undertaking concerned the rights or powers listed in (b);

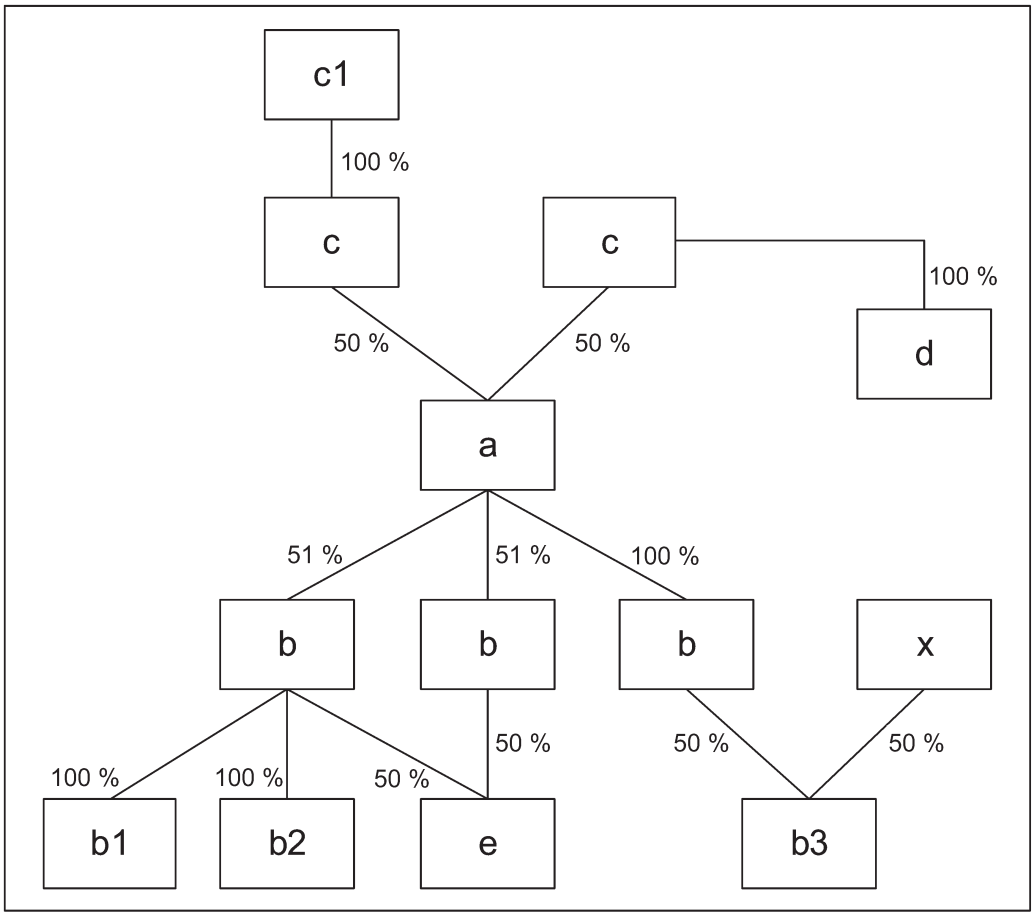
(d) those undertakings in which an undertaking as referred to in (c) has the rights or powers listed in (b);

(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).'

An undertaking which has in another undertaking the rights and powers mentioned in Article 5(4)(b) will be referred to as the 'parent' of the latter in the present section of this Notice dealing with the calculation of turnover, whereas the latter is referred to as 'subsidiary' of the former. In short, Article 5(4) therefore provides that the turnover of the undertaking concerned by the concentration (point (a)) should include its subsidiaries (point (b)), its parent companies (point (c)), the other subsidiaries of its parent undertakings (point (d)) and any other subsidiary jointly held by two or more of the undertakings identified under (a)-(d) (point (e)).

(178) A graphic example is as follows:

The undertaking concerned and its group:




a: The undertaking concerned ([124])

b: Its subsidiaries, jointly held companies together with third parties (b3) 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 held by two (or more) companies of the group

x: Third party

*Note*: the letters a — e correspond to the relevant points of Article 5(4). Percentages set out in the graph relate to the percentage of voting rights held by the respective parent company.

(179) The rights or powers listed in Article 5(4)(b)(i)-(iii) can be identified in a rather straightforward way as they refer to quantitative thresholds. These thresholds are fulfilled if the undertaking concerned owns more than half of the capital or business assets of other undertakings, has more than half of the voting rights or has legally the power to appoint more than half of the board members in other undertakings. However, the thresholds are also met if the undertaking concerned *de facto* has the power to exercise more than half of the voting rights in the shareholders' assembly or the power to appoint more than half of the board members in other undertakings ([125]).

([124]) For the graph it is assumed that the joint venture itself is the undertaking concerned according to the criteria set out in paragraph 146 (acquisition by a full-function JV operating on the same market).

([125]) Case IV/M.187 — Ifint/Exor of 2 March 1992; Case IV/M.062 — Eridania/ISI of 30 July 1991.

(180) The provision contained in Article 5(4)(b)(iv) refers to the right to manage the undertaking's affairs. Such a right to manage exists under company law in particular on the basis of organisational contracts such as a '*Beherrschungsvertrag*' under German law, on the basis of business lease agreements or on the basis of the organisation structure for the general partner in a limited partnership ([126]). However, the 'right to manage' may also result from the holding of voting rights (alone or in combination with contractual arrangements, such as a shareholders' agreement) which enable, on a stable, *de jure* basis, to determine the strategic behaviour of an undertaking.

(181) The right to manage also covers situations in which the undertaking concerned jointly has the right to manage an undertaking's affairs together with third parties ([127]). The underlying consideration is that the undertakings exercising joint control have jointly the right to manage the controlled undertakings' affairs even if each of them individually may have those rights only in a negative sense, *i.e.* in the form of veto rights. In the example, the undertaking (b3) which is jointly controlled by the undertaking concerned (a) and a third party (x) is taken into account as both (a) and (x) have veto rights in (b3) on the basis of their equal shareholding in (b3) ([128]). Under Article 5(4)(b)(iv) the Commission only takes into account those joint ventures in which the undertaking concerned and third parties have *de jure* rights that give rise to a clear-cut right to manage. The inclusion of joint ventures is therefore limited to situations where the undertaking concerned and third parties have a joint *right* to manage on the basis of an agreement, *e.g.* a shareholders' agreement, or where the undertaking concerned and a third party have an equality of voting rights to the effect that they have the right to appoint an equal number of members to the decision-making bodies of the joint venture.

(182) In the same way, where two or more companies jointly control the undertaking concerned 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 is included. 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). This interpretation results from the referral from Article 5(4)(c), dealing with this case, to Article 5(4)(b), which is applicable to jointly controlled companies as set out in the preceding paragraph.

(183) When any of the companies identified on the basis of Article 5(4) also has links as defined in Article 5(4) with other undertakings, these should also be brought into the calculation. In the example, one of the subsidiaries of the undertaking concerned a (called b) has in turn its own subsidiaries b1 and b2 and one of the parent companies (called c) has its own subsidiary (d).

(184) Article 5(4) sets out specific criteria for identifying undertakings whose turnover can be attributed to the undertaking concerned. These criteria, including the 'right to manage the undertaking's affairs', are not coextensive with the notion of 'control' under Article 3(2). There are significant differences between Articles 3 and 5, as those provisions fulfil different roles. The differences are most apparent in the field of *de facto* control. Whereas under Article 3(2) even a situation of economic dependence may lead to control on a *de facto* basis (see in detail above), a solely controlled subsidiary is only taken into account on a *de facto* basis under Article 5(4)(b) if it is clearly demonstrated that the undertaking concerned has the power to exercise more than half of the voting rights or to appoint more than half of the board members. Concerning joint control scenarios, Article 5(4)(b)(iv) covers those scenarios where the controlling undertakings jointly have a right to manage on the basis of individual veto rights. However, Article 5(4) would not cover situations where joint control occurs on a *de facto* basis due to strong common interests between different minority shareholders of the joint venture company on the basis of shareholders' attendance. The difference is reflected in the fact that Article 5(4)(b)(iv) refers to the *right* to manage, and not a *power* (as in subparagraph (b)(ii) and (iii)) and is explained by the need for precision and certainty in the criteria used for calculating turnover so that jurisdiction can be readily verified.

([126]) Case IV/M.126 — Accor/WagonLits of 28 April 1992.

([127]) Case COMP/M.1741 — MCI Worldcom/Sprint; Case IV/M. 187 — Ifint/Exor; Case IV/M.1046 — Ameritech/Tele Danmark.

([128]) However, only half of the turnover generated by b3 is taken into account, see paragraph 187.

Under Article 3(3), however, the question whether a concentration arises can be much more comprehensively investigated. In addition, situations of negative sole control are only exceptionally covered (if the conditions of Article 5(4)(b)(i)-(iii) are met in the specific case); the 'right to manage' under Article 5(4)(b)(iv) does not cover negative control scenarios. Finally, Article 5(4)(b)(i), for example, covers situations where 'control' under Article 3(2) may not exist.

### 5.2. *Allocation of turnover of the undertakings identified*

(185) In general, as long as the test under Article 5(4)(b) is fulfilled, the whole turnover of the subsidiary in question will be taken into account regardless of the actual shareholding which the undertaking concerned holds in the subsidiary. In the chart, the whole turnover of the subsidiaries called b of the undertaking concerned a will be taken into account.

(186) However, the Merger Regulation includes specific rules for joint ventures. Article 5(5)(b) provides that for joint ventures between two or more undertakings concerned, the turnover of the joint venture (as far as the turnover is generated from activities with third parties as set out above in paragraph 168) should be apportioned equally amongst the undertakings concerned, irrespective of their share of the capital or the voting rights.

(187) The principle contained in Article 5(5)(b) is followed by analogy for the allocation of turnover for joint ventures between undertakings concerned and third parties if their turnover is taken into account according to Article 5(4)(b) as set out above in paragraph 181. The Commission's practice has been to allocate to the undertaking concerned the turnover of the joint venture on a per capita basis according to the number of undertakings exercising joint control. In the example, half of the turnover of b3 is taken into account.

(188) The rules of Article 5(4) also have to be adapted in situations involving a change from joint to sole control in order to avoid double counting of the turnover of the joint venture. Even if the acquiring undertaking has rights or powers in the joint venture which satisfy the requirements of Article 5(4), the turnover of the acquiring shareholder has to be calculated without the turnover of the joint venture, and the turnover of the joint venture has to be taken without the turnover of the acquiring shareholder.

### 5.3. *Allocation of turnover in case of investment funds*

(189) The investment company, as set out above in paragraph 15, normally acquires indirect control over portfolio companies held by an investment fund. In the same way, the investment company may be considered to indirectly have the powers and rights which are set out in Article 5(4)(b), in particular to indirectly have the power to exercise the voting rights held by the investment fund in the portfolio companies.

(190) The same considerations, as set out above in the framework of Article 3 (paragraph 15), may also apply if an investment company sets up several investment funds with possibly different investors. Typically, on the basis of the organisational structure, in particular links between the investment company and the general partner(s) of the different funds organised as limited partnerships, or contractual arrangements, especially advisory agreements between the general partner or the investment fund and the investment company, the investment company will indirectly have the power to exercise the voting rights held by the investment fund in the portfolio companies or indirectly have one of the other powers or rights set out in Article 5(4)(b). In these circumstances, the investment company may exercise a common control structure over the different funds which it has set up and the common operation of the different funds by the investment company is often indicated by a common brand for the funds.

(191) Consequently, such an organisation of the different funds by the investment company may lead to the result that the turnover of all portfolio companies held by different funds is taken into account for the purpose of assessing whether the turnover thresholds in Article 1 are met if the investment company acquires indirect control of a portfolio company via one of the funds.

### 5.4. *Allocation of turnover for State-owned undertakings*

(192) As regards the calculation of turnover of State-owned undertakings, Article 5(4) should be read in conjunction with recital 22 of the Merger Regulation. This recital declares that, in order to avoid discrimination between the public and 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' ([129]).

(193) This recital clarifies that Member States (or other public bodies) are not considered as 'undertakings' under Article 5(4) simply because they have interests in other undertakings which satisfy the conditions of Article 5(4). Therefore, for the purposes of calculating turnover of State-owned undertakings, account is only taken of those undertakings which belong to the same economic unit, having the same independent power of decision.

(194) Thus, where a State-owned company is not subject to any coordination with other State-controlled holdings, it should be treated as independent for the purposes of Article 5, and the turnover of other companies owned by that State should not be taken into account. Where, however, several State-owned companies are under the same independent centre of commercial decision-making, then the turnover of those businesses should be considered part of the group of the undertaking concerned for the purposes of Article 5.

## V. GEOGRAPHIC ALLOCATION OF TURNOVER

(195) The thresholds concerning Community-wide and Member State turnover in Article 1(2) and (3) aim to identify 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 the Community and to individual Member States. Since audited accounts often do not provide a geographical breakdown as required by the Merger Regulation, the Commission will rely on the best figures available provided by the undertakings. 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.'

*General rule*

(196) The Merger Regulation does not discriminate between 'products sold' and 'services provided' for the geographic allocation of turnover. In both cases, the general rule is that turnover should be attributed to the place where the customer is located. The underlying principle is that turnover should be allocated to the location where competition with alternative suppliers takes place. This location is normally also the place where the characteristic action under the contract in question is to be performed, *i.e.* where the service is actually provided and the product is actually delivered. In the case of Internet transactions, it may be difficult for the undertakings to determine the location of the customer at the time when the contract is concluded via the Internet. If the product or the service itself is not supplied via the Internet, focusing on the place where the characteristic action under the contract is performed may avoid those difficulties. In the following, the sale of goods and the provision of services are dealt with separately as they exhibit certain different features in terms of allocation of turnover.

([129]) See also Case IV/M.216 — CEA Industrie/France Telecom/Finmeccanica/SGS-Thomson, of 22 February 1993.

*Sale of goods*

(197) For the sale of goods, particular situations may arise in situations in which the place where the customer was located at the time of concluding the purchase agreement is different from the billing address and/or the place of delivery. In these situations, the place where the purchase agreement was entered into and the place of delivery are more important than the billing address. As the delivery is in general the characteristic action for the sale of goods, the place of delivery may even be prevailing over the place where the customer was located at the time when the purchase agreement was concluded. This will depend on whether the place of delivery is to be considered the place where competition takes place for the sale of goods or whether competition rather takes place at the residence of the customer. In the case of a sale of mobile goods, such as a motor car, to a final consumer, the place where the car is delivered to the customer is decisive even if the agreement was concluded via the phone or the Internet before.

(198) A specific situation arises in cases where a multinational corporation has a Community buying strategy and sources all its requirements for a good from one location. As a central purchasing organisation can take different forms, it is necessary to consider its concrete form since this may determine how to allocate the turnover. Where goods are purchased by and delivered to the central purchasing organisation and are subsequently re-distributed internally to different plants in a variety of Member States, turnover is allocated only to the Member State where the central purchasing organisation is located. In this case, competition takes place at the location of the central purchasing organisation and this is also the place where the characteristic action under the sales contract is performed. The situation is different in case of direct links between the seller and the different subsidiaries. This comprises the case where the central purchasing organisation concludes a mere framework agreement, but the individual orders are placed by and the products are directly delivered to the subsidiaries in different Member States as well as the case where the individual orders are placed via the central purchasing organisation, but the products are directly delivered to the subsidiaries. In both cases, turnover is to be allocated to the different Member States in which the subsidiaries are located, irrespective of whether the central purchasing organisation or the subsidiaries receive the bills and effect the payment. The reason is that in both cases competition with alternative suppliers takes place for the delivery of products to the different subsidiaries even though the contract is concluded centrally. In the first case, in addition, the subsidiaries actually decide upon the quantities to be delivered and on an element essential for competition on their own.

*Provision of services*

(199) For services, the Merger Regulation foresees that the place of their provision to the customer is relevant. Services containing cross-border elements can be considered to fall into three general categories. The first category comprises cases where the service provider travels, the second category cases where the customer travels. The third category comprises those cases where a service is provided without either the service provider or the customer having to travel. In the first two categories, the turnover generated is to be allocated to the place of destination of the traveller, *i.e.* the place where the service is actually provided to the customer. In the third category, the turnover is generally to be allocated to the location of the customer. For the central sourcing of services the above outlined principles for the central purchasing of goods apply in an analogous way.

(200) An example of the first category would be a situation where a non-European company provides special airplane maintenance services to a carrier in a Member State. In this case, the service provider travels to the Community where the service is actually provided and where also competition for this service takes place. If a European tourist hires a car or books a hotel directly in the United States, this falls into the second category as the service is provided outside the Community and also competition takes place between hotels and rental car companies at the location chosen. However, the case is different for package holidays. For this kind of holiday, the service starts with the sale of the package through a travel agent at the customer's location and competition for the sale of holidays through travel agents takes place locally, as with retail shopping, even though parts of the service may be provided in a number of distant locations. The case therefore falls into the third category and the turnover generated is to be allocated to the customer's location. The third category also comprises cases like the supply of software or the distribution of films which are made outside the Community, but are supplied to a customer in a Member State so that the service is actually provided to the customer within the Community.

(201) Cases concerning the transport of goods are different as the customer, to whom those services are provided, does not travel, but the transport service is provided to the customer at its location. Those cases fall into the third category and the location of the customer is the relevant criterion for the allocation of the turnover.

(202) In telecom cases, the qualification of call termination services may raise problems. Although call termination would appear to fall into the third category, there are reasons to treat it differently. Call termination services are provided, *e.g.*, in situations where a call, originating from a European operator, is being terminated in the United States. Although neither the European nor the US operator travels, the signal travels and the service is provided by the US network to the European operator in the United States. This is also the place where competition takes place (if any). The turnover is therefore to be considered as non-Community turnover ([130]).

*Specific sectors*

(203) Certain sectors do, however, pose very particular problems with regard to the geographical allocation of turnover. These will be dealt with in Section VI below.

## VI. CONVERSION OF TURNOVER INTO EURO

(204) When converting turnover figures into euro 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 via DG Competition's website ([131]). The audited annual turnover figures should be converted as such and not be broken down into quarterly or monthly figures which would then be converted individually.

(205) 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 euros at the yearly average rate. Local currency sales should not be converted directly into euros since these figures are not from the consolidated audited accounts of the company.

## VII. PROVISIONS FOR CREDIT AND OTHER FINANCIAL INSTITUTIONS AND INSURANCE UNDERTAKINGS

### 1. **Scope of application**

(206) Due to the specific nature of the sector, Article 5(3) contains specific rules for the calculation of turnover of credit and other financial institutions as well as insurance undertakings.

(207) In order to define the terms 'credit institutions and other financial institutions' under the Merger Regulation, the Commission in its practice has consistently adopted the definitions provided in the applicable European regulation in the banking sector. The Directive on the taking up and pursuit of the business of credit institutions foresees that ([132]):

— 'Credit institution shall mean an undertaking whose business is to receive deposits or other repayable funds from the public and to grant credits for its own account.'

— 'Financial institution shall mean an undertaking other than a credit institution, the principal activity of which is to acquire holdings or to carry on one or more of the activities listed in points 2 to 12 of Annex I.'

([130]) This does not affect the turnover which the European telephony operator generates vis-à-vis its own customer with this call.

([131]) See http://europa.eu.int/comm/competition/mergers/others/exchange_rates.html#footnote_1. The website makes reference to the European Central Bank's Monthly Bulletin.

([132]) The definitions are to be found in Article 1 (1) and (5) of Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions (OJ L 126, 26.5.2000, p. 1).

(208) Financial institutions within the meaning of Article 5(3) of the Merger Regulation are, accordingly, on the one hand holding companies and, on the other hand, undertakings which perform on a regular basis as a principal activity one or more activities expressly mentioned in points 2 to 12 of the Annex of the banking Directive. These activities include:

— lending (comprising activities such as consumer credit, mortgage credit, factoring);

— financial leasing;

— money transmission services;

— issuing and administering means of payment (e.g. credit cards, travellers' cheques and bankers' drafts);

— guarantees and commitments;

— trading for own account or for account of customers in money market instruments, (cheques, bills, certificates of deposit, etc.), foreign exchange, financial futures and options, exchange and interest-rate instruments, transferable securities;

— participation in securities issues and the provision of services related to such issues;

— money broking;

— portfolio management and advice; and

— safekeeping and administration of securities.

## 2. **Calculation of turnover**

(209) Article 5(3) of the Merger Regulation sets out the methods of calculation of turnover for credit and other financial institutions and for insurance undertakings. In the following Section, some supplementary questions related to turnover calculation for the abovementioned types of undertakings are addressed.

### 2.1. *Calculation of turnover of credit and financial institutions (other than financial holding companies)*

#### 2.1.1. General

(210) 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.

For the geographic allocation of turnover to the Community and to individual Member States, the specific provision of Article 5 (3)(a) second subparagraph applies. It specifies that the turnover is to be allocated to the branch or division established in the Community or in the Member State which receives this income.

#### 2.1.2. Turnover of leasing companies

(211) 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.

(212) As already mentioned above, a company performing as its principal activity financial leasing is a financial institution within the meaning of Article 5(3)(a) and its turnover is to be calculated according to the specific rules set out in this provision. All payments on financial leasing contracts, except for the redemption part, are to be taken into account; a sale of future leasing payments at the beginning of the contract for re-financing purposes is not relevant.

(213) Operational leasing activities are, however, not considered to be carried out by financial institutions, and therefore the general turnover calculation rules of Article 5(1) apply ([133]).

### 2.2. *Insurance undertakings*

(214) In order to measure the turnover of insurance undertakings, Article 5(3)(b) of the Merger Regulation provides that gross premiums written are taken into account. The gross premiums written are the sum of received premiums, including any 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 only costs related to the provision of insurance coverage and are not to be deducted from the gross premiums written.

(215) The premiums to be taken into account are not only related 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.

(216) In order to constitute appropriate reserves allowing for the payment of claims, insurance undertakings, usually hold a portfolio of investments in shares, interest-bearing securities, land and property and other assets providing annual revenues. The annual revenues coming from those sources are not considered as turnover for insurance undertakings under Article 5(3)(b). However, a distinction has to be made between pure financial investments, which do not confer the rights and powers specified in Article 5(4) to the insurance undertaking in the undertakings in which the investment has been made, and those investments leading to the acquisition of an interest which meets the criteria specified in Article 5(4)(b). In the latter case, Article 5(4) of the Merger Regulation applies, and the turnover of this undertaking has to be added to the turnover of the insurance undertaking, as calculated according to Article 5(3)(b), for the determination of the thresholds laid down in the Merger Regulation ([134]).

### 2.3. *Financial holding companies*

(217) As an 'other financial institution' within the meaning of Article 5(3)(a) of the Merger Regulation, the turnover of a financial holding company has to be calculated according to the specific rules set out in this provision. However, in the same way as mentioned above for insurance undertakings, Article 5(4) applies to those participations which meet the criteria specified in Article 5(4)(b). Thus, the turnover of a financial holding is to be basically 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) ('Art. 5(4) companies') ([135]).

([133]) See Case IV/M.234 — GECC/Avis Lease, 15 July 1992.

([134]) See Case IV/M.018 — AG/AMEV, of 21 November 1990.

([135]) The principles for financial holding companies may to a certain extent be applied to fund management companies.

(218) In practice, the turnover of the financial holding company (non-consolidated) must first be taken into account. Then the turnover of the Art. 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:

(*EUR million*)

| | |
|---|---|
| 1. Turnover related to financial activities (from non-consolidated P&L) | 3 000 |
| 2. Turnover related to insurance Art. 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 Art. 5(4) companies 2 and 3 | <200> |
| Total turnover financial holding and its group | 5 100 |

(219) In such calculations different accounting rules 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 ([136]) 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.

(220) 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.

([136]) See for example Case IV/M.166 — Torras/Sarrió, of 24 February 1992.

# Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004

(2005/C 56/04)

**(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 (the EC Merger Regulation) ([1]) 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]) 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 ([4]).

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.

([1]) OJ L 24, 29.1.2004, p. 1.
([2]) OJ C 217, 29.7.2000, p. 32.
([3]) OJ L 395, 30.12.1989, p. 1; corrected version OJ L 257, 21.9.1990, p. 13.
([4]) The notification requirements are set out in Annexes I and II to Commission Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.

## 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 ([5]) of the joint venture and/or the turnover of the contributed activities ([6]) is less than EUR 100 million in the EEA territory; and

(ii) the total value of assets ([7]) transferred to the joint venture is less than EUR 100 million in the EEA territory ([8]);

([5]) 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.
([6]) 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.
([7]) 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.
([8]) Where the assets transferred generate turnover, then neither the value of the assets nor that of the turnover may exceed EUR 100 million.

(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 ([9]);

(c) two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking and:

(i) 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

(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) ([10]), provided that none of their individual or combined market shares is at either level 25 % or more ([11]);

(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, 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 ([12]). 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 categories referred to in point 5 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 related neighbouring markets ([13]) 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 ([14]) or other known competition problems may also be unsuitable.

([9]) See Commission Notice on the definition of relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5).

([10]) See footnote 6.

([11]) 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).

([12]) 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(3)(a), of the EC Merger Regulation).

([13]) 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.

([14]) See Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings OJ C 31, 5.2.2004, p. 5, points 14-21.

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 ([15]). In cases where such scenarios require a closer analysis, the Commission may revert to a normal first phase merger procedure ([16]).

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 EC 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.

*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 set out in 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 ([17]). The Commission's experience of the simplified procedure has shown that candidate cases for the simplified procedure may raise complex issues for instance, of market definition (see point 6) which should preferably be resolved prior to 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 Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings ([18]) on the grounds that the operation to be notified will not raise competition concerns.

([15]) Case No. IV/M.1328 *KLM/Martinair,* XXIXth Report on Competition Policy 1999 – SEC(2000) 720 final, points 165-166.

([16]) Case No COMP/M.2908 *Deutsche Post/DHL (II),* Decision of 18.9.2002.

([17]) 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

([18]) OJ L 133, 30.4.2004, p. 1.

*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.

*Short-form decision*

17. If the Commission is satisfied that the concentration fulfils the criteria for the simplified procedure (see point 5), 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 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 that the concentration is declared compatible with the common market because it falls within one or more of the categories described in this Notice, 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.

([19]) Article 4(3) of the EC Merger Regulation.

# Commission Notice on Case Referral in respect of concentrations

(2005/C 56/02)

**(Text with EEA relevance)**

1. The purpose of this Notice is to describe in a general way the rationale underlying the case referral system in Article 4(4) and (5), Article 9 and Article 22 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) ([1]) (hereinafter '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 Merger 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) 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, Regulation (EEC) No 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 were fulfilled.

4. When Regulation (EEC) No 4064/89 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' ([3]). There have, however, been a number of developments since the adoption of Regulation (EEC) No 4064/89. First, merger control laws have been introduced in almost all

([1]) OJ L 24, 29.1.2004, p. 1. This Regulation has recast Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ L 395, 30.12.1989, p. 1. Corrected version in OJ L 257, 21.9.1990, p. 13).

([2]) See EEA Joint Committee Decision No 78/2004 of 8 June 2004 (OJ L 219, 8.6.2004, p. 13).

([3]) See the Notes on Council Regulation (EEC) No 4064/89 ['Merger Control in the European union', European Commission, Brussels-Luxembourg, 1998, at p. 54]. See also Case T-119/02 *Philips v Commission* [2003] ECR II-1433 (Case M.2621 *SEB/Moulinex*) at paragraph 354.

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 ([4]). Likewise, in a number of cases ([5]), 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 ([6]). Third, there has been an increase in the number of transactions not meeting the thresholds in Article 1 of the Merger Regulation which must be filed in multiple Member State jurisdictions, a trend which is likely to continue in line with the Community's growing membership. Many of these transactions affect competition beyond the territories of individual Member States ([7]).

5. The revisions made to the referral system in the Merger Regulation are 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 are 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 Community ([8]). 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 Member State 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 Regulation (EC) No. 139/2004 were motivated by a desire that it should operate as a jurisdictional mechanism which is flexible ([9]) but which at the same time ensures effective protection of 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 Article 4(4) and (5), Article 9(2)(a) and Article 22 ([10]). 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.

([4]) It is a fact that some concentrations of Community dimension affect competition in national or sub-national markets within one or more Member States.

([5]) M.2698 *Promatech/Sulzer*; M.2738 *GE/Unison*; M.3136 *GE/AGFA*.

([6]) 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*.

([7]) 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 paragraph 21 et seq of the Commission's Green Paper of 11 December 2001 (COM(2001) 745 final).

([8]) See Recitals 11, 12 and 14 to the Merger Regulation.

([9]) See Recital 11 to the Merger Regulation.

([10]) 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.

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 ([11]). 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 which is 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 ([12]). 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 ([13]).

*More appropriate authority*

9. In principle, jurisdiction should only be re-attributed to another competition authority 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 authority. 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 ([14]).

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 ([15]). The provision of a one-stop-shop is beneficial to competition authorities and businesses alike. The handling of a merger by a single competition authority 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.

([11]) See Article 5 of the EC Treaty.

([12]) See Recitals 11 and 14 to the Merger Regulation.

([13]) See Article 9(8) of the Merger Regulation; see also *Philips v Commission* (paragraph 343) where the Court of First Instance of the European Communities states that '… although the first subparagraph of Article 9(3) of Regulation (EEC) 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 Commission* of 30 September 2003, case not yet reported (paragraph 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 paragraphs 346-347 of *Philips v Commission*, cited above).

([14]) 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.

([15]) See Recital 11 of the Merger Regulation.

12. Fragmentation of cases through referral should therefore be avoided where possible ([16]), 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 Article 4(4) and Article 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 ([17]).

*Legal certainty*

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 ([18]). 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 ([19]).

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:

(i) there must be indications *that the concentration may significantly affect competition* in a market or markets;

(ii) the market(s) in question must be within a Member State and *present all the characteristics of a distinct market*.

([16]) The Court of First Instance in *Philips v 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 (EEC) No 4064/89 is based'. Moreover, the Court, 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 paragraphs 350 and 380).

([17]) 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 United Kingdom, because it wished to avoid a fragmentation of the case (See Commission press release of 11.4.2002, IP/02/552)

([18]) See Recital 11 of the Merger Regulation.

([19]) 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.

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 the parties are not required to demonstrate that the effect on competition is likely to be an adverse one ([20]), they should point to indicators which are generally suggestive of the existence of some competitive effects stemming from the transaction ([21]).

18. As regards the *second criterion*, the requesting parties are required to show that a geographic market in which competition is affected by the transaction in the manner just described (paragraph 17) is national, or narrower than national in scope ([22]).

*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 (paragraphs 8 to 14), 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 the effects of which are likely to be confined to, or have their main economic impact in, a single Member State ([23]), 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.

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

([20]) 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'.

([21]) 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).

([22]) 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 to their centre of activity) and supply, significant variation of prices and market shares across countries, national consumer 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).

([23]) 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*.

involve potential foreclosure effects and consequent fragmentation of the common market ([24])), may be an appropriate candidate for referral will depend on the specific circumstances of the case. As 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 ([25]). 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 ([26]), 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 NCA(s) to which referral of the case is contemplated may possess specific expertise concerning local markets ([27]), or be examining, or about to examine, another transaction in the sector concerned ([28]).

---

([24]) 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 a decision pursuant to Article 8(2).

([25]) For some examples, see M.1383 *Exxon/Mobil*, where the Commission, despite the United Kingdom 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.

([26]) See M. 2898, *Le Roy Merlin/Brico*, M.1030, *Redland/Lafarge*, M. 1684, *Carrefour/Promodes*.

([27]) 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*.

([28]) 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 11.4.2002, IP/02/552).

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 at least three Member States* (see also paragraphs 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.

26. In this regard, Recital 16 to the Merger Regulation states that '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.' 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 one or more markets affected by the concentration. In any case, indications of possible competitive impact may be no more than preliminary in nature ([29]), 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 ([30]), 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 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).

([30]) 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 paragraph 11.

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 Member States ([31]). 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.

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 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 ([32]).

***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:

(i) the concentration must *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 *prima facie* evidence of such a possible significant adverse impact, but would be without prejudice to the outcome of a full investigation.

([31]) 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.

([32]) See Recitals 12 and 16 of the Merger Regulation.

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 (paragraph 35) is/are national, or narrower than national in scope ([33]).

*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 NCA would be to scrutinise the operation (see above at paragraphs 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:

(i) the concentration *must 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 must 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 (paragraph 38) 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 ([34]), it appears that such situations are generally limited to markets with a narrow geographic scope, within a Member State.

([33]) See Commission notice on the definition of relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5).

([34]) 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 United Kingdom; in M.2730, *Connex/DNVBVG*, where the transaction affected competition in local public transport services in the Riesa area (Saxony, 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 United Kingdom. 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 of 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 v 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* [1994] ECR I-5077, paragraph. 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'.

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 one or more Member States to the Commission pursuant to Article 22, two legal requirements must be fulfilled:

(i) the concentration must *affect trade between Member States*; and

(ii) 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 fulfils this requirement to the extent that it is liable to have some discernible influence on the pattern of trade between Member States ([35]).

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.

*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 ([36]). 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 one or more markets which 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 Member States, 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 Article 4(4) and (5), Article 9 and Article 22 set out in detail the various steps required for a case to be referred from the Commission to Member States and vice versa.

([35]) See also, by analogy, the Commission Notice — Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (OJ C 101, 27.4.2004, p. 81).

([36]) 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 paragraph 11.

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:

(a) Pre-notification referrals:

(i) From the Commission to Member States (Article 4(4))

(ii) From Member States to the Commission (Article 4(5))

(b) Post-notification referrals:

(i) From the Commission to Member States (Article 9)

(ii) From Member States to the Commission (Article 22).

48. The flowcharts in Annex I to this Notice describe in graphical form the various procedural steps to be followed in the referral mechanisms set out in Articles 4(4) and (5), Article 9 and Article 22.

**Pre-notification referrals**

49. Pre-notification referrals can only be requested by the undertakings concerned ([37]). It is for the undertakings concerned to verify whether the concentration meets the criteria specified in Article 4(4) (that the concentration has a Community dimension but may significantly affect competition in a distinct market within a Member State) or Article 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). 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 Article 4(4) and Article 4(5).

— Under Article 4(4), the Member State or States concerned ([38]) have 15 working days from the date they receive the submission to express agreement or disagreement with the request. Silence on the part of a Member State is deemed to constitute agreement ([39]). If the Member State or States concerned agree 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 one or more parts thereof) is referred to the Member States or States as requested by the undertakings concerned. If the referral is made, the Member State or States concerned apply their national law to the referred part of the case ([40]). Articles 9(6) to 9(9) apply.

([37]) The term 'undertakings concerned' includes 'persons' within the meaning of Article 3(1)(b).

([38]) 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.

([39]) 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 (EEC) No 4064/89, in Article 9(5). It is now included in Article 4(4) (second and fourth sub-paragraphs), Article 4(5) (fourth sub-paragraph), Article 9(5) and Article 22(3) (first sub-paragraph, last sentence) of the Merger Regulation. The positive silence mechanism is, however, not applicable with regard to decisions by Member States to join a request under Article 22(2).

([40]) 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 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 sub-paragraph 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.

— Under Article 4(5), the Member States concerned ([41]) have 15 working days from the date they receive the submission to express agreement or disagreement with the request. At the end of that 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 have expressed 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 Article 9(2) and Article 22(1), post-notification referrals are triggered by Member States either on their own initiative or following an invitation by the Commission pursuant to Article 9(2) and Article 22(5) respectively. 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 ([42]). If the referral is made, the Member State concerned applies its own national competition law, subject only to Article 9(6) and (8).

— 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' ([43]) to the Member State concerned. The Commission transmits the request to all Member States. Any other Member States can decide to join the request ([44]) within a period of 15 working days from the date they receive a copy of the initial request. All national time limits relating to the concentration are suspended a decision has been taken as to where it will be examined; a Member State can re-start the national time limits before

([41]) That is, 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.

([42]) As regards cases where the Commission takes preparatory steps within 65 working days, see Article 9(4)(b) and (5).

([43]) 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.

([44]) 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.

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 the expiry of the 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) ([45]). 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.

## B. DETAILS OF THE REFERRAL MECHANISM

52. This section of this Notice provides guidance regarding certain aspects of the functioning of the referral system set out in Article 4(4) and(5), Article 9 and Article 22 of the Merger Regulation.

### 1. **The network of competition authorities**

53. Article 19(2) of the Merger Regulation provides that the Commission is to carry out the procedures set out in that Regulation in close and constant liaison with the competent authorities of the Member States (the NCAs). 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 should 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 ([46]).

([45]) 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 Merger Regulation. This is established in Article 22(4) of that Regulation. It is to be noted that the Commission examines the concentration upon the request of and on behalf of the requesting Member States. This provision 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 (for example, where the geographic market extends beyond the territory/or territories of the requesting Member State(s).

([46]) 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.

56. Pursuant to Article 4(4) and (5), the Commission must transmit reasoned requests made by the undertakings concerned 'without delay' ([47]). The Commission will endeavour to transmit such documents on the working day following that on which 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 the Commission and all NCAs, their officials and other servants, and other persons working under the supervision of those 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 must not disclose non-public information they have acquired through the application of the Merger Regulation, 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 complete and accurate information, whenever required, in a timely fashion and in the most efficient way possible. Legal requirements concerning the information to be provided and the consequences of providing incorrect, incomplete or misleading information are set out in the Merger Regulation, Regulation (EC) No 802/2004 (hereinafter 'the Merger Implementing Regulation') and Form RS ([48]).

60. Form RS states that 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 fulfil the conditions of Article 4(5) comes to its attention during the course of the investigation), or to revoke any decision it adopts pursuant to Article 6 or Article 8, 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 ([49]).

([47]) 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.

([48]) Form RS is annexed to Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ L 133, 30.4.2004, p. 1).

([49]) 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.

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 competition ([50]). They should, however, provide as much information as possible showing clearly in what way the concentration meets the relevant legal criteria set out in Article 4(4) and (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 require publication of the fact that a Form RS has been lodged, 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 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 the NCAs in a frank and open manner in order to enable the Commission and the 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, even 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 (5) of the Merger Regulation ([51]).

### 3. **Concentrations eligible for referral**

65. Only concentrations within the meaning of Article 3 of the Merger Regulation are eligible for referral pursuant to Article 4(5) and Article 22. Only concentrations falling within the ambit of the relevant national competition laws for the control of mergers are eligible for referral pursuant to Article 4(4) and Article 9 ([52]).

66. Pre-filing referral requests pursuant to Article 4(4) and (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 ([53]).

### 4. **The concept of 'prior to notification' under Article 4(4) and (5)**

67. Article 4(4) and (5) only apply at the pre-notification stage.

([50]) See Recital 16 to the Merger Regulation.
([51]) 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).
([52]) By contrast, the reference to 'national legislation on competition' in Article 21(3) and Article 22(3) should be understood as referring to all aspects of national competition law.
([53]) 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 been submitted pursuant to Article 4(1).

69. Likewise, Article 4(5) specifies that the request may be made 'before any notification to the competent [national] authorities'. This means that the concentration in question must not have been formally notified in any Member State jurisdiction for that provision to apply. Even one notification anywhere in the Community 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 while a request pursuant to Article 4(5) is pending.

### 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 a 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 notified under national law ([54]).

72. Pursuant to the third and fourth subparagraphs of Article 4(5), 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 must 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 a copy of the Form RS. However, only Member States 'competent' to review the case are counted for the purposes of the third and fourth subparagraphs of Article 4(5). Pursuant to the third subparagraph of Article 4(5), 'competent' Member States 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 be deemed to acquire a Community dimension pursuant to the fifth subparagraph of Article 4(5). According to the fourth subparagraph of Article 4(5), by contrast, if even only one 'competent' Member State disagrees, no referral will take place from any Member State.

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.

([54]) Even in circumstances where a notification is voluntary *de jure*, the parties may in practice wish or be expected to file a notification.

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 for in the third subparagraph of Article 4(5), a Member State which is not identified in Form RS as being competent 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 for in the third subparagraph of Article 4(5), a Member State which has been identified as competent in Form RS may inform the Commission that it is not 'competent'. That 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, 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 paragraph 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 the fourth subparagraph of Article 4(4), the fourth subparagraph of Article 4(5), Article 9(1) and the second subparagraph of Article 22(3), 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 a concentration.

79. The information will be provided by means of a letter addressed to the undertakings concerned (or for decisions adopted pursuant to Article 9(1) or Article 22(3), 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 of the European Union* ([55]). The Commission will, 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 Article 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.

([55]) Pursuant to Article 20 of the Merger Regulation this is only required for decisions taken under Article 8(1)-(6) and Articles 14 and 15.

82. In addition, Article 9(6) provides that the competent national authority must, within 45 working days after the Commission's referral or following receipt of a notification at the national level if requested 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 notification, as appropriate, 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 the pre-notification referral provisions in Article 4(4) and (5), by 1 July 2009.

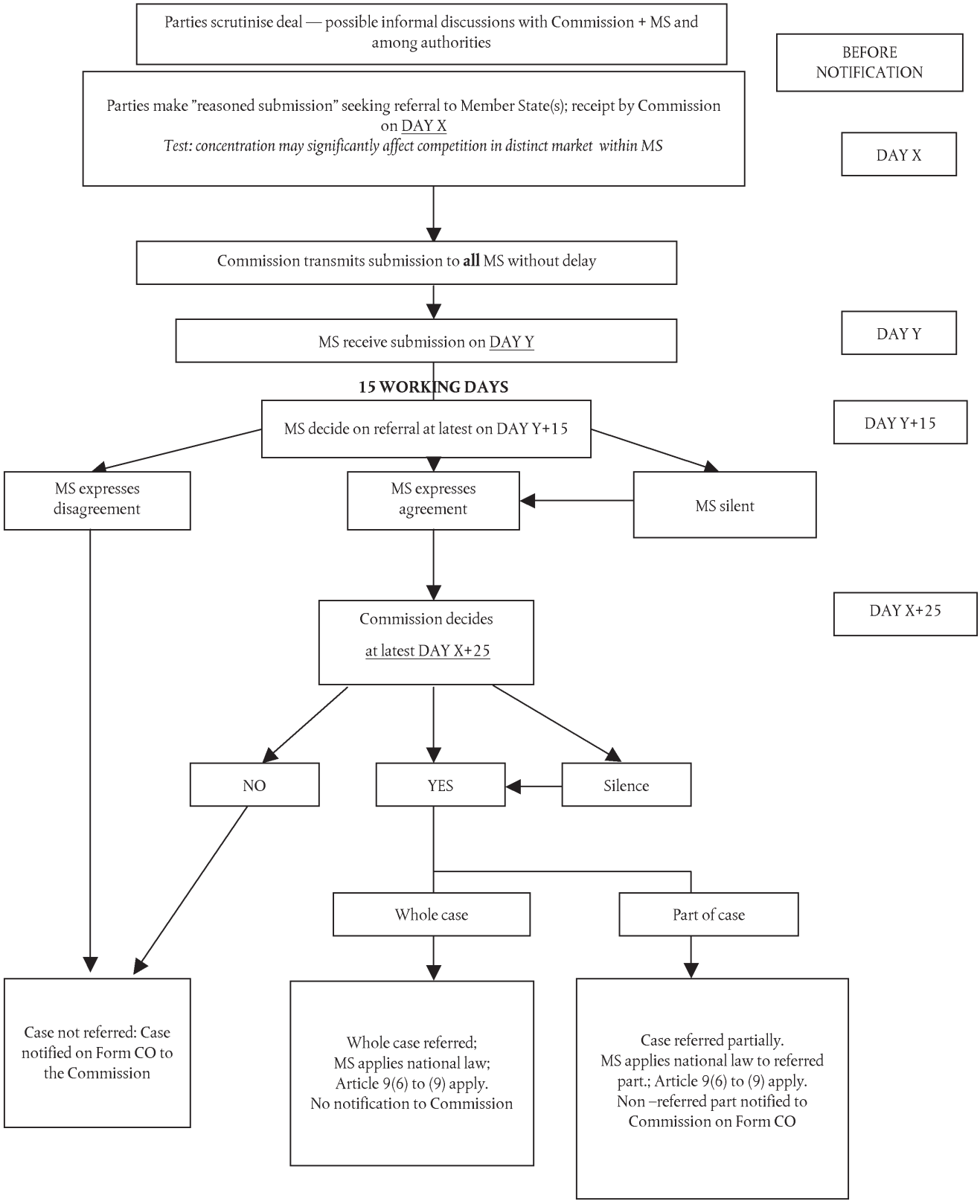
84. This Notice is without prejudice to any interpretation of the applicable Treaty and regulatory provisions by the Court of First Instance and the Court of Justice of the European Communities.

*ANNEXES*

**REFERRAL CHARTS**

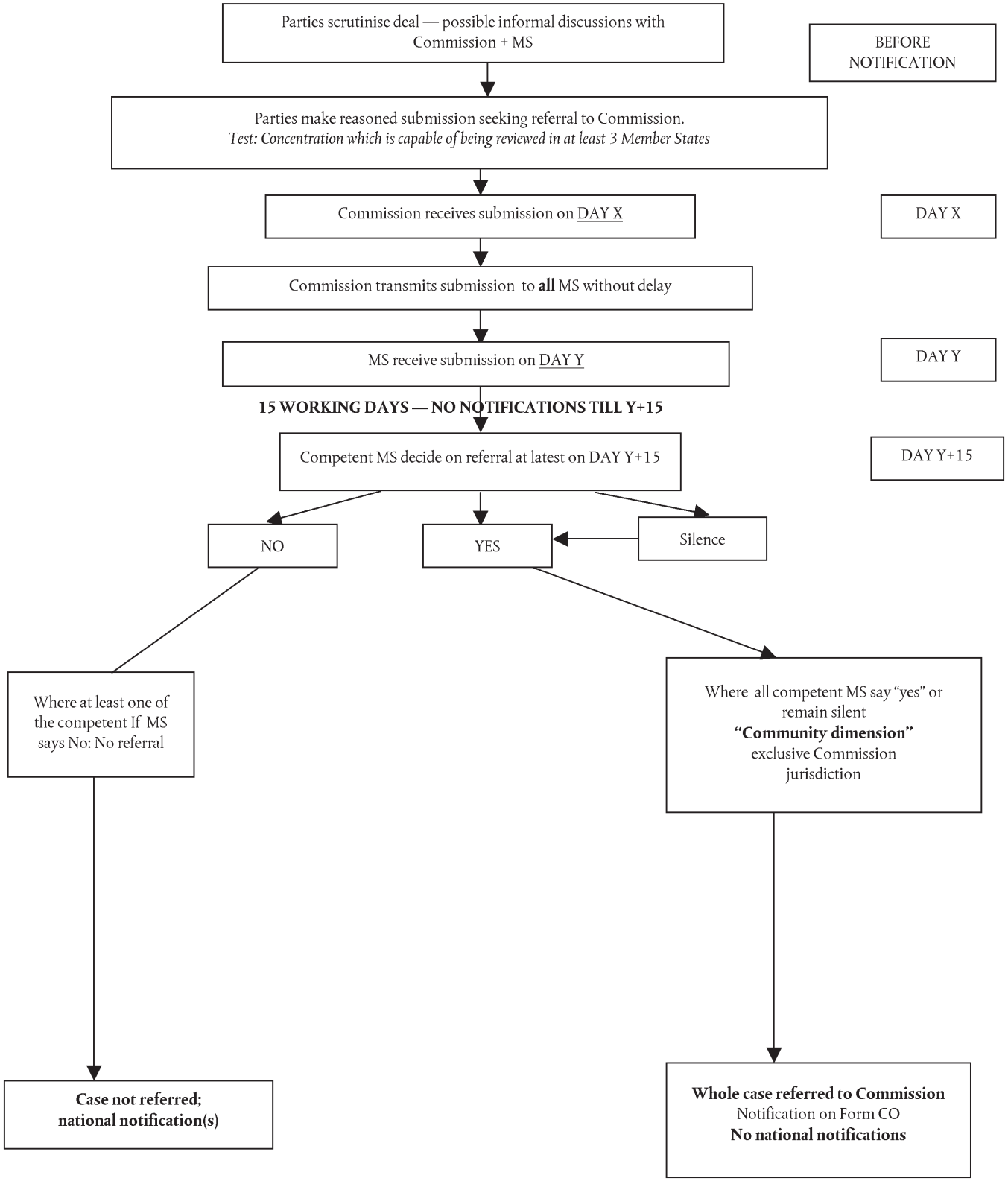
**Article 4(4)**

**Concentration with Community Dimension**



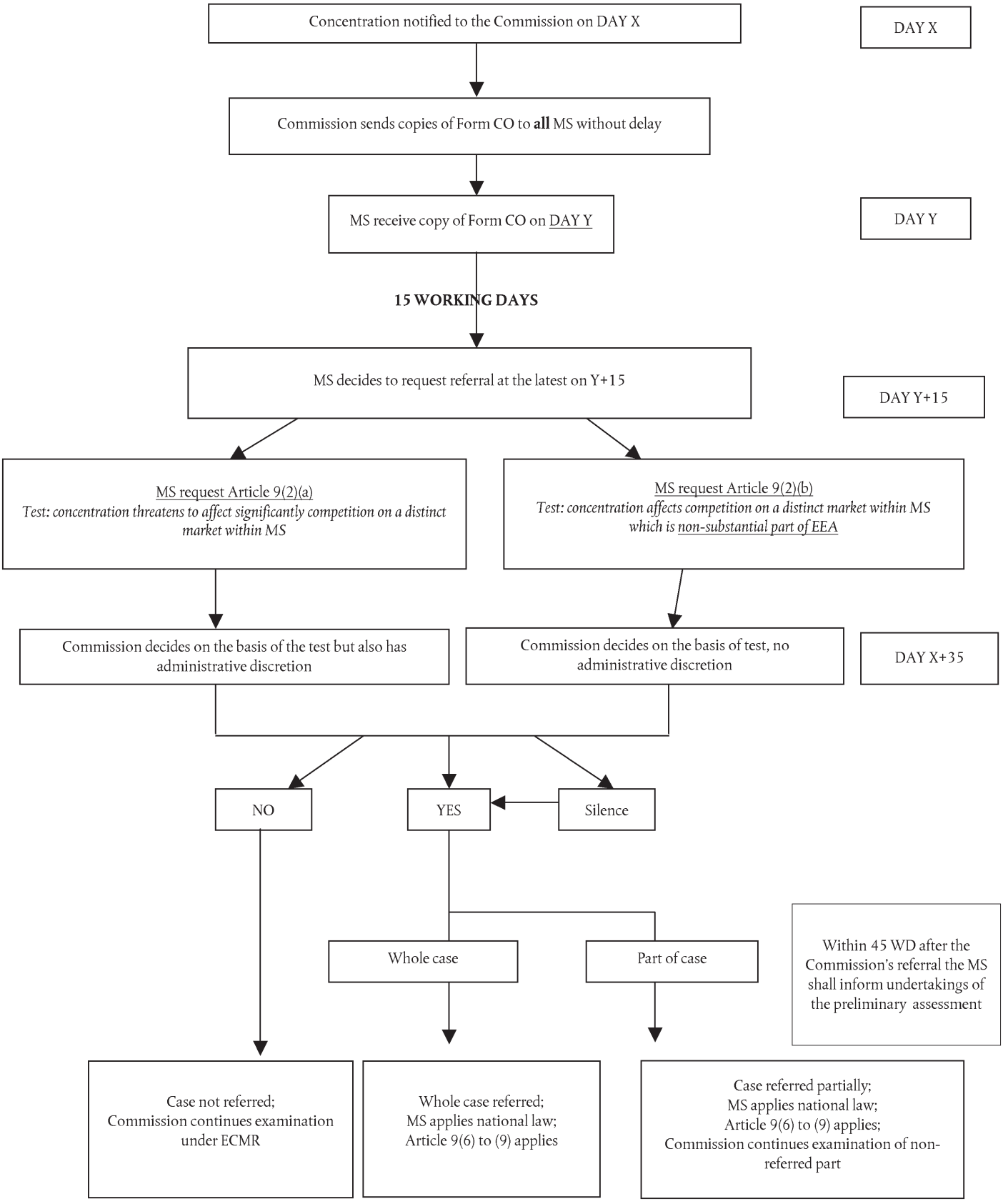
**Article 4(5)**

**Concentration without Community Dimension reviewable in at least three MS under national law**



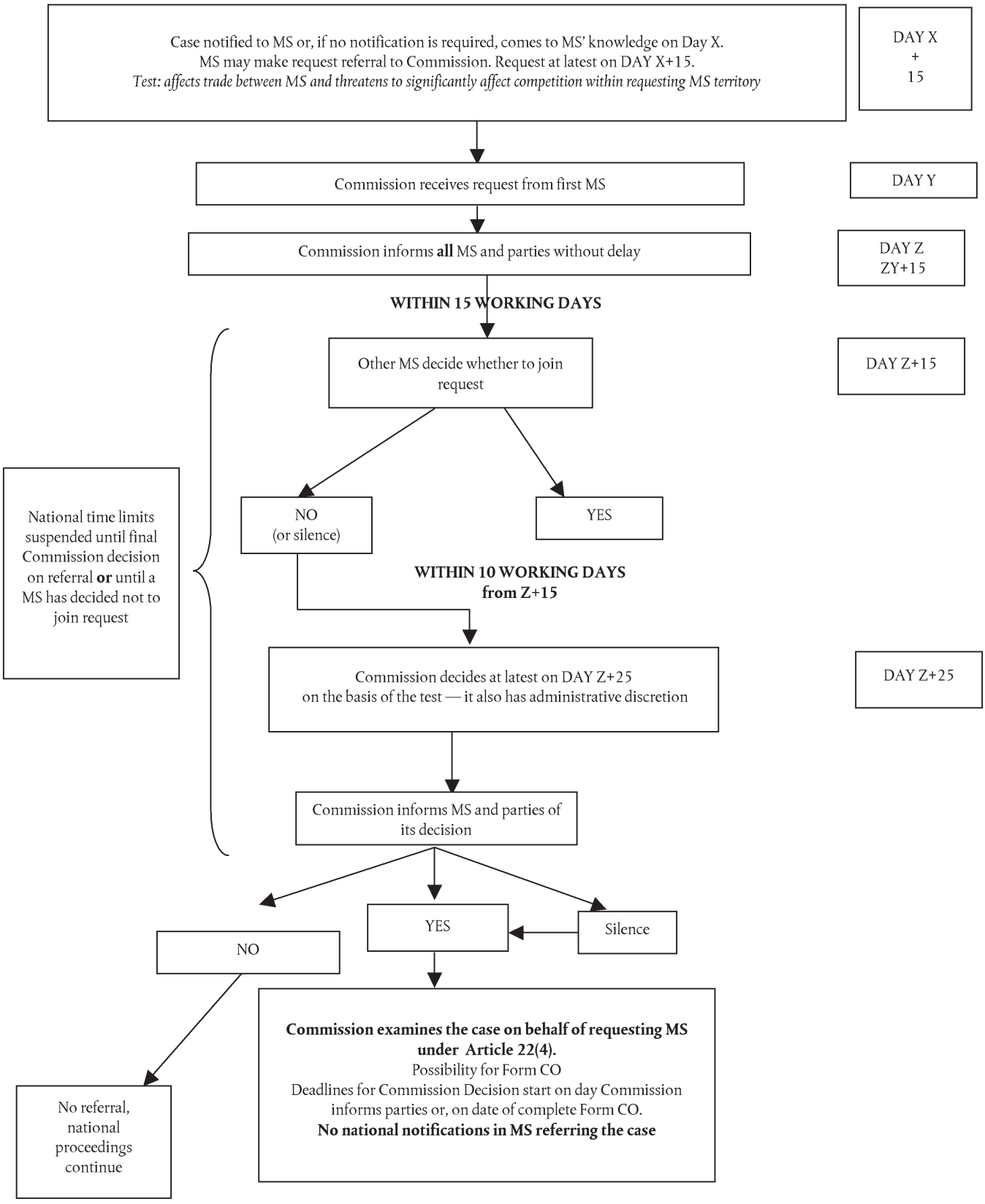
**Article 9**

**Concentration with Community Dimension**



**Article 22**

**Concentration without Community dimension**



# 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.

([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.

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.

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.

---

## Notice on agreements of minor importance which do not fall within the meaning of Article 85 (1) of the Treaty establishing the European Community

(97/C 372/04)

**(Text with EEA relevance)**

### I.

1. The Commission considers it important to facilitate cooperation between undertakings where such cooperation is economically desirable without presenting difficulties from the point of view of competition policy. To this end, it published the notice concerning agreements, decisions and concerted practices in the field of cooperation between enterprises [1] listing a number of agreements that by their nature cannot be regarded as being in restraint of competition. Furthermore, in the notice concerning its assessment of certain subcontracting agreements [2] the Commission considered that that type of contract, which offers all undertakings opportunities for development, does not automatically fall within the scope of Article 85 (1). The notice concerning the assessment of cooperative joint ventures pursuant to Article 85 of the EC Treaty [3] describes in detail the conditions under which the agreements in question do not fall under the prohibition of restrictive agreements. By issuing this notice which replaces the Commission notice of 3 September 1986 [4], the Commission is taking a further step towards defining the scope of Article 85 (1), in order to facilitate cooperation between undertakings.

2. Article 85 (1) prohibits agreements which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. The Court of Justice of the European Communities has clarified that this provision is not applicable where the impact of the agreement on intra-Community trade or on competition is not appreciable. Agreements which are not capable of significantly affecting trade between Member States are not caught by Article 85. They should therefore be examined on the basis, and within the framework, of national legislation alone. This is also the case for

[1] OJ C 75, 29. 7. 1968. p. 3, as corrected in OJ C 84, 28. 8. 1968, p. 14.

[2] OJ C 1, 3. 1. 1979, p. 2.

[3] OJ C 43, 16. 2. 1993, p. 2.

[4] OJ C 231, 12. 9. 1986, p. 2.

# 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.

# Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings

(2008/C 265/07)

## 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. This document develops guidance as to how the Commission assesses concentrations ([2]) where the undertakings concerned are active on different relevant markets ([3]). In this document, these concentrations will be called 'non-horizontal mergers'.

3. Two broad types of non-horizontal mergers can be distinguished: vertical mergers and conglomerate mergers.

4. Vertical mergers involve companies operating at different levels of the supply chain. For example, when a manufacturer of a certain product (the 'upstream firm') merges with one of its distributors (the 'downstream firm'), this is called a vertical merger ([4]).

5. Conglomerate mergers are mergers between firms that are in a relationship which is neither horizontal (as competitors in the same relevant market) nor vertical (as suppliers or customers) ([5]). In practice, the focus of the present guidelines is on mergers between companies that are active in closely related markets (e.g. mergers involving suppliers of complementary products or products that belong to the same product range).

6. The general guidance already given in the Notice on horizontal mergers is also relevant in the context of non-horizontal mergers. The purpose of the present document is to concentrate on the competition aspects that are relevant to the specific context of non-horizontal mergers. In addition, it will set out the Commission's approach to market shares and concentration thresholds in this context.

7. In practice, mergers may entail both horizontal and non-horizontal effects. This may for instance be the case where the merging firms are not only in a vertical or conglomerate relationship, but are also actual or potential competitors of each other in one or more of the relevant markets concerned ([6]). In such a case, the Commission will appraise horizontal, vertical and/or conglomerate effects in accordance with the guidance set out in the relevant notices ([7]).

([1]) Council Regulation (EC) No 139/2004 of 20 January 2004 (OJ L 24, 29.1.2004, p. 1).

([2]) 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 Document, unless otherwise specified, the term 'merger' will be used as a synonym for concentration and therefore cover all the above types of transactions.

([3]) Guidance on the assessment of mergers involving undertakings which are actual or potential competitors on the same relevant market ('horizontal mergers') is given in the Commission Notice: Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ C 31, 5.2.2004, p. 5) ('Notice on Horizontal Mergers').

([4]) In the present document, the terms 'downstream' and 'upstream' are used to describe the (potential) commercial relationship that the merging entities have with each other. Generally the commercial relationship is one where the 'downstream' firm purchases the output from the 'upstream' firm and uses it as an input in its own production, which it then sells on to its customers. The market where the former transactions take place is referred to as the intermediate market (upstream market). The latter market is referred to as the downstream market.

([5]) The distinction between conglomerate mergers and horizontal mergers may be subtle, e.g. when a conglomerate merger involves products that are weak substitutes for each other. The same holds true for the distinction between conglomerate mergers and vertical mergers. For instance, products may be supplied by some companies with the inputs already integrated (vertical relationship), whereas other producers leave it to the customers to select and assemble the inputs themselves (conglomerate relationship).

([6]) For instance, in certain markets upstream or downstream firms are often well-placed potential entrants. See e.g. in the electricity and gas sector, Case COMP/M.3440 — EDP/ENI/GDP (2004). The same may hold for producers of complementary products. See e.g. in the liquid packaging sector, Case COMP/M.2416 — TetraLaval/Sidel (2001).

([7]) Guidance on the assessment of mergers with a potential competitor is given in the Notice on horizontal mergers, in particular at paragraphs 58 to 60 thereof.

8. The guidance set out in this document draws and elaborates on the Commission's evolving experience with the appraisal of non-horizontal mergers under Regulation (EEC) No 4064/89 since its entry into force on 21 September 1990, the Merger Regulation presently in force 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 the notice on non-horizontal mergers from time to time in the light of future developments and of evolving insight.

9. The Commission's interpretation of the Merger Regulation as regards the appraisal of non-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**

10. 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. An 'increase in market power' in this context refers to the ability of one or more firms to profitably increase prices, reduce output, choice or quality of goods and services, diminish innovation, or otherwise negatively influence parameters of competition ([1]).

11. Non-horizontal mergers are generally less likely to significantly impede effective competition than horizontal mergers.

12. First, unlike horizontal mergers, vertical or conglomerate mergers do not entail the loss of direct competition between the merging firms in the same relevant market ([2]). As a result, the main source of anti-competitive effect in horizontal mergers is absent from vertical and conglomerate mergers.

13. Second, vertical and conglomerate mergers provide substantial scope for efficiencies. A characteristic of vertical mergers and certain conglomerate mergers is that the activities and/or the products of the companies involved are complementary to each other ([3]). The integration of complementary activities or products within a single firm may produce significant efficiencies and be pro-competitive. In vertical relationships for instance, as a result of the complementarity, a decrease in mark-ups downstream will lead to higher demand also upstream. A part of the benefit of this increase in demand will accrue to the upstream suppliers. An integrated firm will take this benefit into account. Vertical integration may thus provide an increased incentive to seek to decrease prices and increase output because the integrated firm can capture a larger fraction of the benefits. This is often referred to as the 'internalisation of double mark-ups'. Similarly, other efforts to increase sales at one level (e.g. improve service or stepping up innovation) may provide a greater reward for an integrated firm that will take into account the benefits accruing at other levels.

14. Integration may also decrease transaction costs and allow for a better co-ordination in terms of product design, the organisation of the production process, and the way in which the products are sold. Similarly, mergers which involve products belonging to a range or portfolio of products that are generally sold to the same set of customers (be they complementary products or not) may give rise to customer benefits such as one-stop-shopping.

([1]) In this document, the expression 'increased prices' is often used as shorthand for these various ways in which a merger may result in competitive harm. The expression should also be understood to 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.

([2]) Such a loss of direct competition can, nevertheless, arise where one of the merging firms is a potential competitor in the relevant market where the other merging firm operates. See paragraph 7 above.

([3]) In this document, products or services are called 'complementary' (or 'economic complements') when they are worth more to a customer when used or consumed together than when used or consumed separately. Also a merger between upstream and downstream activities can be seen as a combination of complements which go into the final product. For instance, both production and distribution fulfil a complementary role in getting a product to the market.

15. However, there are circumstances in which non-horizontal mergers may significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position. This is essentially because a non-horizontal merger may change the ability and incentive to compete on the part of the merging companies and their competitors in ways that cause harm to consumers.

16. In the context of competition law, the concept of 'consumers' encompasses intermediate and ultimate consumers ([1]). When intermediate customers are actual or potential competitors of the parties to the merger, the Commission focuses on the effects of the merger on the customers to which the merged entity and those competitors are selling. Consequently, the fact that a merger affects competitors is not in itself a problem. It is the impact on effective competition that matters, not the mere impact on competitors at some level of the supply chain ([2]). In particular, the fact that rivals may be harmed because a merger creates efficiencies cannot in itself give rise to competition concerns.

17. There are two main ways in which non-horizontal mergers may significantly impede effective competition: non-coordinated effects and coordinated effects ([3]).

18. Non-coordinated effects may principally arise when non-horizontal mergers give rise to *foreclosure*. In this document, the term 'foreclosure' will be used to describe any instance where actual or potential rivals' access to supplies or markets is hampered or eliminated as a result of the merger, thereby reducing these companies' ability and/or incentive to compete. As a result of such foreclosure, the merging companies — and, possibly, some of its competitors as well — may be able to profitably increase the price ([4]) charged to consumers. These instances give rise to a significant impediment to effective competition and are therefore referred to hereafter as 'anticompetitive foreclosure'.

19. Coordinated effects arise where the merger changes the nature of competition in such a way that firms that previously were not coordinating their behaviour, are now significantly more likely to coordinate to 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.

20. 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 ([5]). 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 will take into account future changes to the market that can reasonably be predicted. 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. The Commission may take into account future market developments that result from impending regulatory changes ([6]).

([1]) See Article 2(1)(b) of the Merger Regulation and paragraph 84 of the Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty (OJ C 101, 27.4.2004, p. 97).

([2]) One example of this approach can be found in the case COMP/M.3653 — Siemens/VA Tech (2005), in which the Commission assessed the effect of the transaction on the two complementary markets for electrical rail vehicles and electrical traction systems for rail vehicles, which combine into a full rail vehicle. While the merger allegedly reduced the independent supply of electrical traction systems, there would still be several integrated suppliers which could deliver the rail vehicle. The Commission thus concluded that even if the merger had negative consequences for independent suppliers of electrical rail vehicles 'sufficient competition would remain in the relevant downstream market for rail vehicles'.

([3]) See Section II of the Notice on Horizontal Mergers.

([4]) For the meaning of the expression 'increased prices' see footnote 8.

([5]) 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.

([6]) This may be particularly relevant in cases where effective competition is expected to arise in the future as a result of market opening. See e.g. Case COMP/M.3696 — E.ON/MOL (2005), at points 457 to 463.

21. In its assessment, the Commission will consider both the possible anti-competitive effects arising from the merger and the possible pro-competitive effects stemming from substantiated efficiencies benefiting consumers ([1]). The Commission examines the various chains of cause and effect with a view to ascertaining which of them is the most likely. The more immediate and direct the perceived anti-competitive effects of a merger, the more likely the Commission is to raise competition concerns. Likewise, the more immediate and direct the pro-competitive effects of a merger, the more likely the Commission is to find that they counteract any anti-competitive effects.

22. This document describes the main scenarios of competitive harm and sources of efficiencies in the context of vertical mergers and, subsequently, in the context of conglomerate mergers.

## III. MARKET SHARE AND CONCENTRATION LEVELS

23. Non-horizontal mergers pose no threat to effective competition unless the merged entity has a significant degree of market power (which does not necessarily amount to dominance) in at least one of the markets concerned. The Commission will examine this issue before proceeding to assess the impact of the merger on competition.

24. Market shares and concentration levels provide useful first indications of the market power and the competitive importance of both the merging parties and their competitors ([2]).

25. The Commission is unlikely to find concern in non-horizontal mergers, be it of a coordinated or of a non-coordinated nature, where the market share post-merger of the new entity in each of the markets concerned is below 30 % ([3]) and the post-merger HHI is below 2 000.

26. In practice, the Commission will not extensively investigate such mergers, except where special circumstances such as, for instance, one or more of the following factors are present:

(a) a merger involves a company that is likely to expand significantly in the near future, e.g. because of a recent innovation;

(b) there are significant cross-shareholdings or cross-directorships among the market participants;

(c) one of the merging firms is a firm with a high likelihood of disrupting coordinated conduct;

(d) indications of past or ongoing coordination, or facilitating practices, are present.

27. The Commission will use the above market share and HHI thresholds as an initial indicator of the absence of competition concerns. However, these thresholds do not give rise to a legal presumption. The Commission is of the opinion that it is less appropriate in this context to present market share and concentration levels above which competition concerns would be deemed to be likely, as the existence of a significant degree of market power in at least one of the markets concerned is a necessary condition for competitive harm, but is not a sufficient condition ([4]).

## IV. VERTICAL MERGERS

28. This Section sets out the Commission's framework of analysis in the context of vertical mergers. In its assessment, the Commission will consider both the possible anti-competitive effects arising from vertical mergers and the possible pro-competitive effects stemming from efficiencies substantiated by the parties.

([1]) See Section VII on efficiencies in the Notice on Horizontal Mergers.
([2]) See also Section III of the Notice on Horizontal Mergers. The calculation of market shares depends critically on market definition (see Commission notice on the definition of the relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997)). Special care must be taken in contexts where vertically integrated companies supply products internally.
([3]) In analogy to the indications given in 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). Where a merged entity would have a market share just above the 30 % threshold on one market but substantially below on other, related, markets competition concerns will be less likely.
([4]) See Sections IV and V.

## A. **Non-coordinated effects: foreclosure**

29. A merger is said to result in foreclosure where actual or potential rivals' access to supplies or markets is hampered or eliminated as a result of the merger, thereby reducing these companies' ability and/or incentive to compete. Such foreclosure may discourage entry or expansion of rivals or encourage their exit. Foreclosure thus can be found even if the foreclosed rivals are not forced to exit the market: It is sufficient that the rivals are disadvantaged and consequently led to compete less effectively. Such foreclosure is regarded as anti-competitive where the merging companies — and, possibly, some of its competitors as well — are as a result able to profitably increase the price charged to consumers ([1]).

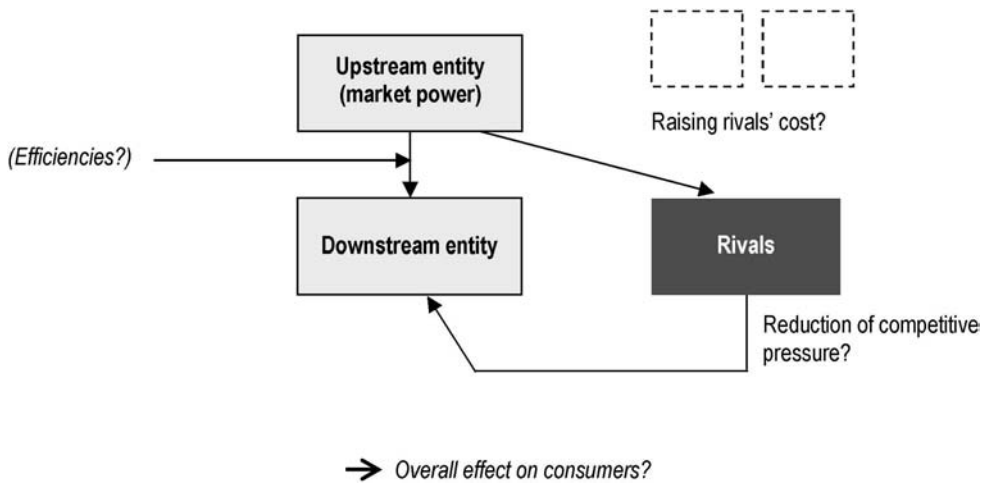
30. Two forms of foreclosure can be distinguished. The first is where the merger is likely to raise the costs of downstream rivals by restricting their access to an important input (input foreclosure). The second is where the merger is likely to foreclose upstream rivals by restricting their access to a sufficient customer base (customer foreclosure) ([2]).

### 1. *Input foreclosure*

31. Input foreclosure arises where, post-merger, the new entity would be likely to restrict access to the products or services that it would have otherwise supplied absent the merger, thereby raising its downstream rivals' costs by making it harder for them to obtain supplies of the input under similar prices and conditions as absent the merger. This may lead the merged entity to profitably increase the price charged to consumers, resulting in a significant impediment to effective competition. As indicated above, for input foreclosure to lead to consumer harm, it is not necessary that the merged firm's rivals are forced to exit the market. The relevant benchmark is whether the increased input costs would lead to higher prices for consumers. Any efficiencies resulting from the mergermay, however, lead the merged entity to reduce price, so that the overall likely impact on consumers is neutral or positive. A graphical presentation of this mechanism is provided in Figure 1.

*Figure 1*

**Input foreclosure**




([1]) For the meaning of the expression 'increased prices' see footnote 8. For the meaning of 'consumers', see footnote 16.
([2]) See Merger Regulation, Article 2(1)(b), referring to 'access to supplies' and 'access to […] markets', respectively.

32. In assessing the likelihood of an anticompetitive input foreclosure scenario, the Commission examines, first, whether the merged entity would have, post-merger, the ability to substantially foreclose access to inputs, second, whether it would have the incentive to do so, and third, whether a foreclosure strategy would have a significant detrimental effect on competition downstream ([1]). In practice, these factors are often examined together since they are closely intertwined.

A. Ability to foreclose access to inputs ([2])

33. Input foreclosure may occur in various forms. The merged entity may decide not to deal with its actual or potential competitors in the vertically related market. Alternatively, the merged firm may decide to restrict supplies and/or to raise the price it charges when supplying competitors and/or to otherwise make the conditions of supply less favourable than they would have been absent the merger ([3]). Further, the merged entity may opt for a specific choice of technology within the new firm which is not compatible with the technologies chosen by rival firms ([4]). Foreclosure may also take more subtle forms, such as the degradation of the quality of input supplied ([5]). In its assessment, the Commission may consider a series of alternative or complementary possible strategies.

34. Input foreclosure may raise competition problems only if it concerns an important input for the downstream product ([6]). This is the case, for example, when the input concerned represents a significant cost factor relative to the price of the downstream product. Irrespective of its cost, an input may also be sufficiently important for other reasons. For instance, the input may be a critical component without which the downstream product could not be manufactured or effectively sold on the market ([7]), or it may represent a significant source of product differentiation for the downstream product ([8]). It may also be that the cost of switching to alternative inputs is relatively high.

35. For input foreclosure to be a concern, the vertically integrated firm resulting from the merger must have a significant degree of market power in the upstream market. It is only in these circumstances that the merged firm can be expected to have a significant influence on the conditions of competition in the upstream market and thus, possibly, on prices and supply conditions in the downstream market.

36. The merged entity would only have the ability to foreclose downstream competitors if, by reducing access to its own upstream products or services, it could negatively affect the overall availability of inputs for the downstream market in terms of price or quality. This may be the case where the remaining upstream suppliers are less efficient, offer less preferred alternatives, or lack the ability to expand output in response to the supply restriction, for example because they face capacity constraints or, more generally, face decreasing returns to scale ([9]). Also, the presence of exclusive contracts between the merged entity and independent input providers may limit the ability of downstream rivals to have adequate access to inputs.

([1]) See e.g. Case COMP/M.4300 — Philips/Intermagnetics, COMP/M.4314 — Johnson & Johnson/Pfizer Consumer Healthcare, COMP/M.4389 — WLR/BST, COMP/M.4403 — Thales/Finmeccanica/Alcatel Alenia Space and Telespazio, COMP/M.4494 — Evraz/Highveld, and COMP/M.4561 — GE/Smiths Aerospace.
([2]) The term 'inputs' is used here as a generic term and may also cover services, access to infrastructure and access to intellectual property rights.
([3]) See e.g. Case COMP/M.1693 — Alcoa/Reynolds (2000), Case COMP/M.4403 — Thales/Finmeccanica/Alcatel Alenia Space/Telespazio, points 257-260.
([4]) See e.g. Case COMP/M.2861 — Siemens/Drägerwerk/JV (2003), Case COMP/M.3998 — Axalto, point 75.
([5]) See e.g. Case COMP/M.4314 — Johnson & Johnson/Pfizer Consumer Healthcare, points 127-130.
([6]) See e.g. Case COMP/M.3868 — Dong/Elsam/Energi E2, Case COMP/M.4094 — Ineos/BP Dormagen, points 183-184, Case COMP/M.4561 — GE/Smiths Aerospace, points 48-50.
([7]) For instance, an engine starter can be considered a critical component to an engine (Case T-210/01, *General Electric v Commission* [2005] ECR II-000); see also, e.g. Case COMP/M.3410 — Total/GDF, points 53-54 and 60-61.
([8]) For instance, personal computers are often sold with specific reference to the type of microprocessor they contain.
([9]) See e.g. Case COMP/M.4494 — Evraz/Highveld, point 92 and points 97-112.

37. When determining the extent to which input foreclosure may occur, it must be taken into account that the decision of the merged entity to rely on its upstream division's supply of inputs may also free up capacity on the part of the remaining input suppliers from which the downstream division used to purchase before. In fact, the merger may merely realign purchase patterns among competing firms.

38. When competition in the input market is oligopolistic, a decision of the merged entity to restrict access to its inputs reduces the competitive pressure exercised on remaining input suppliers, which may allow them to raise the input price they charge to non-integrated downstream competitors. In essence, input foreclosure by the merged entity may expose its downstream rivals to non-vertically integrated suppliers with increased market power ([1]). This increase in third-party market power will be greater the lower the degree of product differentiation between the merged entity and other upstream suppliers and the higher the degree of upstream concentration. However, the attempt to raise the input price may fail when independent input suppliers, faced with a reduction in the demand for their products (from the downstream division of the merged entity or from independent downstream firms), respond by pricing more aggressively ([2]).

39. In its assessment, the Commission will consider, on the basis of the information available, whether there are effective and timely counter-strategies that the rival firms would be likely to deploy. Such counterstrategies include the possibility of changing their production process so as to be less reliant on the input concerned or sponsoring the entry of new suppliers upstream.

B. Incentive to foreclose access to inputs

40. The incentive to foreclose depends on the degree to which foreclosure would be profitable. The vertically integrated firm will take into account how its supplies of inputs to competitors downstream will affect not only the profits of its upstream division, but also of its downstream division. Essentially, the merged entity faces a trade-off between the profit lost in the upstream market due to a reduction of input sales to (actual or potential) rivals and the profit gain, in the short or longer term, from expanding sales downstream or, as the case may be, being able to raise prices to consumers.

41. The trade-off is likely to depend on the level of profits the merged entity obtains upstream and downstream ([3]). Other things constant, the lower the margins upstream, the lower the loss from restricting input sales. Similarly, the higher the downstream margins, the higher the profit gain from increasing market share downstream at the expense of foreclosed rivals ([4]).

42. The incentive for the integrated firm to raise rivals' costs further depends on the extent to which downstream demand is likely to be diverted away from foreclosed rivals and the share of that diverted

([1]) The analysis of the likely effect of the removal of a competitive constraint is similar to the analysis of non-coordinated effects with horizontal mergers (see Section IV of the Notice on Horizontal Mergers).

([2]) Also the nature of the supply contracts between upstream suppliers and the downstream independent firms may be important in this respect. For instance, when these contracts use a price system combining a fixed fee and a per-unit supply price, the effect on downstream competitors' marginal costs may be affected less than when these contracts involve only per-unit supply prices.

([3]) See e.g. Case COMP/M.4300 — Philips/Intermagnetics, points 56-62, Case COMP/M.4576 — AVR/Van Gansewinkel, points 33-38.

([4]) It has to be considered that upstream and downstream margins may change as a result of the merger. This may impact upon the merged entity's incentive to engage in foreclosure.

demand that the downstream division of the integrated firm can capture ([1]). This share will normally be higher the less capacity constrained the merged entity will be relative to non-foreclosed downstream rivals and the more the products of the merged entity and foreclosed competitors are close substitutes. The effect on downstream demand will also be higher if the affected input represents a significant proportion of downstream rivals' costs or if the affected input represents a critical component of the downstream product ([2]).

43. The incentive to foreclose actual or potential rivals may also depend on the extent to which the downstream division of the integrated firm can be expected to benefit from higher price levels downstream as a result of a strategy to raise rivals' costs ([3]). The greater the market shares of the merged entity downstream, the greater the base of sales on which to enjoy increased margins ([4]).

44. An upstream monopolist that is already able to fully extract all available profits in vertically related markets may not have any incentive to foreclose rivals following a vertical merger. The ability to extract available profits from the consumers does not follow immediately from a very high market share ([5]). Such a finding would require a more thorough analysis of the actual and future constraints under which the monopolist operates. When all available profits cannot be extracted, a vertical merger — even if it involves an upstream monopolist — may give the merged entity the incentive to raise the costs of downstream rivals, thereby reducing the competitive constraint they exert on the merged entity in the downstream market.

45. In its assessment of the likely incentives of the merged firm, the Commission may take into account various considerations such as the ownership structure of the merged entity ([6]), the type of strategies adopted on the market in the past ([7]) or the content of internal strategic documents such as business plans.

([1]) See e.g. Case COMP/M.3943 — Saint-Gobain/BPB (2005), point 78. The Commission noted that it would be very unlikely that BPB, the main supplier of plaster board in the UK, would cut back on supplies to rival distributors of Saint-Gobain, in part because expansion of Saint-Gobain's distribution capacity was difficult.

([2]) Conversely, if the input accounts only for a small share of the downstream product and is not a critical component, even a high market share upstream may not give the merged entity the incentive to foreclose downstream rivals because few, if any, sales would be diverted to the integrated firm's downstream unit. See e.g. Case COMP/M.2738 — GEES/Unison; Case COMP M.4561 — GE/Smiths Aerospace, points 60-62.

([3]) See e.g. Case COMP/M.4314 — Johnson & Johnson/Pfizer Consumer Healthcare, points 131-132.

([4]) It must be noted that the less the merged firm can target a specific downstream market, the less it is likely to raise its prices for the input it supplies, as it would have to incur opportunity costs in other downstream markets. In this respect, the extent to which the merged entity can price discriminate when the merged entity supplies several downstream markets and/or ancillary markets may be taken into account (e.g. for spare parts).

([5]) One situation in which this may not be the case would be when the monopolist has a so-called commitment problem which it is unable to solve. For example, a downstream buyer may be willing to pay a high price to an upstream monopolist if the latter does not subsequently sell additional quantities to a competitor. But once the terms of supply are fixed with one downstream firm, the upstream supplier may have an incentive to increase its supplies to other downstream firms, thereby making the first purchase unprofitable. Since downstream firms will anticipate this kind of opportunistic behavior, the upstream supplier will be unable to fully exploit its market power. Vertical integration may restore the upstream supplier's ability to commit not to expand input sales as this would harm its own downstream division. Another case in which the monopolist cannot obtain all available monopoly profits may arise when the company cannot differentiate its prices among customers.

([6]) For instance, in cases where two companies have joint control over a firm active in the upstream market, and only one of them is active downstream, the company without downstream activities may have little interest in foregoing input sales. In such cases, the incentive to foreclose is smaller than when the upstream company is fully controlled by a company with downstream activities. See e.g. Case COMP/M.3440 — EDP/ENI/GDP (2004), Case COMP/M.4403 — Thales/Finmeccanica/Alcatel Alenia Space/Telespazio, points 121 and 268.

([7]) The fact that, in the past, a competitor with a similar market position as the merged entity has stopped supplying inputs may demonstrate that it is commercially rational to adopt such a strategy (see e.g. COMP/M.3225 — Alcan/Pechiney (2004), at point 40).

46. In addition, when the adoption of a specific course of conduct by the merged entity is an essential step in foreclosure, the Commission examines both the incentives to adopt such conduct and the factors liable to reduce, or even eliminate, those incentives, including the possibility that the conduct is unlawful. Conduct may be unlawful *inter alia* because of competition rules or sector-specific rules at the EU or national levels. This appraisal, however, does not require an exhaustive and detailed examination of the rules of the various legal orders which might be applicable and of the enforcement policy practised within them ([1]). Moreover, the illegality of a conduct may be likely to provide significant disincentives for the merged entity to engage in such conduct only in certain circumstances. In particular, the Commission will consider, on the basis of a summary analysis: (i) the likelihood that this conduct would be clearly, or highly probably, unlawful under Community law ([2]), (ii) the likelihood that this illegal conduct could be detected ([3]), and (iii) the penalties which could be imposed.

### C. Overall likely impact on effective competition

47. In general, a merger will raise competition concerns because of input foreclosure when it would lead to increased prices in the downstream market thereby significantly impeding effective competition.

48. First, anticompetitive foreclosure may occur when a vertical merger allows the merging parties to increase the costs of downstream rivals in the market thereby leading to an upward pressure on their sales prices. Significant harm to effective competition normally requires that the foreclosed firms play a sufficiently important role in the competitive process on the downstream market. The higher the proportion of rivals which would be foreclosed on the downstream market, the more likely the merger can be expected to result in a significant price increase in the downstream market and, therefore, to significantly impede effective competition therein ([4]). Despite a relatively small market share compared to other players, a specific firm may play a significant competitive role compared to other players ([5]), for instance because it is a close competitor of the vertically integrated firm or because it is a particularly aggressive competitor.

49. Second, effective competition may be significantly impeded by raising barriers to entry to potential competitors ([6]). A vertical merger may foreclose potential competition on the downstream market when the merged entity would be likely not to supply potential downstream entrants, or only on less favourable terms than absent the merger. The mere likelihood that the merged entity would carry out a foreclosure strategy post-merger may already create a strong deterrent effect on potential entrants ([7]). Effective competition on the downstream market may be significantly impeded by raising barriers to entry, in particular if input foreclosure would entail for such potential competitors the need to enter at both the downstream and the upstream level in order to compete effectively on either market. The concern of raising entry barriers is particularly relevant in those industries that are opening up to competition or are expected to do so in the foreseeable future ([8]).

([1]) Case C-12/03 P, *Commission v Tetra Laval BV* [2003] ECR I-000, paragraphs 74-76. Case T-210/01, *General Electric v Commission* [2005] ECR II-000, at paragraph 73.
([2]) Case T-210/01, *General Electric v Commission* [2005] ECR II-000, specifically at points 74-75 and 311-312.
([3]) For instance, in Case COMP/M.3696 — E.ON/MOL (2005), points 433 and 443-446, the Commission attached importance to the fact that the national Hungarian regulator for the gas sector indicated that in a number of settings, although it has the right to control and to force market players to act without discrimination, it would not be able to obtain adequate information on the commercial behaviour of the operators. See also Case COMP/M.3440 — EDP/ENI/GDP (2004), point 424.
([4]) See e.g. Case COMP/M.4494 — Evraz/Highveld, points 97-112.
([5]) See e.g. Case COMP/M.3440 — EDP/ENI/GDP (2004).
([6]) See e.g. Case COMP/M.4180 — Gaz de France/Suez, points 876-931, Case COMP/M.4576 — AVR/Van Gansewinkel, points 33-38.
([7]) See Case COMP/M.3696 — E.ON/MOL (2005), at point 662 *et seq*.
([8]) See paragraph 20. It is important that regulatory measures aimed at opening a market are not rendered ineffective through vertically-related incumbent companies merging and thereby closing off the market, or eliminating each other as potential entrants.

50. If there remain sufficient credible downstream competitors whose costs are not likely to be raised, for example because they are themselves vertically integrated ([1]) or they are capable of switching to adequate alternative inputs, competition from those firms may constitute a sufficient constraint on the merged entity and therefore prevent output prices from rising above pre-merger levels.

51. The effect on competition on the downstream market must also be assessed in light of countervailing factors such as the presence of buyer power ([2]) or the likelihood that entry upstream would maintain effective competition ([3]).

52. Further, the effect on competition needs to be assessed in light of efficiencies substantiated by the merging parties ([4]) The Commission 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.

53. When assessing efficiencies in the context of non-horizontal mergers, the Commission applies the principles already set out in Section VII of the Notice on Horizontal Mergers In particular, for the Commission to take account of efficiency claims in its assessment of the merger, the efficiencies have to benefit consumers, be merger-specific and be verifiable. These conditions are cumulative ([5]).

54. Vertical mergers may entail some specific sources of efficiencies, the list of which is not exhaustive.

55. In particular, a vertical merger allows the merged entity to internalise any pre-existing double mark-ups resulting from both parties setting their prices independently pre-merger ([6]). Depending on the market conditions, reducing the combined mark-up (relative to a situation where pricing decisions at both levels are not aligned) may allow the vertically integrated firm to profitably expand output on the downstream market ([7]).

56. A vertical merger may further allow the parties to better coordinate the production and distribution process, and therefore to save on inventories costs.

57. More generally, a vertical merger may align the incentives of the parties with regard to investments in new products, new production processes and in the marketing of products. For instance, whereas before the merger, a downstream distributor entity might have been reluctant to invest in advertising and informing customers about the qualities of products of the upstream entity when such investment would also have benefited the sale of other downstream firms, the merged entity may reduce such incentive problems.

---

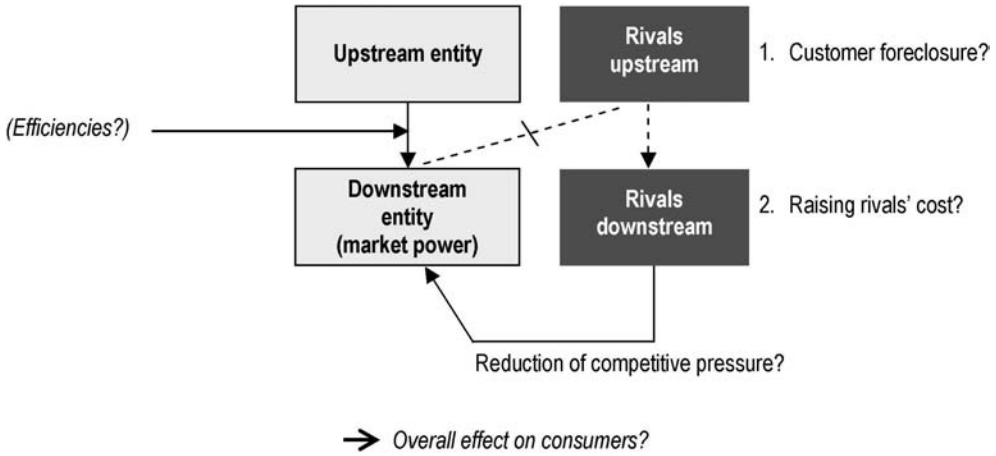
([1]) See e.g. Case COMP/M.3653 — Siemens/VA Tech (2005), at point 164.
([2]) See Section V on countervailing buyer power in the Notice on Horizontal Mergers.
([3]) See Section VI on entry in the Notice on Horizontal Mergers.
([4]) See Section VII on efficiencies in the Notice on Horizontal Mergers.
([5]) See, more specifically, paragraphs 79 to 88 of the Notice on Horizontal Mergers.
([6]) See also paragraph 13 above.
([7]) It is important to recognise, however, that the problem of double mark-ups is not always present or significant pre-merger, for instance because the merging parties had already concluded a supply agreement with a price mechanism providing for volume discounts eliminating the mark-up. The efficiencies associated with the elimination of double mark-ups may thus not always be merger specific because vertical cooperation or vertical agreements may, short of a merger, achieve similar benefits with less anti-competitive effects. In addition, a merger may not fully eliminate the double mark-up when the supply of the input is limited by capacity constraints and there is an equally profitable alternative use for the input. In such circumstances, the internal use of the input entails an opportunity cost for the vertically integrated company: using more of the input internally to increase output downstream means selling less in the alternative market. As a result, the incentive to use the input internally and increase output downstream is less than when there is no opportunity cost.

2. *Customer foreclosure*

58. Customer foreclosure may occur when a supplier integrates with an important customer in the downstream market ([1]). Because of this downstream presence, the merged entity may foreclose access to a sufficient customer base to its actual or potential rivals in the upstream market (the input market) and reduce their ability or incentive to compete. In turn, this may raise downstream rivals' costs by making it harder for them to obtain supplies of the input under similar prices and conditions as absent the merger. This may allow the merged entity profitably to establish higher prices on the downstream market. Any efficiencies resulting from the merger, however, may lead the merged entity to reduce price, so that there is overall not a negative impact on consumers. For customer foreclosure to lead to consumer harm, it is thus not necessary that the merged firm's rivals are forced to exit the market. The relevant benchmark is whether the increased input costs would lead to higher prices for consumers. A graphical presentation of this mechanism is provided in Figure 2.

*Figure 2*

**Customer foreclosure**




59. In assessing the likelihood of an anticompetitive customer foreclosure scenario, the Commission examines, first, whether the merged entity would have the ability to foreclose access to downstream markets by reducing its purchases from its upstream rivals, second, whether it would have the incentive to reduce its purchases upstream, and third, whether a foreclosure strategy would have a significant detrimental effect on consumers in the downstream market ([2]).

A. Ability to foreclose access to downstream markets

60. A vertical merger may affect upstream competitors by increasing their cost to access downstream customers or by restricting access to a significant customer base. Customer foreclosure may take various forms. For instance, the merged entity may decide to source all of its required goods or services from its upstream division and, as a result, may stop purchasing from its upstream competitors. It may also reduce its purchases from upstream rivals, or purchase from those rivals on less favourable terms than it would have done absent the merger ([3]).

([1]) See footnote 4 for the definition of 'downstream' and 'upstream'.
([2]) See e.g. Case COMP/M.4389 — WLR/BST.
([3]) For instance, in cases involving distribution, the merged entity may be less likely to grant access to its outlets under the same conditions as absent the merger.

61. When considering whether the merged entity would have the ability to foreclose access to downstream markets, the Commission examines whether there are sufficient economic alternatives in the downstream market for the upstream rivals (actual or potential) to sell their output ([1]). For customer foreclosure to be a concern, it must be the case that the vertical merger involves a company which is an important customer with a significant degree of market power in the downstream market ([2]). If, on the contrary, there is a sufficiently large customer base, at present or in the future, that is likely to turn to independent suppliers, the Commission is unlikely to raise competition concerns on that ground ([3]).

62. Customer foreclosure can lead to higher input prices in particular if there are significant economies of scale or scope in the input market or when demand is characterised by network effects ([4]). It is mainly in such circumstances that the ability to compete of upstream rivals, be they actual or potential, can be impaired.

63. For instance, customer foreclosure can lead to higher input prices when existing upstream rivals operate at or close to their minimum efficient scale. To the extent that customer foreclosure and the corresponding loss of output for the upstream rivals increases their variable costs of production, this may result in an upward pressure on the prices they charge to their customers operating in the downstream market.

64. In the presence of economies of scale or scope, customer foreclosure may also render entry upstream by potential entrants unattractive by significantly reducing the revenue prospects of potential entrants. When customer foreclosure effectively results in entry deterrence, input prices may remain at a higher level than otherwise would have been the case, thereby raising the cost of input supply to downstream competitors of the merged firm.

65. Further, when customer foreclosure primarily impacts upon the revenue streams of upstream rivals, it may significantly reduce their ability and incentive to invest in cost reduction, R & D and product quality ([5]). This may reduce their ability to compete in the long run and possibly even cause their exit from the market.

66. In its assessment, the Commission may take into account the existence of different markets corresponding to different uses for the input. If a substantial part of the downstream market is foreclosed, an upstream supplier may fail to reach efficient scale and may also operate at higher costs in the other market(s). Conversely, an upstream supplier may continue to operate efficiently if it finds other uses or secondary markets for its input without incurring significantly higher costs.

([1]) The loss of the integrated firm as a customer is normally less significant if that firm's pre-merger purchases from non-integrated firms are a small share of the available sales base for those firms. In that case, sufficient alternative customers are more likely to be available. The presence of exclusive contracts between the merged entity and other downstream firms may limit the ability of upstream rivals to reach a sufficient sales volume.

([2]) See e.g. Case COMP/M.2822 — ENBW/ENI/GVS (2002) at points 54-57.

([3]) See e.g. Case COMP/M.81 — VIAG/Continental Can (1991), point 51, see e.g. Case COMP/M.4389 — WLR/BST, points 33-35.

([4]) Economies of scale or scope exist when an increase in scale or scope of production leads to a reduction in average unit cost. Network effects occur when the value of a product for a customer increases when the number of other customers also using it increases. Examples include communication devices, specific software programmes, products requiring standardisation, and platforms bringing together buyers and sellers.

([5]) An input supplier foreclosed from an important customer may prefer to stay out of the market if it fails to reach some minimum viable scale following the investment. Such minimum viable scale may be achieved, however, if a potential entrant has access to a broader customer base including customers in other relevant markets. See Case COMP/M.1879 — Boeing/Hughes (2000); Case COMP/M.2978 — Lagardère/Natexis/VUP (2003).

67. In its assessment, the Commission will consider, on the basis of the information available, whether there are effective and timely counter-strategies, sustainable over time, that the rival firms would be likely to deploy. Such counterstrategies include the possibility that upstream rivals decide to price more aggressively to maintain sales levels in the downstream market, so as to mitigate the effect of foreclosure ([1]).

### B. Incentive to foreclose access to downstream markets

68. The incentive to foreclose depends on the degree to which it is profitable. The merged entity faces a trade-off between the possible costs associated with not procuring products from upstream rivals and the possible gains from doing so, for instance, because it allows the merged entity to raise price in the upstream or downstream markets.

69. The costs associated with reducing purchases from rival upstream suppliers are higher, when the upstream division of the integrated firm is less efficient than the foreclosed suppliers. Such costs are also higher if the upstream division of the merged firm is capacity constrained or rivals' products are more attractive due to product differentiation.

70. The incentive to engage in customer foreclosure further depends on the extent to which the upstream division of the merged entity can benefit from possibly higher price levels in the upstream market arising as a result of upstream rivals being foreclosed. The incentive to engage in customer foreclosure also becomes higher, the more the downstream division of the integrated firm can be expected to enjoy the benefits of higher price levels downstream resulting from the foreclosure strategy. In this context, the greater the market shares of the merged entity's downstream operations, the greater the base of sales on which to enjoy increased margins ([2]).

71. When the adoption of a specific conduct by the merged entity is an essential step in foreclosure, the Commission examines both the incentives to adopt such conduct and the factors liable to reduce, or even eliminate, those incentives, including the possibility that the conduct is unlawful ([3]).

### C. Overall likely impact on effective competition

72. Foreclosing rivals in the upstream market may have an adverse impact in the downstream market and harm consumers. By denying competitive access to a significant customer base for the foreclosed rivals' (upstream) products, the merger may reduce their ability to compete in the foreseeable future. As a result, rivals downstream are likely to be put at a competitive disadvantage, for example in the form of raised input costs. In turn, this may allow the merged entity to profitably raise prices or reduce the overall output on the downstream market.

---

([1]) For instance, in Case COMP/M.1879 — Boeing/Hughes (2000), point 100, it was considered, among several other factors, that in view of the high fixed costs involved, if competing satellite launch vehicle providers were to become less cost-competitive relative to the merged entity, they would try to cut prices in order to salvage volume and recoup at least part of their fixed costs rather than accept losing a contract and incur a higher loss. The most likely impact would therefore be greater price competition rather than market monopolisation.

([2]) If the vertically integrated firm partially supplies inputs to downstream competitors it may benefit from the ability to expand sales, or as the case may be, to increase input prices.

([3]) The analysis of these incentives will be conducted as set out in paragraph 46 above.

73. The negative impact on consumers may take some time to materialise when the primary impact of customer foreclosure is on the revenue streams of upstream rivals, reducing their incentives to make investments in cost reduction, product quality or in other competitive dimensions so as to remain competitive.

74. It is only when a sufficiently large fraction of upstream output is affected by the revenue decreases resulting from the vertical merger that the merger may significantly impede effective competition on the upstream market. If there remain a number of upstream competitors that are not affected, competition from those firms may be sufficient to prevent prices from rising in the upstream market and, consequently, in the downstream market. Sufficient competition from these non-foreclosed upstream firms requires that they do not face barriers to expansion e.g. through capacity constraints or product differentiation ([1]). When the reduction of competition upstream affects a significant fraction of output downstream, the merger is likely, as with input foreclosure, to result in a significant increase of the price level in the downstream market and, therefore, to significantly impede effective competition ([2]).

75. Effective competition on the upstream market may also be significantly impeded by raising barriers to entry to potential competitors. This may be so in particular if customer foreclosure would entail for such potential competitors the need to enter at both the downstream and the upstream level in order to compete effectively on either market. In such a context, customer foreclosure and input foreclosure may thus be part of the same strategy. The concern of raising entry barriers is particularly relevant in those industries that are opening up to competition or are expected to do so in the foreseeable future ([3]).

76. The effect on competition must be assessed in light of countervailing factors such as the presence of countervailing buyer power ([4]) or the likelihood that entry would maintain effective competition in the upstream or downstream markets ([5]).

77. Further, the effect on competition needs to be assessed in light of efficiencies substantiated by the merging parties ([6]).

### B. **Other non-coordinated effects**

78. The merged entity may, by vertically integrating, gain access to commercially sensitive information regarding the upstream or downstream activities of rivals ([7]). For instance, by becoming the supplier of a downstream competitor, a company may obtain critical information, which allows it to price less aggressively in the downstream market to the detriment of consumers ([8]). It may also put competitors at a competitive disadvantage, thereby dissuading them to enter or expand in the market.

([1]) The analysis of such non-coordinated effects bears similarities with the analysis of non-coordinated effects in horizontal mergers (see Section IV of the Notice on Horizontal Mergers).
([2]) See paragraph 47-50 of the present Notice.
([3]) It is important that regulatory measures aimed at opening a market are not rendered ineffective through vertically-related incumbent companies merging and thereby closing off the market, or eliminating each other as potential entrants.
([4]) See Section V on countervailing buyer power in the Notice on Horizontal Mergers.
([5]) See Section VI on entry in the Notice on Horizontal Mergers.
([6]) For the assessment of efficiencies in a vertical context, see Section V.A.1 above.
([7]) See Case COMP/M.1879 — Boeing/Hughes (2000); Case COMP/M.2510 — Cendant/Galileo, point 37; Case COMP/M.2738 — Gees/Unison, point 21; Case COMP/M.2925 — Charterhouse/CDC/Telediffusion de France, point 37-38; Case COMP/M.3440 — EDP/ENL/GDP (2004).
([8]) See e.g. Case COMP/M.2822 — ENBW/ENI/GVS (2002), at point 56; Case COMP/M.3440 — EDP/ENI/GDP (2004), points 368-379; Case COMP/M.3653 — Siemens/VA Tech (2005) points 159-164.

## C. **Coordinated effects**

79. As set out in Section IV of the Notice on Horizontal Mergers, a merger may change 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 ([1]).

80. Market coordination may arise where competitors are able, without entering into an agreement or resorting to a concerted practice within the meaning of Article 81 of the Treaty, to identify and pursue common objectives, avoiding the normal mutual competitive pressure by a coherent system of implicit threats. In a normal competitive setting, each firm constantly has an incentive to compete. This incentive is ultimately what keeps prices low, and what prevents firms from jointly maximising their profits. Coordination involves a departure from normal competitive conditions in that firms are able to sustain prices in excess of what independent short term profit maximisation would yield. Firms will refrain from undercutting the high prices charged by their competitors in a coordinated way because they anticipate that such behaviour would jeopardise coordination in the future. For coordinated effects to arise, the profit that firms could make by competing aggressively in the short term ('deviating') has to be less than the expected reduction in revenues that this behaviour would entail in the longer term, as it would be expected to trigger an aggressive response by competitors ('a punishment').

81. 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 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 ([2]).

*Reaching terms of coordination*

82. A vertical merger may make it easier for the firms in the upstream or downstream market to reach a common understanding on the terms of coordination ([3]).

83. For instance, when a vertical merger leads to foreclosure ([4]), it results in a reduction in the number of effective competitors in the market. Generally speaking, a reduction in the number of players makes it easier to coordinate among the remaining market players.

84. Vertical mergers may also increase the degree of symmetry between firms active in the market ([5]). This may increase the likelihood of coordination by making it easier to reach a common understanding on the terms of coordination. Likewise, vertical integration may increase the level of market transparency, making it easier to coordinate among the remaining market players.

85. Further, a merger may involve the elimination of a maverick in a market. A maverick is a supplier that for its own reasons is unwilling to accept the co-ordinated outcome and thus maintains aggressive competition. The vertical integration of the maverick may alter its incentives to such an extent that co-ordination will no longer be prevented.

([1]) See Case COMP/M.3101 — Accor/Hilton/Six Continents, points 23-28.
([2]) See Case T-342/99, *Airtours v Commission* [2002] ECR II-2585, paragraph 62.
([3]) See e.g. Case COMP/M.3314 — Air Liquide/Messer Targets, points 91-100.
([4]) Foreclosure would have to be shown by the Commission along the lines of Part A of this Section.
([5]) See Case COMP/M.2389 — Shell/DEA; Case COMP/M.2533 — BP/EON. Alternatively, vertical integration may also decrease the degree of symmetry between firms active in the market, rendering coordination more difficult.

*Monitoring deviations*

86. Vertical integration may facilitate coordination by increasing the level of market transparency between firms through access to sensitive information on rivals or by making it easier to monitor pricing. Such concerns may arise, for example, if the level of price transparency is higher downstream than upstream. This could be the case when prices to final consumers are public, while transactions at the intermediate market are confidential. Vertical integration may give upstream producers control over final prices and thus monitor deviations more effectively.

87. When it leads to foreclosure, a vertical merger may also induce a reduction in the number of effective competitors in a market. A reduction in the number of players may make it easier to monitor each other's actions in the market.

*Deterrent mechanisms*

88. Vertical mergers may affect coordinating firms' incentives to adhere to the terms of coordination. For instance, a vertically integrated company may be in a position to more effectively punish rival companies when they choose to deviate from the terms of coordination, because it is either a crucial customer or supplier to them ([1]).

*Reactions of outsiders*

89. Vertical mergers may reduce the scope for outsiders to destabilise the coordination by increasing barriers to enter the market or otherwise limiting the ability to compete on the part of outsiders to the coordination.

90. A vertical merger may also involve the elimination of a disruptive buyer in a market. If upstream firms view sales to a particular buyer as sufficiently important, they may be tempted to deviate from the terms of co-ordination in an effort to secure their business. Similarly, a large buyer may be able to tempt the co-ordinating firms to deviate from these terms by concentrating a large amount of its requirements on one supplier or by offering long term contracts. The acquisition of such a buyer may increase the risk of co-ordination in a market.

## V. **CONGLOMERATE MERGERS**

91. Conglomerate mergers are mergers between firms that are in a relationship which is neither purely horizontal (as competitors in the same relevant market) nor vertical (as supplier and customer). In practice, the focus is on mergers between companies that are active in closely related markets ([2]) (e.g. mergers involving suppliers of complementary products or of products which belong to a range of products that is generally purchased by the same set of customers for the same end use).

92. Whereas it is acknowledged that conglomerate mergers in the majority of circumstances will not lead to any competition problems, in certain specific cases there may be harm to competition. In its assessment, the Commission will consider both the possible anti-competitive effects arising from conglomerate mergers and the possible pro-competitive effects stemming from efficiencies substantiated by the parties.

([1]) For instance, in a case that was subsequently withdrawn (Case COMP/M.2322 — CRH/Addtek (2001)) the merger involved an upstream dominant supplier of cement and a downstream producer or pre-cast concrete products, both active in Finland. The Commission provisionally took the view in the administrative procedure that the new entity would be able to discipline the downstream rivals by using the fact that they would be highly dependent on cement supplies of the merged entity. As a result, the downstream entity would be able to increase the price of its pre-cast concrete products while making sure that the competitors would follow these price increases and avoiding that they turn to cement imports from the Baltic States and Russia.

([2]) See also Form CO, Section IV, 6.3(c).

A. **Non-coordinated effects: foreclosure**

93. The main concern in the context of conglomerate mergers is that of foreclosure. The combination of products in related markets may confer on the merged entity the ability and incentive to leverage ([1]) a strong market position from one market to another by means of tying or bundling or other exclusionary practices ([2]). Tying and bundling as such are common practices that often have no anticompetitive consequences. Companies engage in tying and bundling in order to provide their customers with better products or offerings in cost-effective ways. Nevertheless, in certain circumstances, these practices may lead to a reduction in actual or potential rivals' ability or incentive to compete. This may reduce the competitive pressure on the merged entity allowing it to increase prices.

94. In assessing the likelihood of such a scenario, the Commission examines, first, whether the merged firm would have the ability to foreclose its rivals, second, whether it would have the economic incentive to do so and, third, whether a foreclosure strategy would have a significant detrimental effect on competition, thus causing harm to consumers ([3]). In practice, these factors are often examined together as they are closely intertwined.

A. *Ability to foreclose*

95. The most immediate way in which the merged entity may be able to use its market power in one market to foreclose competitors in another is by conditioning sales in a way that links the products in the separate markets together. This is done most directly either by tying or bundling.

96. 'Bundling' usually refers to the way products are offered and priced by the merged entity. One can distinguish in this respect between pure bundling and mixed bundling. In the case of pure bundling the products are only sold jointly in fixed proportions. With mixed bundling the products are also available separately, but the sum of the stand-alone prices is higher than the bundled price ([4]). Rebates, when made dependent on the purchase of other goods, may be considered a form of mixed bundling.

97. 'Tying' usually refers to situations where customers that purchase one good (the tying good) are required to also purchase another good from the producer (the tied good). Tying can take place on a technical or contractual basis. For instance, technical tying occurs when the tying product is designed in such a way that it only works with the tied product (and not with the alternatives offered by competitors). Contractual tying entails that the customer when purchasing the tying good undertakes only to purchase the tied product (and not the alternatives offered by competitors).

98. The specific characteristics of the products may be relevant for determining whether any of these means of linking sales between separate markets are available to the merged entity. For instance, pure bundling is very unlikely to be possible if products are not bought simultaneously or by the same customers ([5]). Similarly, technical tying is only an option in certain industries.

99. In order to be able to foreclose competitors, the new entity must have a significant degree of market power, which does not necessarily amount to dominance, in one of the markets concerned. The effects of bundling or tying can only be expected to be substantial when at least one of the merging

([1]) There is no received definition of 'leveraging' but, in a neutral sense, it implies being able to increase sales of a product in one market (the 'tied market' or 'bundled market'), by virtue of the strong market position of the product to which it is tied or bundled (the 'tying market' or 'leveraging market').
([2]) These concepts are defined further below.
([3]) See Case T-210/01, *General Electric v Commission* [2005] ECR II-000, paragraphs 327, 362-363, 405; Case COMP/M.3304 — GE/Amersham (2004), point 37, and Case COMP/M.4561 — GE/Smiths Aerospace, points 116-126.
([4]) The distinction between mixed bundling and pure bundling is not necessarily clear-cut. Mixed bundling may come close to pure bundling when the prices charged for the individual offerings are high.
([5]) See e.g. Case COMP/M.3304 — GE/Amersham (2004), point 35.

parties' products is viewed by many customers as particularly important and there are few relevant alternatives for that product, e.g. because of product differentiation ([1]) or capacity constraints on the part of rivals.

100. Further, for foreclosure to be a potential concern it must be the case that there is a large common pool of customers for the individual products concerned. The more customers tend to buy both products (instead of only one of the products), the more demand for the individual products may be affected through bundling or tying. Such a correspondence in purchasing behaviour is more likely to be significant when the products in question are complementary.

101. Generally speaking, the foreclosure effects of bundling and tying are likely to be more pronounced in industries where there are economies of scale and the demand pattern at any given point in time has dynamic implications for the conditions of supply in the market in the future. Notably, where a supplier of complementary goods has market power in one of the products (product A), the decision to bundle or tie may result in reduced sales by the non-integrated suppliers of the complementary good (product B). If further there are network externalities at play ([2]) this will significantly reduce these rivals' scope for expanding sales of product B in the future. Alternatively, where entry into the market for the complementary product is contemplated by potential entrants, the decision to bundle by the merged entity may have the effect of deterring such entry. The limited availability of complementary products with which to combine may, in turn, discourage potential entrants to enter market A.

102. It can also be noted that the scope for foreclosure tends to be smaller where the merging parties cannot commit to making their tying or bundling strategy a lasting one, for example through technical tying or bundling which is costly to reverse.

103. In its assessment, the Commission considers, on the basis of the information available, whether there are effective and timely counter-strategies that the rival firms may deploy. One such example is when a strategy of bundling would be defeated by single-product companies combining their offers so as to make them more attractive to customers ([3]). Bundling is further less likely to lead to foreclosure if a company in the market would purchase the bundled products and profitably resell them unbundled. In addition, rivals may decide to price more aggressively to maintain market share, mitigating the effect of foreclosure ([4]).

104. Customers may have a strong incentive to buy the range of products concerned from a single source (one-stop-shopping) rather than from many suppliers, e.g. because it saves on transaction costs.The fact that the merged entity will have a broad range or portfolio of products does not, as such, raise competition concerns ([5]).

B. *Incentive to foreclose*

105. The incentive to foreclose rivals through bundling or tying depends on the degree to which this strategy is profitable. The merged entity faces a trade-off between the possible costs associated with bundling or tying its products and the possible gains from expanding market shares in the market(s) concerned or, as the case may be, being able to raise price in those market(s) due to its market power.

([1]) For instance, in the context of branded products, particularly important products are sometimes referred to as 'must stock' products. See e.g. Case COMP/M.3732 — Procter&Gamble/Gillette (2005), point 110.

([2]) When a product features network externalities, this means that customers or producers derive benefit from the fact that other customers or producers are using the same products as well. Examples include communication devices, specific software programmes, products requiring standardisation, and platforms bringing together buyers and sellers.

([3]) See e.g. Case COMP/M.3304 — GE/Amersham (2004), point 39.

([4]) See e.g. Case COMP/M.1879 — Boeing/Hughes (2000), point 100; Case COMP/M.3304 — GE/Amersham (2004), point 39. The resulting loss of revenues may, however, in certain circumstances, have an impact on the ability of rivals to compete. See Section C.

([5]) See e.g. Case COMP/M.2608 — INA/FAG, point 34.

106. Pure bundling and tying may entail losses for the merged company itself. For instance, if a significant number of customers are not interested in buying the bundle, but instead prefers to buy only one product (e.g. the product used to leverage), sales of that product (as contained in the bundle) may significantly fall. Furthermore, losses on the leveraging product may arise where customers who, before the merger, used to 'mix and match' the leveraging product of a merging party with the product of another company, decide to purchase the bundle offered by rivals or no longer to purchase at all ([1]).

107. In this context it may thus be relevant to assess the relative value of the different products. By way of example, it is unlikely that the merged entity would be willing to forego sales on one highly profitable market in order to gain market shares on another market where turnover is relatively small and profits are modest.

108. However, the decision to bundle and tie may also increase profits by gaining market power in the tied goods market, protecting market power in the tying goods market, or a combination of the two (see Section C below).

109. In its assessment of the likely incentives of the merged firm, the Commission may take into account other factors such as the ownership structure of the merged entity ([2]), the type of strategies adopted on the market in the past or the content of internal strategic documents such as business plans.

110. When the adoption of a specific conduct by the merged entity is an essential step in foreclosure, the Commission examines both the incentives to adopt such conduct and the factors liable to reduce, or even eliminate, those incentives, including the possibility that the conduct is unlawful ([3]).

C. *Overall likely impact on prices and choice*

111. Bundling or tying may result in a significant reduction of sales prospects faced by single-component rivals in the market. The reduction in sales by competitors is not in and of itself a problem. Yet, in particular industries, if this reduction is significant enough, it may lead to a reduction in rivals' ability or incentive to compete. This may allow the merged entity to subsequently acquire market power (in the market for the tied or bundled good) and/or to maintain market power (in the market for the tying or leveraging good).

112. In particular, foreclosure practices may deter entry by potential competitors. They may do so for a specific market by reducing sales prospects for potential rivals in that market to a level below minimum viable scale. In the case of complementary products, deterring entry in one market through bundling or tying may also allow the merged entity to deter entry in another market if the bundling or tying forces potential competitors to enter both product markets at the same time rather than entering only one of them or entering them sequentially. The latter may have a significant impact in particular in those industries where the demand pattern at any given point in time has dynamic implications for the conditions of supply in the market in the future.

113. It is only when a sufficiently large fraction of market output is affected by foreclosure resulting from the merger that the merger may significantly impede effective competition. If there remain effective single-product players in either market, competition is unlikely to deteriorate following a conglomerate merger. The same holds when few single-product rivals remain, but these have the ability and incentive to expand output.

([1]) See e.g. Case COMP/M.3304 — GE/Amersham (2004), point 59.
([2]) For instance, in cases where two companies have joint control over a firm active in one market, and only one of them is active on the neighbouring market, the company without activities on the latter market may have little interest in foregoing sales in the former market. See e.g. Case T-210/01, *General Electric v Commission* [2005] ECR II-000, paragraph 385 and Case COMP/M.4561 — GE/Smiths Aerospace, point 119.
([3]) The analysis of these incentives will be conducted as set out in paragraph 46 above.

114. The effect on competition needs to be assessed in light of countervailing factors such as the presence of countervailing buyer power ([1]) or the likelihood that entry would maintain effective competition in the upstream or downstream markets ([2]).

115. Further, the effect on competition needs to be assessed in light of the efficiencies substantiated by the merging parties ([3]).

116. Many of the efficiencies identified in the context of vertical mergers may, mutatis mutandis, also apply to conglomerate mergers involving complementary products.

117. Notably, when producers of complementary goods are pricing independently, they will not take into account the positive effect of a drop in the price of their product on the sales of the other product. Depending on the market conditions, a merged firm may internalise this effect and may have a certain incentive to lower margins if this leads to higher overall profits (this incentive is often referred to as the 'Cournot effect'). In most cases, the merged firm will make the most out of this effect by means of mixed bundling, i.e. by making the price drop conditional upon whether or not the customer buys both products from the merged entity ([4]).

118. Specific to conglomerate mergers is that they may produce cost savings in the form of economies of scope (either on the production or the consumption side), yielding an inherent advantage to supplying the goods together rather than apart ([5]). For instance, it may be more efficient that certain components are marketed together as a bundle rather than separately. Value enhancements for the customer can result from better compatibility and quality assurance of complementary components. Such economies of scope however are necessary but not sufficient to provide an efficiency justification for bundling or tying. Indeed, benefits from economies of scope frequently can be realised without any need for technical or contractual bundling.

### B. **Co-ordinated effects**

119. Conglomerate mergers may in certain circumstances facilitate anticompetitive co-ordination in markets, even in the absence of an agreement or a concerted practice within the meaning of Article 81 of the Treaty. The framework set out in Section IV of the Notice on Horizontal Mergers also applies in this context. In particular, co-ordination is more likely to emerge in markets where it is fairly easy to identify the terms of co-ordination and where such co-ordination is sustainable.

120. One way in which a conglomerate merger may influence the likelihood of a coordinated outcome in a given market is by reducing the number of effective competitors to such an extent that tacit coordination becomes a real possibility. Also when rivals are not excluded from the market, they may find themselves in a more vulnerable situation. As a result, foreclosed rivals may choose not to contest the situation of co-ordination, but may prefer instead to live under the shelter of the increased price level.

121. Further, a conglomerate merger may increase the extent and importance of multi-market competition. Competitive interaction on several markets may increase the scope and effectiveness of disciplining mechanisms in ensuring that the terms of co-ordination are being adhered to.

---

([1]) See Section V on countervailing buyer power in the Notice on Horizontal Mergers.
([2]) See e.g. Case COMP/M.3732 — Procter&Gamble/Gillette (2005), point 131. See also Section VI on entry in the Notice on Horizontal Mergers.
([3]) See Section VII on efficiencies in the Notice on Horizontal Mergers.
([4]) It is important to recognise however that the problem of double mark-ups is not always present or significant pre-merger. In the context of mixed bundling, it must further be noted that while the merged entity may have an incentive to reduce the price for the bundle, the effect on the prices of the individual products is less clear cut. The incentive for the merged entity to raise its single product prices may come from the fact that it counts on selling more bundled products instead. The merged entity's bundle price and prices of the individually sold products (if any) will further depend on the price reactions of rivals in the market.
([5]) See e.g. Case COMP/M.3732 — Procter&Gamble/Gillette (2005), point 131.

II

*(Information)*

# INFORMATION FROM EUROPEAN UNION INSTITUTIONS AND BODIES

# COMMISSION

## Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004

**(Text with EEA relevance)**

(2008/C 267/01)

### I. INTRODUCTION

1. Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [1] (hereinafter referred to as 'the Merger Regulation') in Articles 6(2) and 8(2) expressly provides that the Commission may decide to declare a concentration compatible with the common market following modification by the parties [2], both before and after the initiation of proceedings. To that end, 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 [3].

2. The purpose of this Notice is to provide guidance on modifications to concentrations, in particular commitments by the undertakings concerned to modify a concentration. Such modifications are more commonly described as 'remedies' since their object is to eliminate the competition concerns [4] identified by the Commission. 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 revision of the Commission's 2001 Notice on remedies [5] is entailed by the entry into force of the recast Merger Regulation (EC) No 139/2004 [6]

(1) OJ L 24, 29.1.2004, p. 1-22.
(2) The references to 'parties' and 'merging parties' also cover situations with one notifying party.
(3) Articles 6(2) and 8(2), second subparagraphs respectively. See also Recital 30 of the Merger Regulation which states that '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'. Recital 30 further explains that 'it is also appropriate to accept commitments before the initiation of proceedings where the competition problem is readily identifiable and can easily be remedied'.
(4) Save where the contrary is indicated, in the following, the term 'competition concerns' corresponds, according to the stage of the procedure, to serious doubts or preliminary findings that the concentration is likely to 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.
(5) Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98 (OJ C 68, 2.3.2001, p. 3).
(6) Regulation replacing Council Regulation (EEC) No 4064/89 (OJ L 395, 30.12.1989, corrected version in OJ L 257, 21.9.1990, p. 13.

and of Commission Regulation (EC) No 802/2004 (the 'Implementing Regulation') ([1]) on 1 May 2004, case-law of the Court of Justice and the Court of First Instance, the conclusions drawn from the systematic *ex post* review of the Commission of past remedies case ([2]), and decisional practice of the Commission in cases involving remedies in recent years. The principles contained herein will be applied and further developed and refined by the Commission in individual cases. The guidance provided in this Notice 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 may be 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. In any case, the Commission will take due account of the particular circumstances of the individual case.

## 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 ([3]). The test for compatibility under Article 2(2) and (3) of the Merger Regulation is whether or not a concentration would significantly impede effective competition in the common market or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position. A concentration that significantly impedes effective competition as described above is incompatible with the common market and the Commission is required to prohibit it. For the creation of a joint venture, the Commission will also examine the concentration under Article 2(4) of the Merger Regulation. The principles set out in this Notice will generally also apply to remedies submitted to eliminate competition concerns identified under Article 2(4).

5. Where a concentration raises competition concerns in that it could significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position, the parties may seek to modify the concentration in order to resolve the competition concerns and thereby gain clearance of their merger. Such modifications may be fully 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 and that those commitments are implemented following clearance.

6. Under the structure of the Merger Regulation, it is the responsibility of the Commission to show that a concentration would significantly impede competition ([4]). The Commission communicates its competition concerns to the parties to allow them to formulate appropriate and corresponding remedies proposals ([5]). It is then for the parties to the concentration to put forward commitments; the Commission is not in a position to impose unilaterally any conditions to an authorisation decision, but only on the basis of the parties' commitments ([6]). The Commission will inform the parties about

([1]) Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ L 133, 30.4.2004, p. 1). This Regulation replaces Commission Regulation (EC) No 447/98 implementing Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (OJ L 61, 2.3.1998, p. 1).

([2]) DG COMP, Merger Remedies Study, October 2005.

([3]) Recital 6 of the Merger Regulation.

([4]) In phase I and before the issuance of a Statement of Objections, this corresponds to *serious doubts* as to the significant impediment to effective competition.

([5]) The Merger Regulation provides for formal steps where the parties are informed of the competition concerns identified by the Commission (Article 6(1)(c) decision, Statement of Objections). In addition, the DG COMPETITION Best Practices on the conduct of EC merger control proceedings foresee that 'state of play' meetings will normally be offered at key stages of the procedure where the Commission will explain its concerns to the parties in order to allow them to respond with remedies proposals.

([6]) Judgment of the CFI in Case T-210/01 *General Electric v Commission* [2005] ECR II-5575, paragraph 52; see judgment of the CFI in Case T-87/05 *EDP v Commission* [2005] ECR II-3745, paragraph 105.

its preliminary assessment of remedies proposals. If, however, the parties do not validly propose remedies adequate to eliminate the competition concerns, the only option for the Commission will be to adopt a prohibition decision ([1]).

7. The Commission has to assess whether the proposed remedies, once implemented, would eliminate the competition concerns identified. Only the parties have all the relevant information necessary for such an assessment, in particular as to the feasibility of the commitments proposed and the viability and competitiveness of the assets proposed for divestiture. It is therefore the responsibility of the parties to provide all such information available that is necessary for the Commission's assessment of the remedies proposal. To this end, the Implementing Regulation obliges the notifying parties to provide, with the commitments, detailed information on the content of the commitments offered, the conditions for their implementation and showing their suitability to remove any significant impediment of effective competition, as set out in the annex to the Implementing Regulation ('Form RM'). For commitments consisting in the divestiture of a business, parties have to describe in detail in particular how the business to be divested is currently operated. This information will enable the Commission to assess the viability, competitiveness and marketability of the business by comparing its current operation to its proposed scope under the commitments. The Commission can adapt the precise requirements to the information necessary in the individual case at hand and will be available to discuss the scope of the information required with the parties in advance of submission of Form RM.

8. Whereas the parties have to propose commitments sufficient to remove the competition concerns and submit the necessary information to assess them, it is for the Commission to establish whether or not a concentration, as modified by commitments validly submitted, must be declared incompatible with the common market because it leads, despite the commitments, to a significant impediment of effective competition. The burden of proof for a prohibition or authorisation of a concentration modified by commitments is therefore subject to the same criteria as an unmodified concentration ([2]).

*Basic conditions for acceptable commitments*

9. Under the Merger Regulation, the Commission only has power to accept commitments that are deemed capable of rendering the concentration compatible with the common market so that they will prevent a significant impediment of effective competition. The commitments have to eliminate the competition concerns entirely ([3]) and have to be comprehensive and effective from all points of view ([4]). Furthermore, commitments must be capable of being implemented effectively within a short period of time as the conditions of competition on the market will not be maintained until the commitments have been fulfilled.

10. Structural commitments, in particular divestitures, proposed by the parties will meet these conditions only in so far as the Commission is able to conclude with the requisite degree of certainty that it will be possible to implement them and that it will be likely that the new commercial structures resulting from them will be sufficiently workable and lasting to ensure that the significant impediment to effective competition will not materialise ([5]).

11. The requisite degree of certainty concerning the implementation of the proposed commitments may in particular be affected by risks in relation to the transfer of a business to be divested, such as conditions attached by the parties to the divestiture, third party rights in relation to the business or the

([1]) See Case COMP/M.2220 — GE/Honeywell of 3 July 2001, confirmed by judgment of the CFI in Case T-210/01 *General Electric v Commission* [2005] ECR II-5575, paragraph 555 *et seq*., 612 *et seq*.; Case COMP/M.3440 — EDP/ENI/GDP of 9 December 2004, confirmed by judgment of the CFI in Case T-87/05 *EDP v Commission* [2005] ECR II-3745, paragraphs 63 *et seq*., 75 *et seq*.; Case IV/M.469 — MSG Media Service of 9 November 1994; Case IV/M.490 — Nordic Satellite Distribution of 19 July 1995; Case IV/M.553 — RTL/Veronica/Endemol of 20 September 1995; Case IV/M.993 — Bertelsmann/Kirch/Prèmiere of 27 May 1998; Case IV/M.1027 — Deutsche Telekom BetaResearch of 27 May 1998; Case IV/M.774 — St Gobain/Wacker Chemie of 4 December 1996; Case IV/M.53 — Aerospatiale/Alenia/De Havilland of 2 October 1991; Case IV/M.619 — Gencor/Lonrho of 24 April 1996, confirmed by judgment of the CFI in Case T-102/96 *Gencor v Commission* [1999] ECR II-753.

([2]) See judgment of the CFI in Case T-87/05 *EDP v Commission* [2005] ECR II-3745, paragraphs 62 ff.

([3]) See recital 30 of the Merger Regulation and judgment of the CFI in Case T-282/02 *Cementbouw v Commission* [2006] ECR II-319, paragraph 307.

([4]) CFI, Case T-210/01 *General Electrics v Commission* [2005] ECR II-5575, paragraph 52; Case T-87/05 *EDP v Commission* [2005] ECR II-3745, paragraph 105.

([5]) CFI, Case T-210/01 *General Electric v Commission* [2005] ECR II-5575, paragraphs 555, 612.

risks of finding a suitable purchaser, as well as risks in relation to the degradation of the assets until the divestiture has taken place. It is incumbent on the parties to remove such uncertainties as to the implementation of the remedy when submitting it to the Commission ([1]).

12. In assessing the second condition, whether the proposed commitment will likely eliminate the competition concerns identified, the Commission will consider all relevant factors relating to the proposed remedy itself, including, *inter alia*, the type, scale and scope of the remedy proposed, judged by reference to the structure and particular characteristics of the market in which the competition concerns arise, including the position of the parties and other players on the market.

13. In order for the commitments to comply with these principles, there has to be an effective implementation and ability to monitor the commitments ([2]). Whereas divestitures, once implemented, do not require any further monitoring measures, other types of commitments require effective monitoring mechanisms in order to ensure that their effect is not reduced or even eliminated by the parties. Otherwise, such commitments would have to be considered as mere declarations of intention by the parties and would not amount to binding obligations, as, due to the lack of effective monitoring mechanisms, any breach of them could not result in the revocation of the decision according to the provisions of the Merger Regulation ([3]).

14. Where, however, the parties submit remedies proposals that are so extensive and complex that it is not possible for the Commission to determine with the requisite degree of certainty, at the time of its decision, that they will be fully implemented and that they are likely to maintain effective competition in the market, an authorisation decision cannot be granted ([4]). The Commission may reject such remedies in particular on the grounds that the implementation of the remedies cannot be effectively monitored and that the lack of effective monitoring diminishes, or even eliminates, the effect of the commitments proposed.

*Appropriateness of different types of remedies*

15. According to the case law of the Court, the basic aim of commitments is to ensure competitive market structures ([5]). Accordingly, commitments which are structural in nature, such as the commitment to sell a business unit, are, as a rule, preferable from the point of view of the Merger Regulation's objective, inasmuch as such commitments prevent, durably, the competition concerns which would be raised by the merger as notified, and do not, moreover, require medium or long-term monitoring measures. Nevertheless, the possibility cannot automatically be ruled out that other types of commitments may also be capable of preventing the significant impediment of effective competition ([6]).

16. The Commission stresses that the question of whether a remedy and, more specifically, which type of remedy is suitable to eliminate the competition concerns identified, has to be examined on a case-by-case basis.

17. Nevertheless, a general distinction can be made between divestitures, other structural remedies, such as granting access to key infrastructure or inputs on non-discriminatory terms, and commitments relating to the future behaviour of the merged entity. Divestiture commitments are the best way to eliminate competition concerns resulting from horizontal overlaps, and may also be the best means of resolving

([1]) Depending on the nature of the risks, specific safeguards may aim at compensating for them. For example, the risk arising from third party rights in relation to the assets to be divested may be compensated by the proposal of an alternative divestiture. Such safeguards will be discussed in more detail below.

([2]) CFI, Case T-177/04 *easyJet v Commission* [2006] ECR II-1931, paragraph 188.

([3]) CFI, Case T-177/04 *easyJet v Commission* [2006] ECR II-1931, paragraph 186 *et seq.*; CFI, judgment in Case T-87/05 *EDP v Commission* [2005] ECR II-3745, paragraph 72.

([4]) See, as an example for such a complex and inappropriate remedy, Case COMP/M.3440 — ENI/EDP/GDP of 9 December 2004; confirmed by CFI, judgment in Case T-87/05 *EDP v Commission* [2005] ECR II-3745, paragraph 102; Case COMP/M.1672 — Volvo/Scania of 15 March 2000.

([5]) See recital 8 of the Merger Regulation; judgment of CFI in Case T-102/96 *Gencor v Commission* [1999] ECR II-753, at paragraph 316; ECJ in Case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-987, paragraph 86; judgment of CFI in Case T-158/00 *ARD v Commission* [2003] ECR II-3825, at paragraphs 192 *et seq.*

([6]) ECJ, judgment in Case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-987, paragraph 86; CFI, judgment of 25 March 1999 in Case T-102/96 *Gencor v Commission* [1999] ECR II-753, paragraphs 319 *et seq.*; CFI, judgment of 30 September 2003 in Case T-158/00 *ARD v Commission* [2003] ECR II-3825, paragraph 193; CFI in Case T-177/04 *easyJet v Commission* [2006] ECR II-1931, paragraph 182; CFI, judgment in Case T-87/05 *EDP v Commission* [2005] ECR II-3745, paragraph 101.

problems resulting from vertical or conglomerate concerns ([1]). Other structural commitments may be suitable to resolve all types of concerns if those remedies are equivalent to divestitures in their effects, as explained in more detail below in paragraphs 61 *et seq*. Commitments relating to the future behaviour of the merged entity may be acceptable only exceptionally in very specific circumstances ([2]). In particular, commitments in the form of undertakings not to raise prices, to reduce product ranges or to remove brands, etc., will generally not eliminate competition concerns resulting from horizontal overlaps. In any case, those types of remedies can only exceptionally be accepted if their workability is fully ensured by effective implementation and monitoring in line with the considerations set out in paragraphs 13-14, 66, 69, and if they do not risk leading to distorting effects on competition ([3]).

*Procedure*

18. The Commission may accept commitments in either phase of the procedure ([4]). 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 ([5]). Pursuant to Article 10(2) of the Merger Regulation, the Commission has to take a clearance decision as soon as the serious doubts referred to in Article 6(1)(c) of the Merger Regulation are removed as a result of commitments submitted by the parties. This rule applies to commitments proposed in phase II-proceedings before the Commission issues a Statement of Objections ([6]). If the Commission reaches the preliminary view that the merger leads to a significant impediment to effective competition and issues a Statement of Objections, the commitments must be sufficient to eliminate such a significant impediment to effective competition.

19. Whilst commitments have to be offered by the parties, the Commission will ensure the enforceability of commitments by making the authorisation of the merger subject to compliance with the commitments. A distinction must be made between conditions and obligations. The requirement for achievement of 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.

20. 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(6), respectively. In case of a breach of an obligation, the parties may also be subject to fines and periodic penalty payments as provided in Article 14(2)(d) and 15(1)(c) respectively of the Merger Regulation. Where, however, a condition is breached, e.g. a business is not divested in the time-frame foreseen in the commitments or afterwards re-acquired, the compatibility decision is no longer applicable. In such circumstances, the Commission may, first, take interim measures appropriate to maintain conditions of effective competition pursuant to Article 8(5)(b) of the Merger Regulation. Second, it may, if the conditions of Article 8(4)(b) are met, order any appropriate measure to ensure that the undertakings concerned dissolve the concentration or take other restorative measures or, according to Article 8(7), take a decision pursuant to Article 8(1)-(3). In addition, the parties may also be subject to fines as provided in Article 14(2)(d).

([1]) See divestiture of storage facilities in Case COMP/M.3868 — DONG/Elsam/Energi E2 of 14 March 2006, paragraphs 170 *et seq*.; Case COMP/M.3696 — E.ON/MOL of 21 December 2005, paragraphs 735 *et seq*., for an example of 'ownership unbundling' to eliminate structural links between the parties in the gas storage sector; further Case COMP/M.4314 — Johnson&Johnson/Pfizer of 11 December 2006, Case COMP/M.4494 — Evraz/Highveld of 20 February 2007.

([2]) See, in relation to conglomerate effects of a concentration, ECJ, judgment of 15 February 2005 in Case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-987, paragraphs 85, 89.

([3]) For example, commitments regarding a certain pricing behaviour such as price caps which contain the risk to lead to an anticompetitive alignment of prices among competitors.

([4]) As foreseen in recital 30 of the Merger Regulation, the Commission will ensure transparency and effective consultation of Member States in both phases of the procedure.

([5]) Commitments in phase I can only be accepted in certain types of situations; see below in paragraph 81.

([6]) See, *inter alia*, Case COMP/M.2972 — DSM/Roche Vitamins of 23 July 2003; Case COMP/M.2861 — Siemens/Drägerwerk/JV of 30 April 2003; Case IV/JV.15 — BT/AT & T of 30 March 1999; Case IV/M.1532 — BP Amoco/Arco of 29 September 1999.

*Model Texts for divestiture commitments*

21. The Commission services have issued Best Practice Guidelines for divestiture commitments, consisting of a Model Text for Divestiture Commitments and a Model Text for Trustee Mandates ([1]). These model texts 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. They complement the present Notice as they outline the typical arrangements for divestiture commitments in a format which can be used by the parties. At the same time, the model texts leave the flexibility to adapt them to the requirements of the specific case.

## III. DIFFERENT TYPES OF REMEDIES

### 1. Divestiture of a business to a suitable purchaser

22. Where a proposed concentration threatens to significantly impede effective competition the most effective way to maintain 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 by the merging parties.

#### 1.1. *Divestiture of a viable and competitive business*

23. 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 and that is divested as a going concern ([2]). For the business to be viable, it may also be necessary to include activities which are related to markets where the Commission did not identify competition concerns if this is required to create an effective competitor in the affected markets ([3]).

24. In proposing a viable business for divestiture, it is necessary to 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 at stake will not necessarily be eliminated.

*Scope of the business to be divested*

25. The business has to include all the assets which contribute to its current operation or which are necessary to ensure its viability and competitiveness and all personnel which is currently employed or which is necessary to ensure the business' viability and competitiveness ([4]).

26. Personnel and assets which are currently shared between the business to be divested and other businesses of the parties, but which contribute to the operation of the business or which are necessary to ensure its viability and competitiveness, also have to be included. Otherwise, the viability and competitiveness of the business to be divested would be endangered. Therefore, the divested business has to contain the personnel providing essential functions for the business such as, for instance, group R & D and information technology staff even where such personnel is currently employed by another business unit of the parties — at least in a sufficient proportion to meet the on-going needs of the divested business. In the same way shared assets have to be included even if those assets are owned by or allocated to another business unit.

([1]) See website of DG COMP, released in May 2003, available at: http://ec.europa.eu/comm/competition/mergers/legislation/legislation.html. The model texts may be continuously up-dated and, if there should be a need, further best practice guidelines in the field of remedies may be issued.

([2]) This includes, under certain conditions, businesses that have to be carved out from a party's business or individual assets; see below paragraphs 35 ff.

([3]) Case IV/M.913 — Siemens/Elektrowatt of 18 November 1997; Case IV/M.1578 — Sanitec/Sphinx of 1 December 1999, at paragraph 255; Case COMP/M.1802 — Unilever/Amora-Maille of 8 March 2000; Case COMP/M.1990 — Unilever/Bestfoods of 28 September 2000.

([4]) Notifying parties will have to undertake in the commitments that the business to be divested includes all those assets and personnel. Where the detailed description of the business, to be provided by the parties as set out in paragraph 27, will at a later point in time appear to be incomplete in that respect and the parties do not complement the business with the necessary additional assets or personnel, the Commission may consider revoking the conditional clearance decision.

27. In order for the Commission to be able to identify the scope of the business to be divested, the parties have to include a precise definition of the scope of the divested business in the commitments (the 'description of the business'). The description of the business has to be adapted to the individual case at hand and should contain all the elements that are part of the business to be divested: tangible (e.g. R & D, production, distribution, sales and marketing activities) and intangible assets (such as intellectual property rights, know-how and goodwill); licences, permits and authorisations by governmental organisations granted to the business; contracts, leases and commitments (e.g. arrangements with suppliers and customers) for the benefit of the business to be divested; and customer, credit and other records. In the description of the business, the parties have to include the personnel to be transferred in general terms, including staff seconded and temporary employees, and to insert a list of the key personnel, i.e. the personnel essential for the viability and competitiveness of the business. The transfer of those employees is without prejudice to the application of the Council Directives on collective redundancies ([1]); on safeguarding employees' rights in the event of transfers of undertakings ([2]); and on informing and consulting employees ([3]) as well as national provisions implementing those Directives and other national laws. The remedy has to include a non-solicitation commitment by the parties with regard to the key personnel.

28. In the description of the business, the parties also have to set out the arrangements for the supply of products and services by them to the divested business or by the divested business to them. Such on-going relationships of the divested business may be necessary to maintain the full economic viability and competitiveness of the divested business for a transitional basis. The Commission will only accept such arrangements if they do not affect the independence of the divested business from the parties.

29. In order to avoid any misunderstanding about the business to be divested, assets or personnel that are used within or employed by the business but that should not, according to the parties, be transferred with the divestiture, have to be expressly excluded by the parties in the commitments text. The Commission will only be able to accept such exclusion of assets or personnel if the parties can clearly show that this does not affect the viability and competitiveness of the business.

30. The business to be divested has to be viable as such. Therefore, the resources of a possible or even presumed future purchaser are not taken into account by the Commission at the stage of assessing the remedy. The situation is different if already during the procedure a sale and purchase agreement with a specific purchaser is concluded whose resources can be taken into account at the time of the assessment of the commitment. This situation will be dealt with in more detail below in paragraphs 56 ff.

31. Once a purchaser is identified after adoption of an authorisation decision, some of the assets or personnel included in the divested business may not be needed by the proposed purchaser. In the purchaser approval process, the Commission may, upon request by the parties, approve the divestiture of the business to the proposed purchaser without one or more assets or parts of the personnel if this does not affect the viability and competitiveness of the business to be divested after the sale, taking account of the resources of the proposed purchaser.

1.2. *Stand-alone business and conditions for acceptability of alternatives*

32. Normally, a viable business is a business 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.

([1]) 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).

([2]) Council Directive 2001/23/EC of 12 March 2001 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 undertakings or businesses (OJ L 82, 22.3.2001, p. 16).

([3]) 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); Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community (OJ L 80, 23.3.2002, p. 29).

33. The Commission has a clear preference for an existing stand-alone business. This may take the form of a pre-existing company or group of companies, or of a business division which was not previously legally incorporated as such.

34. Where the competition concern results from a horizontal overlap, the parties may be able to choose between two businesses. In cases involving a hostile bid, a commitment to divest activities of the target company may, in such circumstances of limited information available to the notifying parties about the business to be divested, increase the risk that this business might not, after a divestiture, result in a viable competitor which could effectively compete in the market on a lasting basis. It may therefore be more appropriate for the parties to propose to divest activities of the acquiring company in such scenarios.

*Carve-outs*

35. Even though normally the divestiture of an existing viable stand-alone business is required, the Commission, taking into account the principle of proportionality, may also consider the divestiture of businesses which have existing strong links or are partially integrated with businesses retained by the parties and therefore need to be 'carved out' in those respects. In order to reduce the risks for the viability and competitiveness to a minimum in such circumstances, an option for the parties is to submit commitments proposing to carve out those parts of an existing business which do not necessarily have to be divested. In effect, an existing, stand-alone business is being divested in those circumstances although, by way of a 'reverse carve-out', the parties may carve-out the limited parts which they may keep.

36. In any case, the Commission will only be able to accept commitments which require the carve-out of a business if it can be certain that, at least at the time when the business is transferred to the purchaser, a viable business on a stand-alone basis will be divested and the risks for the viability and competitiveness caused by the carve-out will thereby be reduced to a minimum. The parties therefore have to ensure, as set out in detail below in paragraph 113, that the carve-out is started in the interim period, i.e. the period between the adoption of the Commission decision up to the completion of the divestiture (meaning the legal and factual transfer of the business to the purchaser). Consequently, at the end of this period, a viable business on a stand-alone basis will be divested. If this should not be possible or if the carve-out should be particularly difficult, parties may provide the requisite degree of certainty for the Commission by proposing an up-front buyer solution, as further detailed below in paragraph 55.

*Divestiture of assets, in particular of brands and licences*

37. A divestiture consisting of a combination of certain assets which did not form a uniform and viable business in the past creates risks as to the viability and competitiveness of the resulting business. This is in particular the case if assets from more than one party are involved. Such an approach may be accepted by the Commission only if the viability of the business is ensured notwithstanding the fact that the assets did not form a uniform business in the past. This may be the case if the individual assets can already be considered a viable and competitive business ([1]). Similarly, only in exceptional cases a divestiture package including only brands and supporting production and/or distribution assets may be sufficient to create the conditions for effective competition ([2]). In such circumstances, the package consisting of brands and assets must be sufficient to allow the Commission to conclude that the resulting business will be immediately viable in the hands of a suitable purchaser.

38. Divestitures of a business generally appear preferable to the granting of licenses to IP rights, as the granting of a license involve more uncertainties, will not enable the licensee to compete immediately in the market, requires an on-going relationship with the parties which may allow the licensor to influence the licensee in its competitive behaviour and may give rise to disputes between the licensor

([1]) Case COMP/M.1806 — AstraZeneca/Novartis of 26 July 2000; COMP/M.1628 — TotalFina/Elf of 9 February 2000; Case IV/M.603 — Crown Cork & Seal/CarnaudMetalbox of 14 November 1995.

([2]) Case COMP/M.2544 — Masterfoods/Royal Canin of 15 February 2002; Case COMP/M.2337 — Nestlé/Ralston Purina of 27 July 2001; Case IV/M.623 — Kimberly-Clark/Scott Paper of 16 January 1996; Case COMP/M.3779 — Pernod Ricard/Allied Domecq of 24 June 2005.

and the licensee over the scope and the terms and conditions of the license. The granting of a license will therefore generally not be considered appropriate where a divestiture of a business seems feasible. Where the competition concerns arise from the market position held for such a technology or such IP rights, a divestiture of the technology or the IP rights is the preferable remedy as it eliminates a lasting relationship between the merged entity and its competitors ([1]). However, the Commission may accept licensing arrangements as an alternative to divestiture where, for instance, a divestiture would impede efficient, on-going research or where a divestiture would be impossible due to the nature of the business ([2]). Such licences will have to enable the licensee to compete effectively with the parties in a similar way as if a divestiture had taken place. They will normally be exclusive licences and have to be without any field-of-use and any geographical restrictions on the licensee. Where there might be any uncertainty as regards the scope of the licence or its terms and conditions, the parties will have to divest the underlying IP right, but may obtain a licence back. If there is uncertainty that the license will actually be granted to a suitable licensee, the parties may consider to propose an up-front licensee or a fix-it-first solution according to the considerations set out below in paragraphs 56, in order to enable the Commission to conclude with the requisite degree of certainty that the remedy will be implemented ([3]).

*Re-branding*

39. In exceptional cases, the Commission has accepted commitments to grant an exclusive, time-limited licence for a brand with the purpose of allowing the licensee to re-brand the product in the period foreseen. After the first licence phase of these so-called re-branding commitments, the parties commit in a second phase to abstain from any use of the brand (blackout phase). The goal of such commitments is to allow the licensee to transfer the customers from the licensed brand to its own brand in order to create a viable competitor, without the licensed brand being permanently divested.

40. A re-branding remedy carries substantially higher risks for restoring effective competition than a divestiture, including the divestiture of a brand as there is considerable uncertainty whether the licensee will succeed in establishing itself as an active competitor in the market on the basis of the re-branded product. A re-branding remedy may be acceptable in circumstances where the brand at stake is widely used and a high proportion of its turnover is generated in markets outside those in which competition concerns have been identified ([4]). In those circumstances, a re-branding remedy has to be defined in such a way as to ensure that the granting of the licence will effectively maintain competition in the market on a lasting basis and that the licensee will be an effective competitor after re-branding the products.

41. As the success of re-branding commitments is substantially linked to the viability of the licensed brand a number of preconditions have to be met for the design of such commitments. Firstly, the brand to be transferred must be well-known and one of considerable strength to guarantee both immediate viability of the licensed brand and its economic survival in the re-branding period. Secondly, part of the assets related to the production or the distribution of the products marketed under the licensed brand or the transfer of know-how may be necessary to ensure the viability of the remedy ([5]). Thirdly, the licence has to be exclusive and normally comprehensive, i.e. not limited to a

([1]) See Case COMP/M.2972 — DSM/Roche Vitamins of 23 July 2003; Case IV/M.1378 — Hoechst/Rhône-Poulenc of 9 August 1999; Case COMP/M.1601 — Allied Signal/Honeywell of 1 December 1999; Case COMP/M.1671 — Dow/UCC of 3 May 2000.

([2]) Case COMP/M.2949 — Finmeccanica/Alenia Telespazio of 30 October 2002; Case COMP/M.3593 — Apollo/Bakelite of 11 April 2005, commitment on carbon bond refractory licence; for cases from the pharmaceutical industry see Case COMP/M.2972 — DSM/Roche Vitamins of 23 July 2003; Case IV/M.555 — Glaxo/Wellcome of 28 February 1995.

([3]) Case COMP/M.2972 — DSM/Roche Vitamins of 23 July 2003.

([4]) However, even in these conditions a divestiture of the brand may be more appropriate, especially if the resulting split in the ownership of the brand corresponds to common practice in the industry, see for the pharmaceutical industry Case COMP/M.3544 — Bayer Healthcare/Roche (OTC) of 19 November 2004, paragraph 59 concerning the divestiture of the Desenex brand.

([5]) COMP/M.3149 — Procter&Gamble/Wella paragraph 60; IV/M.623 — Kimberly-Clark/Scott Paper of 16 January 1996, paragraph 236(i). This is particularly important during the licence phase in which the licensee has to prepare for the launch of a new competitive brand. Such a launch of a new brand appears to not be feasible if the purchaser had to spend considerable resources on the production process, marketing and distribution of the licensed brand; COMP/M.2337 — Nestlé/Ralston Purina of 27 July 2001, paragraphs 67 *et seq.*; COMP/M.2621 — SEB/Moulinex of 8 January 2002, paragraph 140.

certain range of products within a specific market, and has to include the intellectual property rights to ensure that customers will acknowledge the familiarity of the re-branded product. The parties will not be allowed to use similar words or signs as this could undermine the effect of the re-branding exercise ([1]). Fourthly, both the licence and the black-out period have to be sufficiently long, account being taken of the particularities of the case, so that the re-branding remedy is in its effects similar to a divestiture ([2]).

42. The identity of the potential licensee will be a key factor for the success of the commitment. If there is uncertainty that a number of suitable licensees are available, being able and having strong incentives to carry out the re-branding exercise, the parties may consider proposing an up-front or fix-it-first solution, in line with the considerations set out in paragraph 53 below.

1.3. *Non-reacquisition clause*

43. In order to maintain the structural effect of a remedy, the commitments have to foresee that the merged entity cannot subsequently acquire influence ([3]) over the whole or parts of the divested business. The commitments will normally have to foresee that no re-acquisition of material influence is possible for a significant period, generally of 10 years. However, the commitments can also provide for a waiver allowing the Commission to relieve the parties from this obligation if it subsequently finds 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. Even in the absence of an explicit clause, a re-acquisition of the business would violate an implicit obligation on the parties under the commitments as this would affect the effectiveness of the remedies.

1.4. *Alternative divestiture commitments: Crown Jewels*

44. In certain cases, the implementation of the parties' preferred divestiture option (of a viable business solving the competition concerns) might be uncertain in view, for example, of third parties' pre-emption rights or uncertainty as to the transferability of key contracts, intellectual property rights, or the uncertainty of finding a suitable purchaser. Nevertheless, the parties may consider that they would be able to divest this business to a suitable purchaser within a very short time period.

45. In such circumstances, the Commission cannot take the risk that, in the end, effective competition will not be maintained. Accordingly, the Commission will only accept such divestiture commitments under the following conditions: (a) absent the uncertainty, the first divestiture proposed in the commitments would consist of a viable business, and (b) the parties will have to propose a second alternative divestiture which the parties will be obliged to implement if they are not able to implement the first commitment within the given time frame for the first divestiture ([4]). Such an alternative commitment normally has to be a 'crown jewel' ([5]), i.e. it should be as least as good as the first proposed divestiture in terms of creating a viable competitor once implemented, it should not involve any uncertainties as to its implementation and it should be capable of being implemented quickly in order to avoid that the overall implementation period exceeds what would normally be regarded as acceptable in the conditions of the market in question. In order to limit the risks in the interim period, it is indispensable that interim preservation and holding separate measures apply to all assets included in both divestiture alternatives. Furthermore, the commitment has to establish clear criteria and a strict timetable as to how and when the alternative divestiture obligation will become effective and the Commission will require shorter periods for its implementation.

([1]) COMP/M.3149 — Procter&Gamble/Wella of 30 July 2003, paragraph 61; COMP/M.2337 — Nestlé/Ralstone Purina of 27 July 2001, paragraph 68; COMP/M.2621 — SEB/Moulinex of 8 January 2002, paragraph 141; IV/M.623 — Kimberly-Clark/Scott Paper of 16 January 1996, paragraph 236(ii).

([2]) For example taking into account the life cycle of products, c.f. COMP/M.2621 — SEB/Moulinex of 8 January 2002, paragraph 141, where effectively the duration of the commitments covered a period equal to about three product life cycles; confirmed by judgment of CFI in Case T-119/02 *Royal Philips Electronics NV v Commission* [2003] ECR II-1433, paragraphs 112 *et seq*.

([3]) An influence by the previous owner of the business in the competitive behaviour of the divested business risking to frustrate the objective of the remedy.

([4]) See judgment of the CFI in Case T-210/01 *General Electric v Commission* [2005] ECR II-5575, paragraph 617; COMP/M.1453 — AXA/GRE of 8 April 1999.

([5]) The alternative may consist of an entirely different business or, in case of uncertainty as to finding a suitable buyer, of additional businesses and assets that are added to the initial package.

46. If there is uncertainty as to the implementation of the divestiture due to third party rights or as to finding a suitable purchaser crown jewel commitments and up-front buyers as discussed below in paragraphs 54 address the same concerns, and the parties may therefore choose between both structures.

1.5. *Transfer to a suitable purchaser*

47. The intended effect of the divestiture will only be achieved if and once the business is transferred to a suitable purchaser in whose hands it will become an active competitive force in the market. The potential of a business to attract a suitable purchaser is an important element already of the Commission's assessment of the appropriateness of the proposed commitment ([1]). In order to ensure that the business is divested to a suitable purchaser, the commitments have to include criteria to define its suitability which will allow the Commission to conclude that the divestiture of the business to such a purchaser will likely remove the competition concerns identified.

(a) Suitability of a purchaser

48. The standard purchaser requirements are the following:

— the purchaser is required to be independent of and unconnected to the parties,

— the purchaser must possess the financial resources, proven relevant expertise and have the incentive and ability to maintain and develop the divested business as a viable and active competitive force in competition with the parties and other competitors, and

— the acquisition of the business by a proposed purchaser must neither be likely to create new competition problems nor give rise to a risk that the implementation of the commitments will be delayed. Therefore, the proposed purchaser must reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the business to be divested.

49. The standard purchaser requirements may have to be supplemented on a case-by-case basis. An example is the requirement, where appropriate, that the purchaser should be an industrial, rather than a financial purchaser ([2]). The commitments will normally contain such a clause where, due to the specific circumstances of the case, a financial buyer might not be able or might not have the incentives to develop the business as a viable and competitive force in the market even considering that it could obtain the necessary management expertise (e.g. by recruiting managers experienced in the sector at stake) and therefore the acquisition by a financial buyer would not remove the competition concerns with sufficient certainty.

(b) Identification of a suitable purchaser

50. In general, there are three ways to ensure that the business is transferred to a suitable purchaser. First, the business is transferred within a fixed time-limit after adoption of the decision to a purchaser which is approved by the Commission on the basis of the purchaser requirements. Second, in addition to the conditions set out for the first category, the commitments foresee that the parties may not complete the notified operation before having entered into a binding agreement with a purchaser for the business, approved by the Commission (so-called 'up-front-buyer'). Third, the parties identify a purchaser for the business and enter into a binding agreement already during the Commission's procedure ([3]) (so-called 'fix-it-first' ([4]) remedy). The main difference between the two latter options is that in the case of an up-front buyer, the identity of the purchaser is not known to the Commission prior to the authorisation decision.

51. The choice of the category depends on the risks involved in the case and therefore on the measures which enable the Commission to conclude with the requisite degree of certainty that the commitment will be implemented. This will depend on the nature and the scope of the business to be divested, the risks of degradation of the business in the interim period up to divestiture and any uncertainties inherent in the transfer and implementation, in particular the risks of finding a suitable purchaser.

([1]) Case IV/M.913 — Siemens/Elektrowatt of 18 November 1997.
([2]) See commitments in Case COMP/M.2621 — SEB/Moulinex of 8 January 2002, which foresee that the licensee needs to have its own trademark used in the sector concerned. Certain markets may require a sufficient degree of recognition by customers for a purchaser to be able to translate the business to be divested into a competitive force on the market.
([3]) The transfer of the business may be implemented after the Commission decision.
([4]) This terminology might be used differently in other jurisdictions.

1. Sale of the divested business within a fixed time-limit after the decision

52. In the first category, the parties may proceed with the sale of the divested business on the basis of the purchaser requirements within a fixed time-limit after the adoption of the decision. This procedure is likely to be appropriate in the majority of cases, provided that a number of purchasers can be envisaged for a viable business and that no specific issues complicate or stand in the way of the divestiture. Where the purchaser needs to have special qualifications, this procedure may be appropriate if there are sufficient interested potential purchasers available which fulfil the specific purchaser requirements to be included in the commitments in such cases. In these circumstances the Commission may be able to conclude that the divestiture will be implemented and that there are no reasons for the implementation of the notified concentration to be suspended after the Commission decision.

2. Up-front buyer

53. There are cases where only the proposal of an up-front buyer will allow the Commission to conclude with the requisite degree of certainty that the business will be effectively divested to a suitable purchaser. The parties therefore have to undertake in the commitments that they are not going to complete the notified operation before having entered into a binding agreement with a purchaser for the divested business, approved by the Commission ([1]).

54. First, this concerns cases where there are considerable obstacles for a divestiture, such as third party rights, or uncertainties as to finding a suitable purchaser ([2]). In such cases, an up-front buyer will allow the Commission to conclude with the requisite degree of certainty that the commitments will be implemented, as such a commitment creates greater incentives for the parties to close the divestiture in order to be able to complete their own concentration. In these circumstances, parties may choose between proposing an up-front buyer and an alternative divestiture commitment, as set out above in paragraph 46.

55. Second, an up-front buyer may be necessary in cases which cause considerable risks of preserving the competitiveness and saleability of the divestment business in the interim period until divestiture. This category comprises cases where the risks of a degradation of the divestment business appear to be high, in particular due to a risk of losing employees being key for the business, or where the interim risks are increased as the parties are not able to undertake the carve-out process in the interim period, but the carve-out process can only take place once a sales and purchase agreement with a purchaser is entered into. The up-front buyer provision may accelerate the transfer of the business to be divested — given the increased incentives for the parties to close the divestiture in order to be able to complete their own concentration — to such an extent that the commitments may allow the Commission to conclude with the requisite degree of certainty that those risks are limited and the divestiture will be effectively implemented ([3]).

3. Fix-it-first remedies

56. The third category involves cases where the parties identify and enter into a legally binding agreement with a buyer outlining the essentials of the purchase during the Commission procedure ([4]). The Commission will be able to decide in the final decision whether the transfer of the divested business to the identified purchaser will remove the competition concerns. If the Commission authorises the notified concentration, no additional Commission decision for the purchaser approval will be needed and the closing of the sale of the divested business may take place shortly afterwards.

57. The Commission welcomes fix-it-first remedies in particular in cases where the identity of the purchaser is crucial for the effectiveness of the proposed remedy. This concerns cases where, given the circumstances, only very few potential purchasers can be considered suitable, in particular as the divested business is not a viable business in itself, but its viability will only be ensured by specific

([1]) Case COMP/M.3796 — Omya/Huber PCC of 19 July 2006; Case COMP/M.2972 — DSM/Roche Vitamins of 23 July 2003; Case COMP/M.2060 — Bosch/Rexroth of 13 December 2000; Case COMP/M.2337 — Nestlé/Ralston Purina of 27 July 2001; Case COMP/M.2544 — Masterfoods/Royal Canin of 15 February 2002; Case COMP/M.2947 — Verbund/Energie Allianz of 11 June 2003.
([2]) See Case COMP/M.2060 — Bosch/Rexroth of 13 December 2000, paragraph 92.
([3]) See Case COMP/M.2060 — Bosch/Rexroth of 13 December 2000, paragraph 95.
([4]) Such agreements are normally conditional to the final Commission decision accepting the remedy in question.

assets of the purchaser, or where the purchaser needs to have specific characteristics in order for the remedy to solve the competition concerns ([1]). If the parties choose to enter into a binding agreement with a suitable purchaser during the procedure by way of a fix-it-first solution, the Commission can in those circumstances conclude with the requisite degree of certainty that the commitments will be implemented with a sale to a suitable purchaser. In these situations, an 'upfront buyer' solution containing specific requirements as to the suitability of a buyer will generally be considered equivalent and acceptable.

### 2. **Removal of links with competitors**

58. Divestiture commitments may also be used for removing links between the parties and competitors in cases where these links contribute to the competition concerns raised by the merger. The divestiture of a minority shareholding in a joint venture may be necessary in order to sever a structural link with a major competitor ([2]), or, similarly, the divestiture of a minority shareholding in a competitor ([3]).

59. Although the divestiture of such stakes is the preferable solution, the Commission may exceptionally accept the waiving of rights linked to minority stakes in a competitor where it can be excluded, given the specific circumstances of the case, that the financial gains derived from a minority shareholding in a competitor would in themselves raise competition concerns ([4]). In such circumstances, the parties have to waive all the rights linked to such a shareholding which were relevant for behaviour in terms of competition, such as representations on the board, veto rights and also information rights ([5]). The Commission may only be able to accept such a severing of the link with a competitor if those rights are waived comprehensively and in a permanent way ([6]).

60. Where competition concerns result from agreements with companies supplying the same products or providing the same services, a suitable remedy may be the termination of the respective agreement, such as distribution agreements with competitors ([7]) or agreements resulting in the coordination of certain commercial behaviour ([8]). However, the termination of a distribution agreement alone will only remove the competition concerns if it is ensured that the product of a competitor will also be distributed in the future and exercise effective competitive pressure on the parties.

### 3. **Other remedies**

61. Whilst being the preferred remedy, divestitures or the removal of links with competitors are not the only remedy possible to eliminate certain competition concerns. However, divestitures are the benchmark for other remedies in terms of effectiveness and efficiency. The Commission therefore may accept other types of commitments, but only in circumstances where the other remedy proposed is at least equivalent in its effects to a divestiture ([9]).

---

([1]) See Case COMP/M.3916 — T-Mobile Austria/tele.ring of April 2006, the divestiture of certain mobile telephony sites and frequencies, not constituting a viable business, could only take place to a competitor which was likely to play a similar role in the market as tele.ring; Case COMP/M.4000 — Inco/Falconbridge of 4 July 2006, the divestiture of a nickel processing business could only take place to a competitor vertically integrated into the supply of nickel; Case COMP/M.4187 — Metso/Aker Kvaerner of 12 December 2006, only one purchaser was suitable for acquiring the businesses to be divested as it was the only one with the necessary know-how and the necessary presence in neighbouring markets; Case COMP/M.3436 — Continental/Phoenix of 26 October 2004, only the partner in the distribution joint venture was able to render the divested business viable; Case COMP/M.3136 — GE/Agfa of 5 December 2003.

([2]) Case IV/M.942 — VEBA/Degussa of 3 December 1997.

([3]) Case COMP/M.3653 — Siemens/VA Tech of 13 July 2005, paragraphs 491, 493 ff.

([4]) See Case COMP/M.3653 — Siemens/VA Tech of 13 July 2005, paragraphs 327 ff., where effects from the minority stake in financial respect could be excluded as a put option for the sale of this stake had already been exercised.

([5]) Case COMP/M.4153 — Toshiba/Westinghouse of 19 September 2006.

([6]) See Case COMP/M.3440 — ENI/EDP/GDP of 9 December 2004, paragraphs 648 f., 672.

([7]) See for the termination of distribution agreements Case COMP/M.3779 — Pernod Ricard/Allied Domecq of 24 June 2005; Case COMP/M.3658 — Orkla/Chips of 3 March 2005.

([8]) See particularly the sea transport sector, Case COMP/M.3829 — Maersk/PONL of 29 July 2005 and Case COMP/M.3863 — TUI/CP Ships of 12 October 2005. In those cases, the parties committed to withdraw from certain liner conferences and consortia.

([9]) Case COMP/M.3680 — Alcatel/Finmeccanica/Alcatel Alenia Space & Telespazio of 28 April 2005, where a divestiture was impossible.

*Access remedies*

62. In a number of cases, the Commission has accepted remedies foreseeing the granting of access to key infrastructure, networks, key technology, including patents, know-how or other intellectual property rights, and essential inputs. Normally, the parties grant such access to third parties on a non-discriminatory and transparent basis.

63. Commitments granting access to infrastructure and networks may be submitted in order to facilitate market entry by competitors. They may be acceptable to the Commission in circumstances where it is sufficiently clear that there will be actual entry of new competitors that would eliminate any significant impediment to effective competition ([1]). Other examples of access commitments are commitments granting access to pay-TV platforms ([2]) and to energy via gas release programs ([3]). Often, a sufficient reduction of entry barriers is not achieved by individual measures, but by a package comprising a combination of divestiture remedies and access commitments or a commitments package aimed at overall facilitating entry of competitors by a whole range of different measures. If those commitments actually make the entry of sufficient new competitors timely and likely, they can be considered to have a similar effect on competition in the market as a divestiture. If it cannot be concluded that the lowering of the entry barriers by the proposed commitments will likely lead to the entry of new competitors in the market, the Commission will reject such a remedies package ([4]).

64. Commitments granting non-discriminatory access to infrastructure or networks of the merging parties may also be submitted in order to ensure that competition is not significantly impeded as a result of foreclosure. In past Commission decisions, commitments have foreseen the granting of access to pipelines ([5]) and to telecom or similar networks ([6]). The Commission will only accept such commitments if it can be concluded that these commitments will be effective and competitors will likely use them so that foreclosure concerns will be eliminated. In specific cases, it may be appropriate to link such a commitment with an up-front or fix-it-first provision in order to allow the Commission to conclude with the requisite degree of certainty that the commitment will be implemented ([7]).

65. Similarly, the control of key technology or IP rights may lead to concerns of foreclosure of competitors which depend on the technology or IP rights as essential input for the activities in a downstream market. This, for example, concerns cases where competition problems arise as the parties may withhold information necessary for the interoperability of different equipment. In such circumstances, commitments to grant competitors access to the necessary information may eliminate the competition concerns ([8]). Similarly, in sectors where players commonly have to cooperate by licensing patents to each other, concerns that the merged entity would no longer have the incentive to provide licences to the same extent and under the same conditions as before may be eliminated by commitments to grant

([1]) See judgment of the CFI in Case T-177/04 *easyJet v Commission* [2006] ECR II-1931, at paragraphs 197 *et seq*.

([2]) See Case COMP/M.2876 — Newscorp/Telepiù of 2 April 2003, paragraphs 225 *et seq*., where the commitments package included access of competitors to all essential elements of a pay-TV network, such as 1. access to the necessary content; 2. access to the technical platform as well as 3. access to the necessary technical services. Similarly, in Case COMP/JV.37 — BskyB/Kirch Pay TV of 21 March 2000, confirmed by judgment of CFI in Case T-158/00 *ARD v Commission* [2003] ECR II-3825, the Commission accepted a commitments package which allowed other operators comprehensive access to the pay-TV market.

([3]) See Case COMP/M.3696 — E.ON/MOL of 21 December 2005; Case COMP/M.3868 — DONG/Elsam/Energi E2 of 14 March 2006.

([4]) In air transport mergers, a mere reduction of barriers to entry by a commitment of the parties to offer slots on specific airports may not always be sufficient to ensure the entry of new competitors on those routes where competition problems arise and to render the remedy equivalent in its effects to a divestiture.

([5]) Case COMP/M.2533 — BP/E.ON of 20 December 2001, access to pipelines in addition to divestiture of shares in a pipeline company; Case COMP/M.2389 — Shell/DEA of 20 December 2001, access to an ethylene import terminal.

([6]) For access to telecom networks, see Case COMP/M.2803 — Telia/Sonera of 10 July 2002; Case IV/M.1439 — Telia/Telenor of 13 October 1999; Case COMP/M.1795 — Vodafone/Mannesmann of 12 April 2000. See also Case COMP/M.2903 — DaimlerChrysler/Deutsche Telekom/JV of 30 April 2003, where the Commission accepted a commitments package to grant third parties access to a telematics network and to reduce the entry barriers by allowing them to use parts of a telematics device, designed for toll collection, provided by the parties.

([7]) See the 'qualitative moratorium' in Case COMP/M.2903 — DaimlerChrysler/Deutsche Telekom/JV of 30 April 2003, paragraph 76.

([8]) Case COMP/M.3083 — GE/Instrumentarium of 2 September 2003; Case COMP/M.2861 — Siemens/Draegerwerk of 30 April 2003.

licenses on the same basis also in the future ([1]). In those cases, commitments should foresee non-exclusive licences or the disclosure of information on a non-exclusive basis to all third parties which depend on the IP rights or information for their activities. It has to be further ensured that the terms and conditions under which the licenses are granted do not impede the effective implementation of such a license remedy. If no clearly determined terms and conditions for the granting of licenses exist in the market at stake, the terms and conditions, including the pricing, should be clearly apparent from the commitments (e.g. by way of pricing formulas). An alternative solution may be to rely on royalty-free licences. Furthermore, depending on the case, the granting of licenses may also transmit sensitive information to the licensor on the competitive behaviour of the licensees which are active as competitors in the downstream market, e.g. by transmitting the number of licenses used in the downstream market. In such cases, in order for the remedy to be suitable, the commitments will have to exclude such confidentiality problems. Generally, as set out in the preceding paragraph, the Commission will only accept such commitments if it can be concluded that they will be effective and competitors will likely use them.

66. Access commitments are often complex in nature and necessarily include general terms for determining the terms and conditions under which access is granted. In order to render them effective, those commitments have to contain the procedural requirements necessary for monitoring them, such as the requirement of separate accounts for the infrastructure in order to allow a review of the costs involved ([2]), and suitable monitoring devices. Normally, such monitoring has to be done by the market participants themselves, e.g. by those undertakings wishing to benefit from the commitments. Measures allowing third parties themselves to enforce the commitments are in particular access to a fast dispute resolution mechanism via arbitration proceedings (together with trustees) ([3]) or via arbitration proceedings involving national regulatory authorities if existing for the markets concerned ([4]). If the Commission can conclude that the mechanisms foreseen in the commitments will allow the market participants themselves to effectively enforce them in a timely manner, no permanent monitoring of the commitments by the Commission is required. In those cases, an intervention by the Commission would only be necessary in cases where the parties do not comply with the solutions found by those dispute resolution mechanisms ([5]). However, the Commission will only be able to accept such commitments where the complexity does not lead to a risk of their effectiveness from the outset and where the monitoring devices proposed ensure that those commitments will be effectively implemented and the enforcement mechanism will lead to timely results ([6]).

*Change of long-term exclusive contracts*

67. 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 agreements if such agreements foreclose either, up-stream, the input for competitors or, down-stream, their access to customers. Where the merged entity will have the ability and the incentives to foreclose competitors in this way, the foreclosure effects resulting from existing exclusive agreements may contribute to significantly impeding effective competition ([7]).

68. In such circumstances, the termination or change of existing exclusive agreements may be considered appropriate to eliminate the competition concerns ([8]). However, the available evidence must allow the

([1]) See Case COMP/M.3998 — Axalto/Gemplus of 19 May 2006.
([2]) See e.g. Case COMP/M.2803 — Telia/Sonera of 10 July 2002; Case COMP/M.2903 — DaimlerChrysler/Deutsche Telekom/JV of 30 April 2003.
([3]) As to the effects of arbitration clauses, see judgment of CFI in Case T-158/00 *ARD v Commission* [2003] ECR II-3825, paragraphs 212, 295, 352; CFI judgment in Case T-177/04 *easyJet v Commission* [2006] ECR II-1931, paragraph 186.
([4]) See Case COMP/M.2876 — Newscorp/Telepiù; Case COMP/M.3916 — T-Mobile Austria/tele.ring.
([5]) CFI, judgment in Case T-158/00 *ARD v Commission* [2003] ECR II-3825, paragraphs 212, 295, 352.
([6]) See judgments of the CFI in Case T-87/05 *EDP v Commission* [2005] ECR II-3745, at paragraphs 102 *et seq.*; and Case T-177/04 *easyJet v Commission* [2006] ECR II-1931, at paragraph 188.
([7]) See Commission Notice on non-horizontal mergers […]; Case IV/M.986 — AGFA Gevaert/DuPont of 11 February 1998.
([8]) Case COMP/M.2876 — Newscorp/Telepiù of 2 April 2003, paragraphs 225 *et seq.*, granting unilateral termination rights to suppliers of TV content, limiting the scope of the exclusivity clauses and limiting the duration of future exclusive agreements relating to supply of content; Case COMP/M.2822 — ENI/EnBW/GVS of 17 December 2002, granting of early termination rights to all local gas distributors concerning long-term gas supply agreements; Case IV/M.1571 — New Holland of 28 October 1999; Case IV/M.1467 — Rohm and Haas/Morton of 19 April 1999.

Commission to clearly determine that no *de facto* exclusivity will be maintained. Furthermore, such change of long-term agreements will normally only be sufficient as part of a remedies package to remove the competition concerns identified.

*Other non-divestiture remedies*

69. As indicated above in paragraph 17, non-structural types of remedies, such as promises by the parties to abstain from certain commercial behaviour (e.g. bundling products), will generally not eliminate the competition concerns resulting from horizontal overlaps. In any case, it may be difficult to achieve the required degree of effectiveness of such a remedy due to the absence of effective monitoring of its implementation, as already set out above in paragraph 13(f) ([1]). Indeed, it may be impossible for the Commission to verify whether or not the commitment is complied with and even other market participants, such as competitors, may not be able to establish at all or with the requisite degree of certainty whether the parties meet the conditions of the commitment in practice. In addition, competitors may also not have an incentive to alert the Commission as they do not directly benefit from the commitments. Therefore, the Commission may examine other types of non-divestiture remedies, such as behavioural promises, only exceptionally in specific circumstances, such as in respect of competition concerns arising in conglomerate structures ([2]).

*Time limit for non-divestiture remedies*

70. The Commission may accept that non-divestiture remedies are limited in their duration. The acceptability of a time limit and the duration will depend on the individual circumstances of the case and cannot be pre-defined in a general manner in the present Notice.

## 4. **Review Clause**

71. Irrespective of the type of remedy, commitments will usually include a review clause ([3]). This may allow the Commission, upon request by the parties showing good cause, to grant an extension of deadlines or, in exceptional circumstances, to waive, modify or substitute the commitments.

72. Modifying commitments by extending the deadlines is in particular relevant for divestiture commitments. Parties have to submit a request for an extension within the deadline. Where parties apply for an extension for the first divestiture period, the Commission will only accept that they have shown good cause if the parties were not able to meet the deadline for reasons outside their responsibility and if it can be expected that the parties subsequently will succeed in divesting the business within a short time-frame. Otherwise, the divestiture trustee may be better placed to undertake the divestiture and to fulfil the commitments for the parties.

73. The Commission may grant waivers or accept modifications or substitutions of the commitments only in exceptional circumstances. This will very rarely be relevant for divestiture commitments. As divestiture commitments have to be implemented within a short time-frame after the decision, it is very unlikely that changes of market circumstances will have occurred in such a short time-frame and the Commission will normally not accept any modifications under the general review clause. For specific situations the commitments normally foresee more targeted review clauses ([4]).

([1]) See, as an example for such remedies, Case COMP/M.3440 — ENI/EDP/GDP of 9 December 2004, paragraphs 663, 719.
([2]) See, in relation to conglomerate effects of a concentration, ECJ, judgment of 15 February 2005 in Case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-987, paragraphs 85, 89.
([3]) However, the review clause is of particular relevance for access remedies, which systematically should include such a clause; see below paragraph 74.
([4]) As mentioned in paragraph 30, the Commission may approve a purchaser without some of the assets or personnel foreseen if this does not affect the competitiveness and viability of the divested business. Similarly, the non-requisition clause, as explained in paragraph 43, prohibits the re-acquisition of control over the assets divested only if the Commission has not previously found that that the market structure has changed to such an extent that the divestiture is no longer necessary.

74. A waiver, modification or substitution of commitments may be more relevant for non-divestiture commitments, such as access commitments, which may be on-going for a number of years and for which not all contingencies can be predicted at the time of the adoption of the Commission decision. Exceptional circumstances justifying a waiver, modification or substitution may, first, be accepted for such commitments if parties show that market circumstances have changed significantly and on a permanent basis. For showing this, a sufficient long time-span, normally at least several years, between the Commission decision and a request by the parties is required. Second, exceptional circumstances may also be present if the parties can show that the experience gained in the application of the remedy demonstrates that the objective pursued with the remedy will be better achieved if modalities of the commitment are changed. For any waiver, modification or substitution of commitments, the Commission will also take into account the view of third parties and the impact a modification may have on the position of third parties and thereby on the overall effectiveness of the remedy. In this regard, the Commission will also consider whether modifications affect the right already acquired by third parties after implementation of the remedy ([1]).

75. If at the time of the adoption of the decision the Commission for particular reasons cannot anticipate all contingencies in relation to the implementation of such commitments, it may also be appropriate for the parties to include a clause in the commitments, allowing the Commission to trigger a limited modification to the commitments. Such modifications may be necessary if the original commitments do not achieve the envisaged results set out in those commitments, and therefore do not effectively remove the competition concerns. Procedurally, the parties may be obliged in such cases to propose a change to the commitments in order to achieve the result defined in those commitments, or the Commission may itself, after hearing the parties, modify the conditions and obligations to this end. This type of clause will typically be limited to cases where specific modalities risk to jeopardise effective implementation of the commitments. Such clauses have been used, for example, in relation to the modalities of gas release programs ([2]).

76. The Commission may, upon request, adopt a formal decision for any waiver, modification or substitution of commitments or simply take note of satisfactory amendments of the remedy by the parties, where such amendments improve the effectiveness of the remedy and result in legally binding obligations of the parties, e.g. by contractual arrangements. A change of the commitments will normally only be effective *ex nunc*. Consequently, a modification of the commitments will not heal retroactively any breach of the commitments which has been committed before the time of the modification. The Commission may therefore, where appropriate, further pursue a breach under Articles 14, 15 of the Merger Regulation.

## IV. **ASPECTS OF PROCEDURE FOR SUBMISSION OF COMMITMENTS**

### 1. **Phase I**

77. Pursuant to Article 6(2) of the Merger Regulation the Commission may declare a concentration compatible with the common market also before the initiation of proceedings, where it is confident that following modification a notified concentration no longer raises serious doubts within the meaning of paragraph 1(c).

78. Parties can submit proposals for commitments to the Commission on an informal basis, even before notification. Parties have to submit commitments within not more than 20 working days from the date of the receipt of the notification ([3]). The Commission informs the parties about its serious doubts in due time before that deadline ([4]). Where the parties submit commitments, the deadline for the Commission's decision pursuant to Article 6(1) of the Merger Regulation is extended from 25 to 35 working days ([5]).

([1]) See examples in judgment of CFI in Case T-119/02 *Royal Philips Electronics NV v Commission* [2003] ECR II-1433, paragraph 184.
([2]) See Case COMP/M.3868 — DONG/Elsam/Energi E2 of 14 March 2006, paragraph 24 of the Annex.
([3]) Article 19(1) of the Implementing Regulation.
([4]) The notifying parties will normally be offered the opportunity of attending a state of play meeting in such circumstances, see point 33 of the DG COMPETITION Best Practices on the conduct of EC merger control proceedings.
([5]) Article 10(1), subparagraph 2 of the Merger Regulation.

79. 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 fully specify the substantive and implementing commitments entered into by the parties;

(b) they shall be signed by a person duly authorised to do so;

(c) they shall be accompanied by the information on the commitments offered as provided for in the Implementing Regulation (as explained above in paragraph 7); and

(d) they shall be accompanied by a non-confidential version of the commitments ([1]) for the purposes of market testing them with third parties. The non-confidential version of the commitments must allow third parties to fully assess the workability and the effectiveness of the proposed remedies to remove the competition concerns.

80. 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, including in particular those third parties and the recognised representatives ([2]) of those employees whose positions are directly affected by the proposed remedies. In markets with national regulatory authorities the Commission may also, if appropriate, consult the competent national regulatory authorities ([3]). 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 non-confidential version of 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.

81. Commitments in phase I can only be accepted where the competition problem is readily identifiable and can easily be remedied ([4]). The competition problem therefore needs to be so straightforward and the remedies so clear-cut that it is not necessary to enter into an in-depth investigation and that the commitments are sufficient to clearly rule out 'serious doubts' within the meaning of Article 6(1)(c) of the Merger Regulation ([5]). Where the assessment confirms that the proposed commitments remove the grounds for serious doubts on this basis, the Commission clears the merger in phase I.

82. Due to the time-constraints in phase I, it is particularly important for the parties to submit in a timely manner to the Commission the information required in the Implementing Regulation to properly assess the content and workability of the commitments and their suitability to maintain conditions of effective competition in the common market on a permanent basis. If the parties do not comply with the obligation in the Implementing Regulation, the Commission may not be able to conclude that the proposed commitments will remove the grounds for serious doubts.

83. Where the assessment shows that the commitments offered are not sufficient to remove the competition concerns raised by the concentration, the parties will be informed accordingly. Given that phase I remedies are designed to provide a clear-cut answer to a readily identifiable competition concern, only limited modifications can be accepted to the proposed commitments. Such modifications, presented as an immediate response to the result of the consultations, may include clarifications, refinements and/or other improvements designed to ensure that the commitments are workable and effective. However, such modifications may only be accepted in circumstances where it is ensured that the Commission can carry out a proper assessment of those commitments ([6]).

([1]) Article 20(2) of the Implementing Regulation.
([2]) Cf. Article 2(1)(c) of Council Directive 2001/23/EC of 12 March 2001 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 undertakings or businesses (OJ L 82, 22.3.2001, p. 16). See also Article 2(1)(g) of 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).
([3]) For the role of national regulatory authorities in a dispute resolution mechanism, see paragraph 66.
([4]) See recital 30 of the Merger Regulation.
([5]) See judgment of CFI in Case T-119/02 *Royal Philips Electronics NV v Commission* [2003] ECR II-1433, paragraphs 79 *et seq*.
([6]) See recital 17 of the Implementing Regulation and judgment of the CFI, Case T-119/02 *Royal Philips Electronics NV v Commission* [2003] ECR II-1433, paragraphs 237 *et seq*.

84. If the Commission's final assessment of a case shows that there are no competition concerns in one or more markets, the parties will be informed accordingly and may withdraw the unnecessary commitments for such markets. If the parties do not withdraw them, the Commission will normally ignore them in the decision. In any event, such commitment proposals do not constitute a condition for clearance.

85. Where the parties are informed that the Commission intends to maintain in its final decision that the transaction raises competition concerns for a specific market, it is for the parties to propose commitments. The Commission is not in a position to impose unilaterally any conditions to an authorisation decision, but only on the basis of the parties' commitments ([1]). However, the Commission will review whether the commitments submitted by the parties are proportionate to the competition problem when assessing whether to attach them as conditions or obligations to its final decision ([2]). Nevertheless, it has to be stressed that, in a commitments proposal, all those elements which are required to fulfil the basic conditions for acceptable commitments as set out above in paragraphs 9 *et seq*. will be considered necessary. This paragraph as well as the previous one also applies to commitments in phase II.

86. If the Commission concludes that the commitments offered by the parties do not remove the serious doubts, it will issue an Article 6(1)(c) decision and open proceedings.

### 2. **Phase II**

87. 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 does no longer significantly impede effective competition within the meaning of Article 2(3) of the Merger Regulation.

88. Commitments proposed to the Commission pursuant to Article 8(2) must be submitted to the Commission within not more than 65 working days from the day on which proceedings were initiated. Where the deadlines for the final decision have been extended according to Article 10(3) of the Merger Regulation, also the deadline for remedies is automatically extended by the same number of days ([3]). Only in exceptional circumstances, the Commission may accept that commitments are submitted for the first time after the expiry of this period. The request by the parties for an extension of the deadline must be received within the period and has to set forth the exceptional circumstances which, according to the parties, justify it. In addition to the existence of exceptional circumstances, an extension is only possible where 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 ([4]).

89. The question whether or not submitting remedies will extend the deadline for the Commission to take a final decision depends on the time in the procedure when the commitments are submitted. Where the parties submit commitments within less than 55 working days after the initiation of proceedings, the Commission has to take a final decision within not more than 90 working days of the date of initiation of proceedings ([5]). Where the parties submit commitments on working day 55 or afterwards (even after working day 65, if those commitments should be acceptable due to exceptional circumstances as described above in paragraph 88), the period for the Commission to take a final decision is increased to 105 working days according to Article 10(3), subparagraph 2. Where the parties submit commitments within less than 55 working days, but submit a modified version on day 55 or thereafter, the period to take a final decision will also be extended to 105 working days.

([1]) See above paragraph 6.
([2]) See judgment of ECJ of 18 December 2007 in Case C-202/06 P *Cementbouw v Commission* [2007], paragraph 54.
([3]) Article 19(2), subparagraph 2 of the Implementing Regulation.
([4]) Article 19(2), subparagraph 3 of the Implementing Regulation. See Case COMP/M.1439 — Telia/Telenor of 13 October 1999; Case IV/M.754 — Anglo American Corporation/Lonrho of 23 April 1997.
([5]) Where the deadlines for the final decision have been extended according to Article 10(3) subparagraph 2 of the Merger Regulation before working day 55, this period is also extended.

90. The Commission is available to discuss suitable commitments well in advance of the end of the 65 working day period. The parties are encouraged to submit draft proposals dealing with both substantive and implementation aspects which are necessary to ensure that the commitments are fully workable. If the parties are of the opinion that more time is needed for the investigation of the competition concerns and for the corresponding design of appropriate commitments, they may also suggest to the Commission to extend the final deadline under Article 10(3), subparagraph 1. Such a request will have to be made before the end of the 65 working day period. Indeed, the Commission will normally not extend the period for adopting a final decision according to Article 10(3), subparagraph 1 where the request for extension is presented after the deadline for submitting remedies foreseen in the Implementing Regulation, i.e. after working day 65 ([1]).

91. In order to meet the requirements for a decision pursuant to Article 8(2), commitments must meet the following requirements:

(a) they shall address all competition concerns raised by the concentration and shall fully specify the substantive and implementing commitments entered into by the parties;

(b) they shall be signed by a person duly authorised to do so;

(c) they shall by accompanied by the information on the commitments offered as provided for in the Implementing Regulation (as explained above in paragraph 7); and

(d) they shall be accompanied by a non-confidential version of the commitments ([2]) for the purposes of market testing them with third parties, fulfilling the requirements set out above in paragraph 79.

92. 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 serious doubts (if no Statement of Objection has been issued yet by the Commission) or the competition concerns raised in the Statement of Objections, following the consultations as set out in paragraph 80 above, the Commission will adopt a conditional clearance decision.

93. 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 ([3]).

94. The Merger Regulation does not impose any obligation on the Commission to accept commitments after the legal deadline for remedies, unless the Commission voluntarily undertakes to assess commitments in specific circumstances ([4]). In view of this, where parties subsequently modify the proposed commitments after the deadline of 65 working days, the Commission will only accept these modified commitments 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, fully and unambiguously resolve the competition concerns identified and where there is sufficient time to allow for an adequate assessment by the Commission and for proper consultation with Member States ([5]) ([6]). The Commission will normally reject modified commitments which do not fulfil those conditions ([7]).

---

([1]) The Court of First Instance confirmed that the Merger Regulation and the Implementing Regulation do not impose any obligations on the Commission to accept commitments which are submitted after the legal deadline, as set out below in paragraph 94, see Case T-87/05 *EDP v Commission* [2005] ECR II-3745, at paragraph 161. Therefore, the Commission is not bound to consider any remedies which are submitted by the parties after the deadline for remedies, even if the parties were to agree to extend the final deadline. Moreover, this would not correspond to the purpose, as explained in recital 35 of the Merger Regulation, of the extensions foreseen in Article 10(3). The extension foreseen in Article 10(3), subparagraph 1 is to allow for sufficient time for the investigation of the competitive concerns, whereas it is the purpose of the extension laid down in Article 10(3), subparagraph 2 to allow for sufficient time for the analysis and market testing of commitments.

([2]) Article 20(2) of the Implementing Regulation.

([3]) See paragraphs 30 ff. of the DG Competition Best Practices on the conduct of EC merger proceedings which provide for several state of play meetings between the Commission and the parties throughout the procedure.

([4]) See judgment of CFI in Case T-87/05 *EDP v Commission* [2005] ECR II-3745, at paragraphs 161 *et seq*. See also judgement of CFI in case T-290/94 *Kaysersberg SA v Commission* [1997] ECR II-2137.

([5]) Case COMP/M.3440 — ENI/EDP/GDP of 9 December 2004, paragraphs 855 *et seq*.; confirmed by Judgment of CFI in Case T-87/05 *EDP v Commission* [2005] ECR II-3745, at paragraphs 162 *et seq*.; Case COMP/M.1628 — TotalFina/Elf of 9 March 2000, at paragraph 345.

([6]) This consultation normally requires that the Commission has to be able to send a draft of the final decision, including an assessment of the modified commitments, to the Member States not less than 10 working days before the Advisory Committee with Member States. This period may only be shortened in exceptional circumstances (Article 19(5) of the Merger Regulation).

([7]) See Case COMP/M.3440 — ENI/EDP/GDP of 9 December 2004, paragraph 913.

## V. REQUIREMENTS FOR IMPLEMENTATION OF COMMITMENTS

95. Commitments are offered as a means of securing a clearance, with the implementation normally taking place after the decision. Commitments therefore require safeguards to ensure their effective and timely implementation. These implementing provisions will normally form part of the commitments entered into by the parties *vis-à-vis* the Commission.

96. In the following, detailed guidance is given on the implementation of divestiture commitments, as the most typical commitment. Afterwards, some aspects of the implementation of other types of commitments are discussed.

### 1. Divestiture process

97. The divestiture has to be completed within a fixed time period agreed between the parties and the Commission. In the Commission's practice, the total time period is divided into a period for entering into a final agreement and a further period for the closing, the transfer of legal title, of the transaction. The period for entering into a binding agreement is further normally divided into a first period in which the parties can look for a suitable purchaser (the 'first divestiture period') and, if the parties do not succeed to divest the business, a second period in which a divestiture trustee obtains the mandate to divest the business at no minimum price (the 'trustee divestiture period').

98. The Commission's experience has shown that short divestiture periods contribute largely to the success of the divestiture as, otherwise, the business to be divested will be exposed to an extended period of uncertainty. The time periods should therefore be as short as feasible. The Commission will normally consider a period of around six months for the first divestiture period and an additional period of three months for the trustee divestiture period as appropriate. A period of further three months is normally foreseen for closing the transaction. These periods may be modified on a case-by-case basis. In particular, they may have to be shortened if there is a high risk of degradation of the business' viability in the interim period.

99. The deadline for the divestiture shall normally start on the day of the adoption of the Commission decision. An exception might be justified for a transaction via public bid where the parties commit to divest a business belonging to the target. Where in such circumstances the parties cannot prepare for the divestiture of the target's business before closing of the notified concentration, the Commission might accept that the periods for such a divestiture only start with the date of closing the notified transaction. Similarly, such a solution may be considered if the date of closing of the concentration is not under the control of the parties as it, e.g. requires state approval ([1]). In return, it may be appropriate to shorten the deadlines in order to reduce the time of uncertainty for the business to be divested.

100. Whereas for up-front buyer solutions the above-described procedure applies, the procedure will be different for fix-it-first solutions. In general, a binding agreement with a purchaser will already be entered into during the procedure so that after the decision only a further period for the closing of the transaction has to be foreseen. If before the decision only a framework agreement has been concluded with the purchaser, the periods to be foreseen for entering into a full agreement and the closing afterwards will have to be decided on a case-by-case basis ([2]).

### 2. Approval of the purchaser and of the sale and purchase agreement

101. In order to ensure the effectiveness of the commitment, the sale to a proposed purchaser is subject to prior approval by the Commission. When the parties (or the divestiture trustee) have reached a final agreement with a purchaser, they have to submit a reasoned and documented proposal to the Commission. The parties or the divestiture trustee, as the case may be, will be required to demonstrate to the satisfaction of the Commission that the proposed purchaser meets the purchaser requirements, and that the business is divested in a manner consistent with the Commission's decision and the commitments. Where the commitments allow that 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 concern.

([1]) However, also in those circumstances, other provisions in the commitments, in particular the provisions establishing the safeguards in the interim period, should start running on the date of the adoption of the decision.
([2]) See Case COMP/M.3916 — T-Mobile Austria/tele.ring of 20 April 2006.

102. In assessing any proposed purchaser, the Commission will interpret the purchaser requirements in the light of the purpose of the commitments, to immediately maintain effective competition in the market where competition concerns had been found, and of the market circumstances as set out in the decision ([1]). Generally, the basis for the Commission's assessment of the purchaser requirements will be the submission of the parties, the assessment of the monitoring trustee and, in particular, discussions with the proposed purchaser and its business plan. The Commission will further analyse whether the underlying assumptions of the purchaser appear plausible according to the market circumstances.

103. The requirement that the purchaser has to have the necessary financial resources extends in particular to the way the acquisition is financed by the proposed purchaser. The Commission will normally not accept any financing of the divestiture by the seller, and, in particular, any seller financing if this were to give the seller a share in the profits of the divested business in the future.

104. In assessing whether the proposed purchaser threatens to create competition problems, the Commission will undertake a prima facie assessment in the light of the information available to the Commission in the purchaser approval process. 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 ([2]). Where this is not the case, the Commission's approval of a proposed purchaser is without prejudice to the merger control jurisdiction of national authorities. In addition, the proposed purchaser must be expected to obtain all other necessary approvals from the relevant regulatory authorities. Where it can be foreseen, in the light of the information available to the Commission, that difficulties in obtaining merger control clearance or other approvals may unduly delay the timely implementation of the commitment, it will be considered that the proposed purchaser does not meet the purchaser requirements. Otherwise, the competition concerns identified by the Commission would not be removed in the appropriate time-frame.

105. The requirement for an approval by the Commission does usually not only extend to the identity of the purchaser, but also to the sale and purchase agreement and any other agreement entered into between the parties and the proposed purchaser, including transitory agreements. The Commission will verify whether the divestiture according to the agreements is in line with the commitments ([3]).

106. The Commission will communicate its view as to the suitability of the proposed purchaser to the parties. If the Commission concludes that the proposed purchaser does not meet the purchaser requirements, it will adopt a decision that the proposed purchaser is not a purchaser under the commitments ([4]). If the Commission concludes that the sale and purchase agreement (or any ancillary agreements) does not foresee a divestiture in line with the commitments, the Commission will communicate this to the parties without necessarily rejecting the purchaser as such. If the Commission concludes that the purchaser is suitable under the commitments and that the contracts agree a divestiture in line with the commitments, the Commission will approve the divestiture to the proposed purchaser ([5]). The Commission will issue the necessary approvals as expeditiously as possible.

### 3. **Obligations of the parties in the interim period**

107. Parties have to fulfil certain obligations in the interim period (as defined above in paragraph 36). The following should normally be included in the commitments in this respect: (i) safeguards for the interim preservation of the viability to the business; (ii) the necessary steps for a carve-out process, if relevant; and (iii) the necessary steps to prepare the divestiture of the business.

([1]) See judgment of the CFI in Case T-342/00 *Petrolessence v Commission* [2003] ECR II-1161.
([2]) Case IV/M.1383 — Exxon/Mobil of 29 September 1999 and the follow-up Cases COMP/M.1820 — BP/JV Dissolution of 2 February 2000 and COMP/M.1822 — Mobil/JV Dissolution of 2 February 2000.
([3]) As discussed above, the parties may apply to the Commission to approve the divestiture of the business to the proposed purchaser 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 resources of the proposed purchaser.
([4]) COMP/M.1628 — TotalFina/Elf of 9 February 2000, motorway service stations; confirmed by judgment of the CFI in Case T-342/00 *Petrolessence v Commission* [2003] ECR II-1161.
([5]) Depending on the circumstances of the divestiture, the parties may also have to ensure, for example through appropriate provisions in the purchase agreement, that the purchaser will maintain the divested business as a competitive force in the market and will not sell on the business within a short time-span.

*Interim preservation of the divested business*

108. 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 in the transfer of a business. Up to the transfer of the business to the purchaser, the Commission will require the parties to offer commitments to maintain the independence, economic viability, marketability and competitiveness of the business. Only such commitments will allow the Commission to conclude with the requisite degree of certainty that the divestiture of the business will be implemented in the way as proposed by the parties in the commitments.

109. Generally, these commitments should 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 in its best interest, with a view to ensuring its continued economic viability, marketability and competitiveness and its independence from the businesses retained by the parties.

110. The parties will be required to ensure that all assets of the business are maintained, pursuant to good business practice and in the ordinary course of business, and that no acts which might have a significant adverse impact on the business are carried out. 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 business in the same conditions as before the concentration, in particular provide sufficient resources, such as capital or a line of credit, on the basis and continuation of existing business plans, the same administrative and management functions, or other factors relevant for maintaining competition in the specific sector. The commitments also have to foresee that the parties should take all reasonable steps, including appropriate incentive schemes, to encourage all key personnel to remain with the business, and that the parties may not solicit or move any personnel to their remaining businesses.

111. The parties should further hold the business separate from its retained business and ensure that the key personnel of the business to be divested do not have any involvement into the retained businesses and *vice versa*. If the business to be divested is in corporate form and a strict separation of the corporate structure appears necessary, the parties' rights as shareholders, in particular the voting rights, should be exercised by the monitoring trustee which should also have the power to replace the board members appointed on behalf of the parties. In relation to information, the parties must ring-fence the business to be divested and take all necessary measures to ensure that the parties do not obtain any business secrets or other confidential information. Any documents or information confidential to the business obtained by the parties before adoption of the decision have to be returned to the business or destroyed.

112. The parties are further generally required to appoint a hold-separate manager with the necessary expertise, who will be responsible for the management of the business and the implementation of the hold-separate and ring-fencing obligations. The hold-separate manager should act under the supervision of the monitoring trustee who may issue instructions to the hold-separate manager. The commitments have to provide that the appointment should take place immediately after the adoption of the decision and even before the parties may close the notified concentration. Whereas the parties can appoint the hold-separate manager on their own, the commitments have to foresee that the monitoring trustee is able to remove the hold-separate manager if s/he does not act in line with the commitments or endangers their timely and proper implementation. A new appointment of a hold-separate manager afterwards will be subject to the approval of the monitoring trustee.

*Steps for a carve-out*

113. As outlined above in paragraph 35, the Commission may accept in appropriate circumstances that the divestiture of a business which needs to be carved out from the remaining businesses of the parties can be considered a suitable remedy. Nevertheless, also in such circumstances only the transfer of a viable business to a purchaser which can maintain and develop this business as an active competitive force in the market will remove the Commission's competition concerns. Therefore, the parties have

to commit to a result-oriented obligation to carry out, in the interim period, a carve-out of the assets that contribute to the divested business. The result has to be that a viable and competitive business, which is stand-alone and separate from the other businesses of the parties, can be transferred to a suitable purchaser at the end of the interim period. The parties will have to bear the costs and risks of such a carve-out in the interim period.

114. The carve-out will need to be carried out by the parties under the supervision of the trustee and in cooperation with the hold-separate manager. First, those assets and parts of the personnel which are shared between the business to be divested and remaining businesses of the parties have to be allocated to the business to the extent that this is not excluded in the commitments ([1]). The allocation of the assets and the personnel will be monitored and has to be approved by the monitoring trustee. Second, the carve-out process may also require a replication for the business of assets held or functions performed by other parts of the parties' businesses if this is necessary to ensure the viability and competitiveness of the business to be divested. An example is the termination of the business' participation in a central information technology network and an installation of a separate IT system for the business. In general, the major steps of such a carve-out process and the functions to be replicated should be decided on a case-by-case basis and described in the commitments.

115. At the same time, it has to be ensured that the viability of the business to be divested is not affected by such measures. In the interim period, the parties therefore have to maintain the use of shared assets by and to continue to provide services to the business to the same extent as in the past as long as the business is not yet viable on a stand-alone basis.

*Specific obligations of the parties concerning the divestiture process*

116. For the divestiture process, the commitments should foresee that potential purchasers can carry out a due diligence exercise and obtain, dependent on the stage of the procedure, sufficient information concerning the divested business to allow the purchaser to fully asses the value, scope and commercial potential of the business, and have direct access to its personnel. The parties further have to submit periodic reports on potential purchasers and developments in the negotiations. The divestiture will only be implemented once the transaction is closed, that is the legal title has passed to the approved purchaser, and the assets have been actually transferred. At the end of the process, the parties will have to send a final report, confirming the closing and the transfer of the assets.

## 4. **The monitoring and the divestiture trustee**

*Role of the monitoring trustee*

117. As the Commission cannot, on a daily basis, be directly involved in overseeing the implementation of the commitments, the parties have to propose the appointment of a trustee to oversee the parties' compliance with the commitments, in particular with their obligations in the interim period and the divestiture process (the so-called 'monitoring trustee'). Thereby, the parties guarantee the effectiveness of the commitments submitted by them and allow the Commission to ensure that the modification of the notified concentration, as proposed by the parties, will be carried out with the requisite degree of certainty.

118. The monitoring trustee will carry out its tasks under the supervision of the Commission and is to be considered the Commission's 'eyes and ears'. It shall be the guardian that the business is managed and kept properly on a stand-alone basis in the interim period. The Commission may therefore give any orders and instructions to the monitoring trustee in order to ensure compliance with the commitments, and the trustee may propose to the parties any measures it considers necessary for carrying out its tasks. The parties, however, may not issue any instructions to the trustee without approval by the Commission.

([1]) See paragraph 26 above for the question how shared assets have to be dealt with in commitments.

119. The Commitments will generally set out the tasks of the monitoring trustee. Its duties and obligations will be specified in detail in the trustee mandate, to be concluded between the parties and the trustee, and its tasks shall be further detailed in a work-plan. The tasks of the monitoring trustee will normally start immediately after the adoption of the Commission decision and last until the legal and actual transfer of the business to the approved purchaser. Five main, non-exhaustive tasks can be distinguished which the monitoring trustee should carry out under the supervision of the Commission:

— first, the monitoring trustee will be called upon to oversee the safeguards for the business to be divested in the interim period,

— second, in carve-out cases, the monitoring trustee has to monitor the splitting of assets and the allocation of the personnel between the divested business and retained businesses by the parties as well as the replication of assets and functions in the business previously provided by the parties,

— third, the monitoring trustee shall be responsible for overseeing the parties' efforts to find a potential purchaser and to transfer the business. In general, it shall review the progress of the divestiture process and the potential purchasers included in the process. It shall verify that potential purchasers receive sufficient information relating to the business — in particular by reviewing the information memorandum (if available), the data room or the due diligence process. Once a purchaser is proposed, the monitoring trustee shall submit to the Commission a reasoned opinion as to whether the proposed purchaser fulfils the purchaser requirements in the commitments and whether the business is sold in a manner consistent with the commitments. At the end of the process, the monitoring trustee has to oversee the legal and actual transfer of the business to the purchaser and make a final report, confirming the transfer,

— fourth, the monitoring trustee shall act as a contact point for any requests by third parties, in particular potential purchasers, in relation to the commitments. The parties shall inform interested third parties of the identity and the tasks of the monitoring trustee, including any potential purchasers. In case of disagreement between the parties and third parties in relation to matters dealt with by the commitments, the monitoring trustee shall discuss those matters with both sides and report to the Commission. In order to be able to carry out its role, the monitoring trustee will keep confidential any business secrets of the parties and third parties,

— fifth, the monitoring trustee shall report on these issues to the Commission in periodic compliance reports and shall also submit additional reports upon request by the Commission.

120. The commitments will also comprehensively set out the monitoring trustee's needs for support by and cooperation with the parties; the Commission will supervise the relationship between the parties and the trustee also in this respect. In order to fulfil its tasks, the trustee shall have access to books and records of the parties and of the divested business, insofar and as long as this is relevant for the implementation of the commitments, may ask for managerial and administrative support by the parties, shall be informed of potential purchasers and all developments in the divestiture process, and shall be provided with the information submitted to potential purchasers. In addition, the parties shall indemnify the trustee and allow the trustee to appoint advisors, if appropriate for the fulfilment of its tasks under the commitments. The commitments will also enable the Commission to share the parties' information with the monitoring trustee in order to allow the monitoring trustee to fulfil its tasks. The monitoring trustee will be bound to keep this information confidential.

*Role of the divestiture trustee*

121. As for the monitoring trustee, the parties have to propose to appoint a divestiture trustee in order to make the commitments submitted by them effective and allow the Commission to ensure that the modification of the notified concentration, as proposed by them, will be carried out. If the parties do not succeed in finding a suitable purchaser within the first divestiture period, then in the trustee divestiture period, the divestiture trustee will be given an irrevocable and exclusive mandate to dispose of the business, under the supervision of the Commission, within a specific deadline at no minimum price to a suitable purchaser. The commitments shall allow the divestiture trustee to include in the sale and purchase agreement such terms and conditions as it considers appropriate for an expedient sale, in particular customary representations, warranties and indemnities. The sale of the business by the divestiture trustee is in the same way subject to the prior approval of the Commission as the sale by the parties.

122. The commitments will set out that the parties shall support and inform the divestiture trustee and cooperate with the trustee in the same way as this is foreseen for the monitoring trustee. For the divestiture, the parties have to grant to the divestiture trustee comprehensive powers of attorney, covering all stages of the divestiture.

*Approval of the trustee and the trustee mandate*

123. Depending on the commitment, the monitoring trustee may or may not be the same person or institution as the divestiture trustee. The parties shall propose one or several potential trustees to the Commission, including the full terms of the mandate and an outline of a work-plan. It is of the essence that the monitoring trustee is in place immediately after the Commission decision. Therefore, the parties should propose a suitable trustee immediately after the Commission decision ([1]) and the commitments normally have to foresee that the notified concentration can only be implemented once the monitoring trustee is appointed, after being approved by the Commission ([2]). The situation is different for the divestiture trustee who should be appointed well ahead of the end of the first divestiture period ([3]) so that its mandate can take effect with the beginning of the trustee divestiture period.

124. Both types of trustees will be appointed by the parties on the basis of a trustee mandate, entered into by the parties and the trustee. The appointment and the mandate will be subject to the approval by the Commission which will have discretion in the selection of the trustee and will assess whether the proposed candidate is suitable for the tasks in the specific case. The trustee shall be independent of the parties, possess the necessary qualifications to carry out its mandate and shall not be, or become, exposed to a conflict of interests.

125. The Commission will assess the necessary qualifications in the light of the requirements of the specific case, including the geographic area and the sector concerned. According to the Commission's experience, auditing firms and other consulting firms may be particularly well placed to fulfil the tasks of a monitoring trustee. Individuals who have worked in the specific industry may also be suitable candidates for performing such a role if they have the necessary resources available to deal with the tasks at stake. Investment banks seem to be particularly suitable for the role of a divestiture trustee. The independence of the trustee is crucial in order to enable the trustee to properly fulfil its role of monitoring the parties' compliance for the Commission and to ensure its credibility *vis-à-vis* third parties. In particular, the Commission will not accept persons or institutions as trustees which are at the same time the parties' auditors or their investment advisors in the divestiture. However, no conflicts of interests will arise by relations of the trustee with the parties if those relations will not impair the Trustee's objectivity and independence in discharging its tasks. It is the parties' responsibility to supply the Commission with adequate information for it to verify that the trustee fulfils the requirements. The appointment of the trustee after approval by the parties is irrevocable unless the trustee is replaced with the approval of or upon request by the Commission.

126. The trustee mandate shall define the tasks as specified in the commitments further and shall include all provisions necessary to enable the trustee to fulfil its tasks under the commitments accepted by the Commission. The parties are responsible for remuneration of the trustee under the mandate, and the remuneration structure must be such as to not impede the trustee's independence and effectiveness in fulfilling the mandate. The Commission will approve a trustee only together with a suitable mandate. In appropriate cases, it may publish the identity of the trustee and a summary of its tasks.

127. When the specific commitments with which the trustee has been entrusted have been implemented — that is to say, when legal title for the business to be divested has passed, the assets have been actually transferred to the purchaser and specific arrangements which may continue post-divestiture have been fulfilled — the mandate will provide for the trustee to request the Commission for a discharge from further responsibilities. Even after the discharge has been given, it may be necessary for the Commission to require the reappointment of the trustee on the basis of the commitments, if it appears subsequently to the Commission that the relevant commitments might not have been fully and properly implemented.

([1]) Normally, the commitments should foresee that a monitoring trustee is proposed within two weeks of the date of the decision.

([2]) See Case COMP/M.4180 — GdF/Suez of 14 November 2006; Case COMP/M.4187 — Metso/Aker Kvaerner of 12 December 2006; Case COMP/M.3916 — T-Mobile/tele.ring of 20 April 2006.

([3]) The Commission will normally require an appointment at least one month ahead of the end of the first divestiture period.

### 5. **Obligations of the parties following implementation of the divestiture**

128. The Commitments also have to foresee that for a period of 10 years after the adoption of the decision accepting the commitments the Commission may request information from the parties. This will allow the Commission to monitor the effective implementation of the remedy.

### 6. **Implementation of other commitments**

129. Many of the principles discussed above for the implementation of divestiture commitments can equally be applied to other types of commitments if those commitments need to be implemented subsequent to the Commission decision. For example, if it is foreseen that the beneficiary of a licence needs to be approved by the Commission, the considerations regarding the purchaser approval can be applied. Given the wide range of non-divestiture commitments, no general and comprehensive requirements for the implementation of non-divestiture commitments can be set out.

130. However, given the long duration of non-divestiture commitments and their frequent complexity, they often require a very high monitoring effort and specific monitoring tools in order to allow the Commission to conclude that they will effectively be implemented. Therefore, the Commission will often require the involvement of a trustee to oversee the implementation of such commitments and the establishment of a fast-track arbitration procedure in order to provide for a dispute resolution mechanism and to render the commitments enforceable by the market participants themselves. In past cases, the Commission has often required both the appointment of a trustee and an arbitration clause ([1]). In those circumstances, the trustee will oversee the implementation of the commitments, but will also be able to assist in arbitral proceedings to the effect that they may be finalised in a short period of time.

---

([1]) Such an approach of combined monitoring by arbitration and a monitoring trustee was, e.g. used in Case COMP/M.2803 — Telia/Sonera of 10 July 2002; Case COMP/M.3083 — GE/Instrumentarium of 2 September 2003; and Case COMP/M.3225 — Alcan/Pechiney II of 29 September 2003.

# Commission Notice on restrictions directly related and necessary to concentrations

(2005/C 56/03)

**(Text with EEA relevance)**

## I. INTRODUCTION

1. Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) ([1]) provides in Article 6(1)(b), second subparagraph, in Article 8(1), second subparagraph and in Article 8(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 legislature not to oblige the Commission to assess and individually address ancillary restraints. The treatment of ancillary restraints under the EC Merger Regulation is further explained in recital 21 in the preamble to the EC 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 the task of the undertakings concerned to assess for themselves 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, this 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 this Notice may justify departing from these principles. Parties may find further guidance in 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.

([1]) OJ L 24, 29.1.2004, p. 1.

([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 V.I.*, 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*.

6. Accordingly, a case presents a 'novel and unresolved question giving rise to genuine uncertainty' if those restrictions are not covered by this 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 (EC) No 1/2003 ([1]), (EEC) No 1017/68 ([2]) and (EEC) No 4056/86 ([3]). 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 ([4]). 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 those 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.

9. This Notice replaces the Commission's previous Notice regarding restrictions directly related and necessary to concentrations ([5]).

## 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 ([6]), 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.

([1]) 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, 4.1.2003, p 1; Regulation as last amended by Regulation (EC) No 411/2004 (OJ L 68, 6.3.2004, p. 1).

([2]) Council Regulation (EEC) No 1017/68 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 Regulation (EC) No 1/2003 .

([3]) Council Regulation (EEC) No 4056/86 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 Regulation (EC) No 1/2003.

([4]) See, for example, for licence agreements Regulation (EC) No 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, 27.4.2004, 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.

([5]) OJ C 188, 4.7.2001, p. 5.

([6]) 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).

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 ([1]). 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' ([2]), 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 ([3]). Agreements necessary to the implementation of a concentration are typically aimed at protecting the value transferred ([4]), maintaining the continuity of supply after the break-up of a former economic entity ([5]), or enabling the start-up of a new entity ([6]). 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 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 ([7]). The same applies, in the context of a joint bid, to an agreement by the joint purchasers 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.

---

([1]) 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.

([2]) 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.

([3]) Commission Decision of 18 December 2000 (COMP/M.1863 – *Vodafone/BT/Airtel JV*, paragraph 20).

([4]) 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).

([5]) Commission Decision of 25 February 2000 (COMP/M.1841 – *Celestica/IBM*, paragraph 21).

([6]) 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).

([7]) 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).

## 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 purchaser or of the vendor. In general terms, the need for the purchaser to benefit from certain protection is more compelling than the corresponding need for the vendor. It is the purchaser 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 ([1]), or their scope and/or duration need to be more limited than that of clauses which benefit the purchaser ([2]).

### 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 purchaser 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 purchaser of the full value of the assets transferred, which in general include both physical assets and intangible assets, such as the goodwill accumulated or the know-how ([3]) 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 ([4]).

20. Non-competition clauses are justified for periods of up to three years ([5]), when the transfer of the undertaking includes the transfer of customer loyalty in the form of both goodwill and know-how ([6]). When only goodwill is included, they are justified for periods of up to two years ([7]).

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 purchaser does not need to be protected against competition from the vendor in territories not previously penetrated by the vendor ([8]). 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.

---

([1]) Commission Decision of 27 July 1998 (IV/M.1226 – *GEC/GPTH,* paragraph 24).

([2]) See, for example, 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).

([3]) As defined in Article 1(1)(i) of Regulation (EC) No 772/2004 .

([4]) 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.

([5]) 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).

([6]) 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).

([7]) 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).

([8]) 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).

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 service markets in which the transferred undertaking was not active before the transfer is not considered necessary ([1]).

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 ([2]).

26. Non-solicitation and confidentiality clauses have a comparable effect and are therefore evaluated in a similar way to non-competition clauses ([3]).

### B. **Licence agreements**

27. The transfer of an undertaking or of part of it can include the transfer to the purchaser, 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 purchaser 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 purchaser will grant a licence to the vendor.

28. Licences of patents ([4]), of similar rights, or of know-how ([5]), 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 or exclusive and may be limited to certain fields of use, to the extent that they correspond to the activities of the undertaking transferred.

---

([1]) 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).

([2]) 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).

([3]) 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).

([4]) 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 Regulation (EC) No 772/2004.

([5]) As defined in Article 1(1)(i) of Regulation (EC) No 772/2004.

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 ([1]).

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 purchaser 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 ([2]).

### 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 purchaser under reasonable conditions, it is often necessary to maintain, for a transitional period, the existing or similar links between the vendor and the purchaser. This objective is normally attained by purchase and supply obligations for the vendor and/or the purchaser 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 purchaser, 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 purchaser. 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 ([3]).

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 concentration. However, obligations providing for unlimited quantities ([4]), exclusivity or conferring preferred-supplier or preferred-purchaser status ([5]), 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.

---

([1]) To the extent that they fall within Article 81(1) of the EC Treaty, such agreements may nevertheless fall under Regulation (EC) No 772/2004, or other Community legislation.

([2]) Commission Decision of 1 September 2000 (COMP/M.1980 – *Volvo/Renault V.I.*, paragraph 54).

([3]) 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).

([4]) 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).

([5]) 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.).

## 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 ([1]).

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 ([2]). 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 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 parent undertakings 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.

---

([1]) Commission Decision of 15 January 1998 (IV/M.1042 - *Eastman Kodak/Sun Chemical*, paragraph 40); 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).

([2]) 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).

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.

# 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*

# Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004

(2005/C 325/07)

**(Text with EEA relevance)**

## I. INTRODUCTION AND SUBJECT-MATTER OF THE NOTICE

1. Access to the Commission file is one of the procedural guarantees intended to apply the principle of equality of arms and to protect the rights of the defence. Access to the file is provided for in Article 27(1) and (2) of Council Regulation (EC) No 1/2003 ([1]), Article 15(1) of Commission Regulation (EC) No 773/2004 ('the Implementing Regulation') ([2]), Article 18(1) and (3) of the Council Regulation (EC) No 139/2004 ('Merger Regulation') ([3]) and Article 17(1) of Commission Regulation (EC) No 802/2004 ('the Merger Implementing Regulation') ([4]). In accordance with these provisions, before taking decisions on the basis of Articles 7, 8, 23 and 24(2) of Regulation (EC) No 1/2003 and Articles 6(3), 7(3), 8(2) to (6), 14 and 15 of the Merger Regulation, the Commission shall give the persons, undertakings or associations of undertakings, as the case may be, an opportunity of making known their views on the objections against them and they shall be entitled to have access to the Commission's file in order to fully respect their rights of defence in the proceedings. The present notice provides the framework for the exercise of the right set out in these provisions. It does not cover the possibility of the provision of documents in the context of other proceedings. This notice is without prejudice to the interpretation of such provisions by the Community Courts. The principles set out in this Notice apply also when the Commission enforces Articles 53, 54 and 57 of the EEA Agreement ([5]).

2. This specific right outlined above is distinct from the general right to access to documents under Regulation (EC) No 1049/2001 ([6]), which is subject to different criteria and exceptions and pursues a different purpose.

3. The term access to the file is used in this notice exclusively to mean the access granted to the persons, undertakings or association of undertakings to whom the Commission has addressed a statement of objections.This notice clarifies who has access to the file for this purpose.

4. The same term, or the term access to documents, is also used in the above-mentioned regulations in respect of complainants or other involved parties. These situations are, however, distinct from that of the addressees of a statement of objections and therefore do not fall under the definition of access to the file for the purposes of this notice. These related situations are dealt with in a separate section of the notice.

5. This notice also explains to which information access is granted, when access takes place and what are the procedures for implementing access to the file.

---

([1]) 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, 4.1.2003, p. 1-25.

([2]) Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123, 27.4.2004, p. 18-24.

([3]) Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1-22.

([4]) Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ L 133, 30.4.2004, p. 1-39. Corrected in the OJ L 172, 6.5.2004, p. 9.

([5]) References in this Notice to Articles 81 and 82 therefore apply also to Articles 53 and 54 of the EEA Agreement.

([6]) Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, p. 43. See for instance Case T-2/03, *Verein für Konsumenteninformation v. Commission*, judgment of 13 April 2005, not yet reported.

6. As from its publication, this notice replaces the 1997 Commission notice on access to the file [1]. The new rules take account of the legislation applicable as of 1 May 2004, namely the above referred Regulation (EC) No 1/2003, Merger Regulation, Implementing Regulation and Merger Implementing Regulation, as well as the Commission Decision of 23 May 2001 on the terms of reference of Hearing Officers in certain competition proceedings [2]. It also takes into account the recent case law of the Court of Justice and the Court of First Instance of the European Communities [3] and the practice developed by the Commission since the adoption of the 1997 notice.

## II. **SCOPE OF ACCESS TO THE FILE**

### A. **Who is entitled to access to the file?**

7. Access to the file pursuant to the provisions mentioned in paragraph 1 is intended to enable the effective exercise of the rights of defence against the objections brought forward by the Commission. For this purpose, both in cases under Articles 81 and 82 EC and in cases under the Merger Regulation, access is granted, upon request, to the persons, undertakings or associations of undertakings [4], as the case may be, to which the Commission addresses its objections [5] (hereinafter, 'the parties').

### B. **To which documents is access granted?**

1. *The content of the Commission file*

8. The 'Commission file' in a competition investigation (hereinafter also referred to as 'the file') consists of all documents [6], which have been obtained, produced and/or assembled by the Commission Directorate General for Competition, during the investigation.

9. In the course of investigation under Articles 20, 21 and 22(2) of Regulation (EC) No 1/2003 and Articles 12 and 13 of the Merger Regulation, the Commission may collect a number of documents, some of which may, following a more detailed examination, prove to be unrelated to the subject matter of the case in question. Such documents may be returned to the undertaking from which those have been obtained. Upon return, these documents will no longer constitute part of the file.

2. *Accessible documents*

10. The parties must be able to acquaint themselves with the information in the Commission's file, so that, on the basis of this information, they can effectively express their views on the preliminary conclusions reached by the Commission in its objections. For this purpose they will be granted access to all documents making up the Commission file, as defined in paragraph 8, with the exception of internal documents, business secrets of other undertakings, or other confidential information [7].

---

[1] Commission notice on the internal rules of procedure for processing requests for access to the file in cases under Articles 85 and 86 [*now 81 and 82*] of the EC Treaty, Articles 65 and 66 of the ECSC Treaty and Council Regulation (EEC) No 4064/89, OJ C 23, 23.1.1997, p. 3.

[2] OJ L 162, 19.6.2001, p. 21.

[3] In particular Joint Cases T-25/95 et al., *Cimenteries CBR SA et al. v Commission*, [2000] ECR II-0491.

[4] In the remainder of this Notice, the term 'undertaking' includes both undertakings and associations of undertakings. The term 'person' encompasses natural and legal persons. Many entities are legal persons and undertakings at the same time; in this case, they are covered by both terms. The same applies where a natural person is an undertaking within the meaning of Articles 81 and 82. In Merger proceedings, account must also be taken of persons referred to in Article 3(1)(b) of the Merger Regulation, even when they are natural persons. Where entities without legal personality which are also not undertakings become involved in Commission competition proceedings, the Commission applies, where appropriate, the principles set out in this Notice *mutatis mutandis*.

[5] Cf. Article 15(1) of the Implementing Regulation, Article 18(3) of the Merger Regulation and Article 17(1) of the Merger Implementing Regulation.

[6] In this notice the term 'document' is used for all forms of information support, irrespective of the storage medium. This covers also any electronic data storage device as may be or become available.

[7] Cf. Article 27(2) of Regulation (EC) No 1/2003, Articles 15(2) and 16(1) of the Implementing Regulation, and Article 17(3) of the Merger Implementing Regulation. Those exceptions are also mentioned in Case T-7/89, *Hercules Chemicals v Commission*, [1991] ECR II-1711, paragraph 54. The Court has ruled that it does not belong to the Commission alone to decide which documents in the file may be useful for the purposes of the defence (Cf. Case T-30/91 *Solvay v. Commission*, [1995] ECR II-1775, paragraphs 81-86, and Case T-36/91 *ICI vs. Commission*, [1995] ECR II-1847, paragraphs 91-96).

11. Results of a study commissioned in connection with proceedings are accessible together with the terms of reference and the methodology of the study. Precautions may however be necessary in order to protect intellectual property rights.

3. *Non-accessible documents*

3.1. Internal documents

3.1.1 *General principles*

12. Internal documents can be neither incriminating nor exculpatory ([1]). They do not constitute part of the evidence on which the Commission can rely in its assessment of a case. Thus, the parties will not be granted access to internal documents in the Commission file ([2]). Given their lack of evidential value, this restriction on access to internal documents does not prejudice the proper exercise of the parties' right of defence ([3]).

13. There is no obligation on the Commission departments to draft any minutes of meetings ([4]) with any person or undertaking. If the Commission chooses to make notes of such meetings, such documents constitute the Commission's own interpretation of what was said at the meetings, for which reason they are classified as internal documents. Where, however, the person or undertaking in question has agreed the minutes, such minutes will be made accessible after deletion of any business secrets or other confidential information. Such agreed minutes constitute part of the evidence on which the Commission can rely in its assessment of a case ([5]).

14. In the case of a study commissioned in connection with proceedings, correspondence between the Commission and its contractor containing evaluation of the contractor's work or relating to financial aspects of the study, are considered internal documents and will thus not be accessible.

3.1.2 *Correspondence with other public authorities*

15. A particular case of internal documents is the Commission's correspondence with other public authorities and the internal documents received from such authorities (whether from EC Member States ('the Member States') or non-member countries). Examples of such non-accessible documents include:

— correspondence between the Commission and the competition authorities of the Member States, or between the latter ([6]);

— correspondence between the Commission and other public authorities of the Member States ([7]);

— correspondence between the Commission, the EFTA Surveillance Authority and public authorities of EFTA States ([8]);

— correspondence between the Commission and public authorities of non-member countries, including their competition authorities, in particular where the Community and a third country have concluded an agreement governing the confidentiality of the information exchanged ([9]).

([1]) Examples of internal documents are drafts, opinions, memos or notes from the Commission departments or other public authorities concerned.
([2]) Cf. Article 27(2) of Regulation (EC) No 1/2003, Article 15(2) of the Implementing Regulation, and Article 17(3) of the Merger Implementing Regulation.
([3]) Cf. paragraph 1 above.
([4]) Cf. judgement of 30.9.2003 in Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line and others* v *Commission* (*TACA*), [2003] ECR II-3275, paragraphs 349-359.
([5]) Statements recorded pursuant to Article 19 or Article 20(2)(e) of Regulation 1/2003 or Article 13(2)(e) of Merger Regulation will also normally belong to the accessible documents (see paragraph 10 above).
([6]) Cf. Article 27(2) of Regulation (EC) No 1/2003, Article 15(2) of the Implementing Regulation, Article 17(3) of the Merger Implementing Regulation.
([7]) Cf. Order of the Court of First Instance in Cases T-134/94 et al *NMH Stahlwerke and Others v Commission* [1997] ECR II-2293, paragraph 36, and Case T-65/89, *BPB Industries and British Gypsum* [1993] ECR II-389, paragraph 33.
([8]) In this notice the term 'EFTA States' includes the EFTA States that are parties to the EEA Agreement.
([9]) For example, Article VIII.2 of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws (OJ No L 95, 27.4.1995, p. 47) stipulates that information provided to it in confidence under the Agreement must be protected 'to the fullest extent possible'. That Article creates an international-law obligation binding the Commission.

16. In certain exceptional circumstances, access is granted to documents originating from Member States, the EFTA Surveillance Authority or EFTA States, after deletion of any business secrets or other confidential information. The Commission will consult the entity submitting the document prior to granting access to identify business secrets or other confidential information.

This is the case where the documents originating from Member States contain allegations brought against the parties, which the Commission must examine, or form part of the evidence in the investigative process, in a way similar to documents obtained from private parties. These considerations apply, in particular, as regards:

— documents and information exchanged pursuant to Article 12 of Regulation (EC) No 1/2003, and information provided to the Commission pursuant to Article 18(6) of Regulation (EC) No 1/2003;

— complaints lodged by a Member State under Article 7(2) of Regulation (EC) No 1/2003.

Access will also be granted to documents originating from Member States or the EFTA Surveillance Authority in so far as they are relevant to the parties' defence with regard to the exercise of competence by the Commission ([1]).

3.2. Confidential information

17. The Commission file may also include documents containing two categories of information, namely business secrets and other confidential information, to which access may be partially or totally restricted ([2]). Access will be granted, where possible, to non-confidential versions of the original information. Where confidentiality can only be assured by summarising the relevant information, access will be granted to a summary. All other documents are accessible in their original form.

3.2.1 *Business secrets*

18. In so far as disclosure of information about an undertaking's business activity could result in a serious harm to the same undertaking, such information constitutes business secrets ([3]). Examples of information that may qualify as business secrets include: technical and/or financial information relating to an undertaking's know-how, methods of assessing costs, production secrets and processes, supply sources, quantities produced and sold, market shares, customer and distributor lists, marketing plans, cost and price structure and sales strategy.

3.2.2 *Other confidential information*

19. The category 'other confidential information' includes information other than business secrets, which may be considered as confidential, insofar as its disclosure would significantly harm a person or undertaking. Depending on the specific circumstances of each case, this may apply to information provided by third parties about undertakings which are able to place very considerable economic or commercial pressure on their competitors or on their trading partners, customers or suppliers. The Court of First Instance and the Court of Justice have acknowledged that it is legitimate to refuse to reveal to such undertakings certain letters received from their customers, since their disclosure might easily expose the authors to the risk of retaliatory measures ([4]). Therefore the notion of other confidential information may include information that would enable the parties to identify complainants or other third parties where those have a justified wish to remain anonymous.

([1]) In the merger control area, this may apply in particular to submissions by a Member State under Article 9 (2) of the Merger Regulation with regard to a case referral.

([2]) Cf. Article 16(1) of the Implementing Regulation and Article 17(3) of the Merger Implementing Regulation; Case T-7/89 *Hercules Chemicals NV v Commission*, [1991] ECR II-1711, paragraph 54; Case T-23/99, *LR AF 1998 A/S v Commission*, [2002] ECR II-1705, paragraph 170.

([3]) Judgement of 18.9.1996 in Case T-353/94, *Postbank NV v Commission*, [1996] ECR II-921, paragraph 87.

([4]) The Community Courts have pronounced upon this question both in cases of alleged abuse of a dominant position (Article 82 of the EC Treaty) (Case T-65/89, *BPB Industries and British Gypsum* [1993] ECR II-389; and Case C-310/93P, *BPB Industries and British Gypsum* [1995] ECR I-865), and in merger cases (Case T-221/95 *Endemol* v *Commission* [1999] ECR II-1299, paragraph 69, and Case T-5/02 *Laval* v. *Commission* [2002] ECR II-4381, paragraph 98 et seq.).

20. The category of other confidential information also includes military secrets.

3.2.3 *Criteria for the acceptance of requests for confidential treatment.*

21. Information will be classified as confidential where the person or undertaking in question has made a claim to this effect and such claim has been accepted by the Commission ([1]).

22. Claims for confidentiality must relate to information which is within the scope of the above descriptions of business secrets or other confidential information. The reasons for which information is claimed to be a business secret or other confidential information must be substantiated ([2]). Confidentiality claims can normally only pertain to information obtained by the Commission from the same person or undertaking and not to information from any other source.

23. Information relating to an undertaking but which is already known outside the undertaking (in case of a group, outside the group), or outside the association to which it has been communicated by that undertaking, will not normally be considered confidential ([3]). Information that has lost its commercial importance, for instance due to the passage of time, can no longer be regarded as confidential. As a general rule, the Commission presumes that information pertaining to the parties' turnover, sales, market-share data and similar information which is more than 5 years old is no longer confidential ([4]).

24. In proceedings under Articles 81 and 82 of the Treaty, the qualification of a piece of information as confidential is not a bar to its disclosure if such information is necessary to prove an alleged infringement ('inculpatory document') or could be necessary to exonerate a party ('exculpatory document'). In this case, the need to safeguard the rights of the defence of the parties through the provision of the widest possible access to the Commission file may outweigh the concern to protect confidential information of other parties ([5]). It is for the Commission to assess whether those circumstances apply to any specific situation. This calls for an assessment of all relevant elements, including:

— the relevance of the information in determining whether or not an infringement has been committed, and its probative value;

— whether the information is indispensable;

— the degree of sensitivity involved (to what extent would disclosure of the information harm the interests of the person or undertaking in question)

— the preliminary view of the seriousness of the alleged infringement.

Similar considerations apply to proceedings under the Merger Regulation when the disclosure of information is considered necessary by the Commission for the purpose of the procedure ([6]).

25. Where the Commission intends to disclose information, the person or undertaking in question shall be granted the possibility to provide a non-confidential version of the documents where that information is contained, with the same evidential value as the original documents ([7]).

## C. **When is access to the file granted?**

26. Prior to the notification of the Commission's statement of objections pursuant to the provisions mentioned in paragraph 1, the parties have no right of access to the file.

([1]) See paragraph 40 below.
([2]) See paragraph 35 below.
([3]) However, business secrets or other confidential information which are given to a trade or professional association by its members do not lose their confidential nature with regard to third parties and may therefore not be passed on to complainants. Cf. Joined Cases 209 to 215 and 218/78, *Fedetab*, [1980] ECR 3125, paragraph 46.
([4]) See paragraphs 35-38 below on asking undertakings to identify confidential information.
([5]) Cf. Article 27(2) of Regulation (EC) No 1/2003 and Article 15(3) of the Implementing Regulation.
([6]) Article 18(1) of the Merger Implementing Regulation.
([7]) Cf. paragraph 42 below.

1. *In antitrust proceedings under Articles 81 and 82 of the Treaty*

27. Access to the file will be granted upon request and, normally, on a single occasion, following the notification of the Commission's objections to the parties, in order to ensure the principle of equality of arms and to protect their rights of defence. As a general rule, therefore, no access will be granted to other parties' replies to the Commission's objections.

A party will, however, be granted access to documents received after notification of the objections at later stages of the administrative procedure, where such documents may constitute new evidence — whether of an incriminating or of an exculpatory nature —, pertaining to the allegations concerning that party in the Commission's statement of objections. This is particularly the case where the Commission intends to rely on new evidence.

2. *In proceedings under the Merger Regulation*

28. In accordance with Article 18(1) and (3) of the Merger Regulation and Article 17(1) of the Merger Implementing Regulation, the notifying parties will be given access to the Commission's file upon request at every stage of the procedure following the notification of the Commission's objections up to the consultation of the Advisory Committee. In contrast, this notice does not address the possibility of the provision of documents before the Commission states its objections to undertakings under the Merger Regulation ([1]).

## III. PARTICULAR QUESTIONS REGARDING COMPLAINANTS AND OTHER INVOLVED PARTIES

29. The present section relates to situations where the Commission may or has to provide access to certain documents contained in its file to the complainants in antitrust proceedings and other involved parties in merger proceedings. Irrespective of the wording used in the antitrust and merger implementing regulations ([2]), these two situations are distinct — in terms of scope, timing, and rights — from access to the file, as defined in the preceding section of this notice.

### A. Provision of documents to complainants in antitrust proceedings

30. The Court of First Instance has ruled ([3]) that complainants do not have the same rights and guarantees as the parties under investigation. Therefore complainants cannot claim a right of access to the file as established for parties.

31. However, a complainant who, pursuant to Article 7(1) of the Implementing Regulation, has been informed of the Commission's intention to reject its complaint ([4]), may request access to the documents on which the Commission has based its provisional assessment ([5]). The complainant will be provided access to such documents on a single occasion, following the issuance of the letter informing the complainant of the Commission's intention to reject its complaint.

32. Complainants do not have a right of access to business secrets or other confidential information which the Commission has obtained in the course of its investigation ([6]).

([1]) This question is dealt with in the Directorate General Competition document 'DG COMP Best Practices on the conduct of EC merger control proceedings', available on the web-site of the Directorate General for Competition: http://europa.eu.int/comm/competition/index_en.html.

([2]) Cf. Article 8(1) of the Implementing Regulation, which speaks about 'access to documents' to complainants and Article 17(2) of Merger Implementing Regulation which speaks about 'access to file' to other involved parties 'in so far as this is necessary for the purposes of preparing their comments'.

([3]) See Case T-17/93 *Matra-Hachette SA v Commission*, [1994] ECR II-595, paragraph 34. The Court ruled that the rights of third parties, as laid down by Article 19 of the Council Regulation No 17 of 6.2.1962 (now replaced by Article 27 of Regulation (EC) No 1/2003), were limited to the right to participate in the administrative procedure.

([4]) By means of a letter issued in accordance with Article 7(1) of the Implementing Regulation.

([5]) Cf. Article 8(1) of the Implementing Regulation.

([6]) Cf. Article 8(1) of the Implementing Regulation.

### B. **Provision of documents to other involved parties in merger proceedings**

33. In accordance with Article 17(2) of the Merger Implementing Regulation, access to the file in merger proceedings shall also be given, upon request, to other involved parties who have been informed of the objections in so far as this is necessary for the purposes of preparing their comments.

34. Such other involved parties are parties to the proposed concentration other than the notifying parties, such as the seller and the undertaking which is the target of the concentration ([1]).

## IV. **PROCEDURE FOR IMPLEMENTING ACCESS TO THE FILE**

### A. **Preparatory procedure**

35. Any person which submits information or comments in one of the situations listed hereunder, or subsequently submits further information to the Commission in the course of the same procedures, has an obligation to 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 for making its views known ([2]):

a) In antitrust proceedings

— an addressee of a Commission's statement of objections making known its views on the objections ([3]);

— a complainant making known its views on a Commission statement of objections ([4]);

— any other natural or legal person, which applies to be heard and shows a sufficient interest, or which is invited by the Commission to express its views, making known its views in writing or at an oral hearing ([5]);

— a complainant making known his views on a Commission letter informing him on the Commission's intention to reject the complaint ([6]).

b) In merger proceedings

— notifying parties or other involved parties making known their views on Commission objections adopted with a view to take a decision with regard to a request for a derogation from suspension of a concentration and which adversely affects one or more of those parties, or on a provisional decision adopted in the matter ([7]);

— notifying parties to whom the Commission has addressed a statement of objections, other involved parties who have been informed of those objections or parties to whom the Commission has addressed objections with a view to inflict a fine or a periodic penalty payment, submitting their comments on the objections ([8]);

— third persons who apply to be heard, or any other natural or legal person invited by the Commission to express their views, making known their views in writing or at an oral hearing ([9]);

— any person which supplies information pursuant to Article 11 of the Merger Regulation.

([1]) Cf. Article 11(b) of the Merger Implementing Regulation.
([2]) Cf. Article 16(2) of the Implementing Regulation and Article 18(2) of the Merger Implementing Regulation.
([3]) pursuant to Article 10(2) of the Implementing Regulation.
([4]) pursuant to Article 6(1) of the Implementing Regulation.
([5]) pursuant to Article 13(1) and (3) of the Implementing Regulation.
([6]) pursuant to Article 7(1) of the Implementing Regulation.
([7]) Article 12 of the Merger Implementing Regulation.
([8]) Article 13 of the Merger Implementing Regulation.
([9]) pursuant to Article 16 of the Merger Implementing Regulation.

36. Moreover, the Commission may require undertakings [1], in all cases where they produce or have produced documents, 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 [2].

37. For the purposes of quickly dealing with confidentiality claims referred to in paragraph 36 above, the Commission may set a time-limit within which the undertakings shall: (i) substantiate their claim for confidentiality with regard to each individual document or part of document; (ii) provide the Commission with a non-confidential version of the documents, in which the confidential passages are deleted [3]. In antitrust proceedings the undertakings in question shall also provide within the said time-limit a concise description of each piece of deleted information [4].

38. The non-confidential versions and the descriptions of the deleted information must be established in a manner that enables any party with access to the file to determine whether the information deleted is likely to be relevant for its defence and therefore whether there are sufficient grounds to request the Commission to grant access to the information claimed to be confidential.

## B. **Treatment of confidential information**

39. In antitrust proceedings, if undertakings fail to comply with the provisions set out in paragraphs 35 to 37 above, the Commission may assume that the documents or statements concerned do not contain confidential information [5]. The Commission may consequently assume that the undertaking has no objections to the disclosure of the documents or statements concerned in their entirety.

40. In both antitrust proceedings and in proceedings under the Merger Regulation, should the person or undertaking in question meet the conditions set out in paragraphs 35 to 37 above, to the extent they are applicable, the Commission will either:

— provisionally accept the claims which seem justified; or

— inform the person or undertaking in question that it does not agree with the confidentiality claim in whole or in part, where it is apparent that the claim is unjustified.

41. The Commission may reverse its provisional acceptance of the confidentiality claim in whole or in part at a later stage.

42. Where the Directorate General for Competition does not agree with the confidentiality claim from the outset or where it takes the view that the provisional acceptance of the confidentiality claim should be reversed, and thus intends to disclose information, it will grant the person or undertaking in question an opportunity to express its views. In such cases, the Directorate General for Competition will inform the person or undertaking in writing of its intention to disclose information, give its reasons and set a time-limit within which such person or undertaking may inform it in writing of its views. If, following submission of those views, a disagreement on the confidentiality claim persists, the matter will be dealt with by the Hearing Officer according to the applicable Commission terms of reference of Hearing Officers [6].

---

[1] In merger proceedings the principles set out in the present and subsequent paragraphs also apply to the persons referred to in Article 3(1)(b) of Merger Regulation.

[2] Cf. Article 16(3) of the Implementing Regulation and Article 18(3) of the Merger Implementing Regulation. This also applies to documents gathered by the Commission in an inspection pursuant to Article 13 of the Merger Regulation and Articles 20 and 21 of Regulation (EC) No 1/2003.

[3] Cf. Article 16(3) of the Implementing Regulation and Article 18(3) of the Merger Implementing Regulation.

[4] Cf. Article 16(3) of the Implementing Regulation.

[5] Cf. Article 16 of the Implementing Regulation.

[6] Cf. Article 9 of the Commission Decision of 23.5.2001 on the terms of reference of hearing officers in certain competition proceedings, OJ L 162 19.6.2001, p. 21.

43. Where there is a risk that an undertaking which is able to place very considerable economic or commercial pressure on its competitors or on its trading partners, customers or suppliers will adopt retaliatory measures against those, as a consequence of their collaboration in the investigation carried out by the Commission ([1]), the Commission will protect the anonymity of the authors by providing access to a non-confidential version or summary of the responses in question ([2]). Requests for anonymity in such circumstances, as well as requests for anonymity according to point 81 of the Commission Notice on the handling of complaints ([3]) will be dealt with according to paragraphs 40 to 42 above.

### C. **Provision of access to file**

44. The Commission may determine that access to the file shall be granted in one of the following ways, taking due account of the technical capabilities of the parties:

— by means of a CD-ROM(s) or any other electronic data storage device as may become available in future;

— through copies of the accessible file in paper form sent to them by mail;

— by inviting them to examine the accessible file on the Commission's premises.

The Commission may choose any combination of these methods.

45. In order to facilitate access to the file, the parties will receive an enumerative list of documents setting out the content of the Commission file, as defined in paragraph 8 above.

46. Access is granted to evidence as contained in the Commission file, in its original form: the Commission is under no obligation to provide a translation of documents in the file ([4]).

47. If a party considers that, after having obtained access to the file, it requires knowledge of specific non-accessible information for its defence, it may submit a reasoned request to that end to the Commission. If the services of the Directorate General for Competition are not in a position to accept the request and if the party disagrees with that view, the matter will be resolved by the Hearing Officer, in accordance with the applicable terms of reference of Hearing Officers ([5]).

48. Access to the file in accordance with this notice is granted on the condition that the information thereby obtained may only be used for the purposes of judicial or administrative proceedings for the application of the Community competition rules at issue in the related administrative proceedings ([6]). Should the information be used for a different purpose, at any point in time, with the involvement of an outside counsel, the Commission may report the incident to the bar of that counsel, with a view to disciplinary action.

49. With the exception of paragraphs 45 and 47, this section C applies equally to the grant of access to documents to complainants (in antitrust proceedings) and to other involved parties (in merger proceedings).

---

([1]) Cf. paragraph 19 above.
([2]) Cf. Case T-5/02, *Tetra Laval vs. Commission*, [2002] ECR II-4381, paragraph 98, 104 and 105.
([3]) Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJ C 101, 27.4.2004, p. 65.
([4]) Cf. Case T-25/95 et al. *Cimenteries*, paragraph 635.
([5]) Cf. Article 8 of the Commission Decision of 23.5.2001 on the terms of reference of hearing officers in certain competition proceedings, OJ L 162, 19.6.2001, p. 21.
([6]) Cf. Articles 15(4) and 8(2) of the Implementing Regulation, respectively, and Article 17(4) of the Merger Implementing Regulation.

# E. EEA AGREEMENT

# PART IV

# COMPETITION AND OTHER COMMON RULES

## CHAPTER 1

## RULES APPLICABLE TO UNDERTAKINGS

### *Article 53*

1. The following shall be prohibited as incompatible with the functioning of this Agreement: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Contracting Parties and which have as their object or effect the prevention, restriction or distortion of competition within the territory covered by this Agreement, and in particular those which:

   (a) directly or indirectly fix purchase or selling prices or any other trading conditions;

   (b) limit or control production, markets, technical development, or investment;

   (c) share markets or sources of supply;

   (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

   (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

   - any agreement or category of agreements between undertakings;
   - any decision or category of decisions by associations of undertakings;
   - any concerted practice or category of concerted practices;

   which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

   (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

   (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

### *Article 54*

Any abuse by one or more undertakings of a dominant position within the territory covered by this Agreement or in a substantial part of it shall be prohibited as incompatible with the functioning of this Agreement in so far as it may affect trade between Contracting Parties.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

### *Article 55*

1. Without prejudice to the provisions giving effect to Articles 53 and 54 as contained in Protocol 21 and Annex XIV of this Agreement, the EC Commission and the EFTA Surveillance Authority provided for in Article 108(1) shall ensure the application of the principles laid down in Articles 53 and 54.

   The competent surveillance authority, as provided for in Article 56, shall investigate cases of suspected infringement of these principles, on its own initiative, or on application by a State within the respective territory or by the other surveillance authority. The competent surveillance authority shall carry out these investigations in cooperation with the competent national authorities in the respective territory and in cooperation with the other surveillance authority, which shall give it its assistance in accordance with its internal rules.

   If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.

2. If the infringement is not brought to an end, the competent surveillance authority shall record such infringement of the principles in a reasoned decision.

   The competent surveillance authority may publish its decision and authorize States within the respective territory to take the measures, the conditions and details of which it shall determine, needed to remedy the situation. It may also request the other surveillance authority to authorize States within the respective territory to take such measures.

### *Article 56*

1. Individual cases falling under Article 53 shall be decided upon by the surveillance authorities in accordance with the following provisions:

   (a) individual cases where only trade between EFTA States is affected shall be decided upon by the EFTA Surveillance Authority;

   (b) without prejudice to subparagraph (c), the EFTA Surveillance Authority decides, as provided for in the provisions set out in Article 58, Protocol 21 and the rules adopted for its implementation, Protocol 23 and Annex XIV, on cases where the turnover of the undertakings concerned in the territory of the EFTA States equals 33 per cent or more of their turnover in the territory covered by this Agreement;

   (c) the EC Commission decides on the other cases as well as on cases under (b) where trade between EC Member States is affected, taking into account the provisions set out in Article 58, Protocol 21, Protocol 23 and Annex XIV.

2. Individual cases falling under Article 54 shall be decided upon by the surveillance authority in the territory of which a dominant position is found to exist. The rules set out in paragraph 1(b) and (c) shall apply only if dominance exists within the territories of both surveillance authorities.

3. Individual cases falling under subparagraph (c) of paragraph 1, whose effects on trade between EC Member States or on competition within the Community are not appreciable, shall be decided upon by the EFTA Surveillance Authority.

4. The terms 'undertaking' and 'turnover' are, for the purposes of this Article, defined in Protocol 22.

### *Article 57*

1. Concentrations the control of which is provided for in paragraph 2 and which create or strengthen a dominant position as a result of which effective competition would be significantly impeded within the territory covered by this Agreement or a substantial part of it, shall be declared incompatible with this Agreement.

2. The control of concentrations falling under paragraph 1 shall be carried out by:

   (a) the EC Commission in cases falling under Regulation (EEC) No 4064/89 in accordance with that Regulation and in accordance with Protocols 21 and 24 and Annex XIV to this Agreement. The EC Commission shall, subject to the review of the EC Court of Justice, have sole competence to take decisions on these cases;

   (b) the EFTA Surveillance Authority in cases not falling under subparagraph (a) where the relevant thresholds set out in Annex XIV are fulfilled in the territory of the EFTA States in accordance with Protocols 21 and 24 and Annex XIV. This is without prejudice to the competence of EC Member States.

### *Article 58*

With a view to developing and maintaining a uniform surveillance throughout the European Economic Area in the field of competition and to promoting a homogeneous implementation, application and interpretation of the provisions of this Agreement to this end, the competent authorities shall cooperate in accordance with the provisions set out in Protocols 23 and 24.

### *Article 59*

1. In the case of public undertakings and undertakings to which EC Member States or EFTA States grant special or exclusive rights, the Contracting Parties shall ensure that there is neither enacted nor maintained in force any measure contrary to the rules contained in this Agreement, in particular to those rules provided for in Articles 4 and 53 to 63.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Agreement, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Contracting Parties.

3. The EC Commission as well as the EFTA Surveillance Authority shall ensure within their respective competence the application of the provisions of this Article and shall, where necessary, address appropriate measures to the States falling within their respective territory.

### *Article 60*

Annex XIV contains specific provisions giving effect to the principles set out in Articles 53, 54, 57 and 59.

# CHAPTER 2

# STATE AID

### *Article 61*

1. Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.

2. The following shall be compatible with the functioning of this Agreement:

   (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;

   (b) aid to make good the damage caused by natural disasters or exceptional occurrences;

   (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division.

3. The following may be considered to be compatible with the functioning of this Agreement:

   (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;

   (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of an EC Member State or an EFTA State;

   (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

   (d) such other categories of aid as may be specified by the EEA Joint Committee in accordance with Part VII.

### *Article 62*

1. All existing systems of State aid in the territory of the Contracting Parties, as well as any plans to grant or alter State aid, shall be subject to constant review as to their compatibility with Article 61. This review shall be carried out:

   (a) as regards the EC Member States, by the EC Commission according to the rules laid down in Article 93 of the Treaty establishing the European Economic Community;

   (b) as regards the EFTA States, by the EFTA Surveillance Authority according to the rules set out in an agreement between the EFTA States establishing the EFTA Surveillance Authority which is entrusted with the powers and functions laid down in Protocol 26.

2. With a view to ensuring a uniform surveillance in the field of State aid throughout the territory covered by this Agreement, the EC Commission and the EFTA Surveillance Authority shall cooperate in accordance with the provisions set out in Protocol 27.

### *Article 63*

Annex XV contains specific provisions on State aid.

***Article 64***

1. If one of the surveillance authorities considers that the implementation by the other surveillance authority of Articles 61 and 62 of this Agreement and Article 5 of Protocol 14 is not in conformity with the maintenance of equal conditions of competition within the territory covered by this Agreement, exchange of views shall be held within two weeks according to the procedure of Protocol 27, paragraph (f).

   If a commonly agreed solution has not been found by the end of this two-week period, the competent authority of the affected Contracting Party may immediately adopt appropriate interim measures in order to remedy the resulting distortion of competition.

   Consultations shall then be held in the EEA Joint Committee with a view to finding a commonly acceptable solution.

   If within three months the EEA Joint Committee has not been able to find such a solution, and if the practice in question causes, or threatens to cause, distortion of competition affecting trade between the Contracting Parties, the interim measures may be replaced by definitive measures, strictly necessary to offset the effect of such distortion. Priority shall be given to such measures that will least disturb the functioning of the EEA.

2. The provisions of this Article will also apply to State monopolies, which are established after the date of signature of the Agreement.

## CHAPTER 3

## OTHER COMMON RULES

***Article 65***

1. Annex XVI contains specific provisions and arrangements concerning procurement which, unless otherwise specified, shall apply to all products and to services as specified.

2. Protocol 28 and Annex XVII contain specific provisions and arrangements concerning intellectual, industrial and commercial property, which, unless otherwise specified, shall apply to all products and services.

# PROTOCOL 24 {[1]}

## *ON COOPERATION IN THE FIELD OF CONTROL OF CONCENTRATIONS*

## GENERAL PRINCIPLES

*Article 1*

1. The EFTA Surveillance Authority and the EC Commission shall exchange information and consult each other on general policy issues at the request of either of the surveillance authorities.

2. In cases falling under Article 57(2)(a) of the Agreement, the EC Commission and the EFTA Surveillance Authority shall cooperate in the handling of concentrations as provided for in the provisions set out below.

3. For the purposes of this Protocol, the term 'territory of a surveillance authority' shall mean for the EC Commission the territory of the EC Member States to which the Treaty establishing the European Community applies, upon the terms laid down in that Treaty, and for the EFTA Surveillance Authority the territories of the EFTA States to which the Agreement applies.

*Article 2*

1. Cooperation shall take place, in accordance with the provisions set out in this Protocol, where:

(a) the combined turnover of the undertakings concerned in the territory of the EFTA States equals 25 per cent or more of their total turnover within the territory covered by the Agreement, or

(b) each of at least two of the undertakings concerned has a turnover exceeding EUR 250 million in the territory of the EFTA States, or

(c) the concentration is liable to significantly impede effective competition, in the territories of the EFTA States or a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position.

2. Cooperation shall also take place where:

(a) the concentration fulfils the criteria for referral pursuant to Article 6.

(b) an EFTA State wishes to adopt measures to protect legitimate interests as set out in Article 7.

### INITIAL PHASE OF THE PROCEEDINGS

*Article 3*

1. The EC Commission shall transmit to the EFTA Surveillance Authority copies of notifications of the cases referred to in Article 2(1) and (2)(a) within three working days and, as soon as possible, copies of the most important documents lodged with or issued by the EC Commission.

2. The EC Commission shall carry out the procedures set out for the implementation of Article 57 of the Agreement in close and constant liaison with the EFTA Surveillance Authority. The EFTA Surveillance Authority and EFTA States may express their views upon those procedures. For the purposes of Article 6(1) of this Protocol, the EC Commission shall obtain information from the competent authority of the EFTA State concerned and give

**{[1]} Protocol 24 replaced by Decision No 78/2004 (OJ No L 219, 19.6.2004, p. 13 and EEA Supplement No 32, 19.6.2004, p. 1), e.i.f. 9.6.2004.**

it the opportunity to make known its views at every stage of the procedures up to the adoption of a decision pursuant to that Article. To that end, the EC Commission shall give it access to the file.

Documents to be transmitted from the Commission to an EFTA State and from an EFTA State to the Commission pursuant to this Protocol shall be submitted via the EFTA Surveillance Authority.

## HEARINGS

*Article 4*

In cases referred to in Article 2(1) and (2)(a), the EC Commission shall invite the EFTA Surveillance Authority to be represented at the hearings of the undertakings concerned. The EFTA States may likewise be represented at those hearings.

## THE EC ADVISORY COMMITTEE ON CONCENTRATIONS

*Article 5*

1. In cases referred to in Article 2(1) and (2)(a), the EC Commission shall in due time inform the EFTA Surveillance Authority of the date of the meeting of the EC Advisory Committee on Concentrations and transmit the relevant documentation.

2. All documents forwarded for that purpose from the EFTA Surveillance Authority, including documents emanating from EFTA States, shall be presented to the EC Advisory Committee on Concentrations together with the other relevant documentation sent out by the EC Commission.

3. The EFTA Surveillance Authority and the EFTA States shall be entitled to be present in the EC Advisory Committee on Concentrations and to express their views therein; they shall not have, however, the right to vote.

## RIGHTS OF INDIVIDUAL STATES

*Article 6*

1. The EC Commission may, by means of a decision notified without delay to the undertakings concerned, to the competent authorities of the EC Member States and to the EFTA Surveillance Authority, refer a notified concentration, in whole or in part, to an EFTA State where:

(a) a concentration threatens to affect significantly competition in a market within that EFTA State, which presents all the characteristics of a distinct market, or

(b) a concentration affects competition in a market within that EFTA State, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the territory covered by the Agreement.

2. In cases referred to in paragraph 1, any EFTA State may appeal to the European Court of Justice, on the same grounds and conditions as an EC Member State under Articles 230 and 243 of the Treaty establishing the European Community, and in particular request the application of interim measures, for the purpose of applying its national competition law.

3.**{[2]}** Where the concentration may affect trade between one or more EC Member States and one or more EFTA States, the EC Commission shall inform the EFTA Surveillance Authority of any request received from an EC Member State pursuant to Article 22 of Regulation (EC) No 139/2004 without delay.

One or more EFTA States may join a request as referred to in subparagraph 1 where the concentration affects trade between one or more EC Member States and one or more EFTA States and threatens to significantly affect competition within the territory of the EFTA State or States joining the request.

**{[2]} Paragraph 3 inserted by Decision No 79/2004 (OJ No L 219, 19.6.2004, p. 24 and EEA Supplement No 32, 19.6.2004, p. 10), e.i.f. 1.7.2005.**

Upon receipt of a copy of a request as referred to in subparagraph 1, all national time limits relating to the concentration shall be suspended in the EFTA States until it has been decided where the concentration shall be examined. As soon as an EFTA 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.

Where the Commission decides to examine the concentration, the EFTA State or States having joined the request shall no longer apply their national legislation on competition to the concentration.

4. Prior to the notification of a concentration within the meaning of Article 4(1) of Regulation (EC) No 139/2004 the persons or undertakings referred to in Article 4(2) of Regulation (EC) No 139/2004 may inform the EC Commission, by means of a reasoned submission, that the concentration may significantly affect competition in a market within an EFTA State which presents all the characteristics of a distinct market and should therefore be examined, in whole or in part, by that EFTA State.

The EC Commission shall transmit all submissions pursuant to Article 4(4) of Regulation (EC) No 139/2004 and this paragraph to the EFTA Surveillance Authority without delay.

5. With regard to a concentration as defined in Article 3 of Regulation (EC) No 139/2004 which does not have a Community dimension within the meaning of Article 1 of that Regulation and which is capable of being reviewed under the national competition laws of at least three EC Member States and at least one EFTA State, the persons or undertakings referred to in Article 4(2) of that Regulation may, before any notification to the competent authorities, inform the EC Commission by means of a reasoned submission that the concentration should be examined by the Commission.

The EC Commission shall transmit all submissions pursuant to Article 4(5) of Regulation (EC) No 139/2004 to the EFTA Surveillance Authority without delay.

Where at least one such EFTA State has expressed its disagreement as regards the request to refer the case, the competent EFTA State(s) shall retain their competence, and the case shall not be referred from the EFTA States pursuant to this paragraph.

*Article 7*

1. Notwithstanding the sole competence of the EC Commission to deal with concentrations of a Community dimension as set out in Council Regulation (EC) No 139/2004, EFTA States may take appropriate measures to protect legitimate interests other than those taken into consideration according to the above Regulation and compatible with the general principles and other provisions as provided for, directly or indirectly, under the Agreement.

2. Public security, plurality of media and prudential rules shall be regarded as legitimate interests within the meaning of paragraph 1.

3. Any other public interest must be communicated to the EC Commission and shall be recognized by the EC Commission after an assessment of its compatibility with the general principles and other provisions as provided for, directly or indirectly, under the Agreement before the measures referred to above may be taken. The EC Commission shall inform the EFTA Surveillance Authority and the EFTA State concerned of its decision within 25 working days of that communication.

**ADMINISTRATIVE ASSISTANCE**

*Article 8*

1. When the EC Commission requires by decision a person, an undertaking or an association of undertakings located within the territory of the EFTA Surveillance Authority to supply information, it shall without delay forward a copy of the decision to the EFTA Surveillance Authority. At the specific request of the EFTA Surveillance Authority, the EC Commission shall also forward to the EFTA Surveillance Authority copies of simple requests for information relating to a notified concentration.

2. At the request of the EC Commission, the EFTA Surveillance Authority and the EFTA States shall provide the EC Commission with all necessary information to carry out the duties assigned to it by Article 57 of the Agreement.

3. When the EC Commission interviews a consenting natural or legal person in the territory of the EFTA Surveillance Authority, the EFTA Surveillance Authority shall be informed in advance thereof. The EFTA

Surveillance Authority may be present during the interview, as well as officials from the competition authority on whose territory the interviews are conducted.

4.**{[3]}** At the request of the EC Commission, the EFTA Surveillance Authority shall undertake inspections within its territory.

5.**{[4]}** The EC Commission is entitled to be represented and take an active part in inspections carried out pursuant to paragraph 4.

6.**{[5]}** All information obtained during such inspections on request shall be transmitted to the EC Commission immediately after their finalization.

7. Where the EC Commission carries out investigations within the territory of the Community, it shall, as regards cases falling under Article 2(1) and (2)(a), inform the EFTA Surveillance Authority of the fact that such inspections**{[6]}** have taken place and on request transmit in an appropriate way the relevant results of the investigations.

## PROFESSIONAL SECRECY

*Article 9*

1. Information acquired as a result of the application of this Protocol shall be used only for the purpose of procedures under Article 57 of the Agreement.

2. The EC Commission, the EFTA Surveillance Authority, the competent authorities of the EC Member States and of the EFTA 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 and of the EFTA States shall not disclose information acquired by them as a result of the application of this Protocol and of the kind covered by the obligation of professional secrecy.

3. Rules on professional secrecy and restricted use of information provided for in the Agreement or the legislation of the Contracting Parties shall not prevent the exchange and use of information as set out in this Protocol.

## NOTIFICATIONS

*Article 10*

1. Undertakings shall address their notifications to the competent surveillance authority in accordance with Article 57(2) of the Agreement.

2. Notifications or complaints addressed to the authority which, pursuant to Article 57 of the Agreement, is not competent to take decisions on a given case shall be transferred without delay to the competent surveillance authority.

*Article 11*

The date of submission of a notification shall be the date on which it is received by the competent surveillance authority.

**{[3]} Paragraph 4 inserted by Decision No 79/2004 (OJ No L 219, 19.6.2004, p. 24 and EEA Supplement No 32, 19.6.2004, p. 10), e.i.f. 1.7.2005, as corrected by Corrigendum noted by the EEA Joint Committee Meeting on 24.09.2004.**

**{[4]} Paragraph 5 inserted by Decision No 79/2004 (OJ No L 219, 19.6.2004, p. 24 and EEA Supplement No 32, 19.6.2004, p. 10), e.i.f. 1.7.2005, as corrected by Corrigendum noted by the EEA Joint Committee Meeting on 24.09.2004.**

**{[5]} Paragraph 6 inserted by Decision No 79/2004 (OJ No L 219, 19.6.2004, p. 24 and EEA Supplement No 32, 19.6.2004, p. 10), e.i.f. 1.7.2005, as corrected by Corrigendum noted by the EEA Joint Committee Meeting on 24.09.2004.**

**{[6]} Word 'investigations' replaced by the word 'inspections' by Corrigendum Decision No 78/2004, e.i.f. 9.6.2004, noted by the EEA Joint Committee Meeting on 24.09.2004.**

## LANGUAGES

*Article 12*

1. Undertakings shall be entitled to address and be addressed by the EFTA Surveillance Authority and the EC Commission in an official language of an EFTA State or the Community which they choose as regards notifications. This shall also cover all instances of a proceeding.

2. If undertakings choose to address a surveillance authority in a language which is not one of the official languages of the States falling within the competence of that authority, or a working language of that authority, they shall simultaneously supplement all documentation with a translation into an official language of that authority.

3. As far as undertakings are concerned which are not parties to the notification, they shall likewise be entitled to be addressed by the EFTA Surveillance Authority and the EC Commission in an appropriate official language of an EFTA State or of the Community or in a working language of one of those authorities. If they choose to address a surveillance authority in a language which is not one of the official languages of the States falling within the competence of that authority, or a working language of that authority, paragraph 2 shall apply.

4. The language which is chosen for the translation shall determine the language in which the undertakings may be addressed by the competent authority.

## TIME LIMITS AND OTHER PROCEDURAL QUESTIONS

*Article 13*

As regards time limits and other procedural provisions, including the procedures for referral of a concentration between the EC Commission and one or more EFTA States, the rules implementing Article 57 of the Agreement shall apply also for the purpose of the cooperation between the EC Commission and the EFTA Surveillance Authority and EFTA States, unless otherwise provided for in this Protocol.

The calculation of the time limits referred to in Article 4(4) and (5), Article 9(2) and (6) and Article 22(2) of Regulation (EC) No 139/2004 shall start, for the EFTA Surveillance Authority and the EFTA States, upon receipt of the relevant documents by the EFTA Surveillance Authority **{[7]}**.

## TRANSITION RULE

*Article 14*

Article 57 of the Agreement shall not apply to any concentration which was the subject of an agreement or announcement or where control was acquired before the date of entry into force of the Agreement. It shall not in any circumstances apply to a concentration in respect of which proceedings were initiated before that date by a national authority with responsibility for competition.

**{[7]} In second paragraph, the words 'Article 4(4) and (5) and Article 9(2) and (6)' replaced by Decision No 79/2004 (OJ No L 219, 19.6.2004, p. 24 and EEA Supplement No 32, 19.6.2004, p. 10), e.i.f. 1.7.2005.**

# Case referral under the EEA Agreement

## *1. Introduction*

When the Commission has jurisdiction to deal with a case under the Merger Regulation[1], it is the sole competent authority in the EEA[2], which means that it exercises its powers not only with respect to the EC Member States, but also with respect to the territories of the EFTA States[3]. The rules on referral of cases under the EEA Agreement are included in Protocol 24 to the EEA Agreement. These are based on the Merger Regulation's system for referral of cases, but have been subject to certain adaptations. Following the adoption of Council Regulation 139/2004, many of the new rules on referral (pre-notification and post-notification) of cases included in the Regulation have likewise been incorporated into the EEA Agreement[4].

The referral rules in Protocol 24 of the EEA Agreement apply with regard to cases referred to or from the EFTA States. The referral rules in the Merger Regulation are applicable in parallel with regard to cases referred to or from the EC Member States. Thus, in a case which involves referrals involving both EFTA States and EC Member States, the two sets of rules are applicable. When a referral involves EFTA States only, the EEA Agreement alone applies. Similarly, when a referral involves exclusively EC Member States, only the rules of the Merger Regulation apply.

According to the referral rules in the EEA Agreement, there is a more limited scope for the EFTA States than for the EC Member States to request the referral of a case to the Commission. The rules on referral of cases from the Commission to the EFTA States are, however, essentially identical to those in the Merger Regulation.

## *2. Pre-notification referrals under the EEA Agreement*

The EEA Agreement provides for **pre-notification referrals from the EFTA States to the Commission,** by allowing the parties to a concentration to request the Commission to examine a concentration which is "capable of being reviewed under the national competition laws of at least three EC Member States and at least one EFTA State"[5]. Such a request is optional for the parties. It constitutes an "add-on" to a request for referral from three or more EC Member States under Article 4(5) of Regulation 139/2004. This means that if a case is capable of being reviewed under the competition laws of, e.g., France, Poland, and Norway, this is not sufficient for the case to be referred to the Commission; it is necessary that the case is reviewable also under the national law of a third EC Member State.

1 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24/1, 29.1.2004.

2 This follows from Article 57 (2) and Annex XIV to the EEA Agreement. The EEA Agreement and its Annexes and Protocols can be found of the web site of the EFTA.

3 For the purpose of this note, the term EFTA States, which is the term used in the EEA Agreement, refers to Iceland, Lichtenstein and Norway, and not to Switzerland which has not ratified the EEA Agreement.

4 See the Commission's web-site: http://europa.eu.int/comm/competition/mergers/legislation/regulation/regulation139/

5 See Article 6(5) of Protocol 24 to the EEA Agreement, and Article 4(5) of the Merger Regulation.

If one or more EFTA States vetoes the referral, the competent EFTA State(s) shall retain its/their competence to examine the case under its national competition law and the case shall not be referred from any EFTA State. However, a veto by an EFTA State has no impact on the fate of the request for referral from the EC Member States concerned and the Commission.

The parties can also request the **pre-notification referral of a case from the Commission to a competent EFTA State**. In this situation, the rules of the EEA Agreement are essentially identical to those of the Merger Regulation.[6] They provide that an undertaking concerned may inform the Commission by means of a reasoned submission that the "concentration may significantly affect competition in a market within an EFTA State, which presents all the characteristics of a distinct market and should therefore be examined, in whole or in part, by that EFTA State". In such circumstances, the rules applicable to the assessment of that request by the Commission and by the EFTA State(s) concerned are in substance the same as those set out in the Merger Regulation.

### *3. Post-notification referrals under the EEA Agreement*

The EEA Agreement enables **post-notification referral from the Commission to an EFTA State** of a case or of a part or parts of a case.[7]

The Commission may refer a notified concentration to an EFTA State in two situations. First, a case may be referred where the concentration "threatens to affect significantly competition in a market within that EFTA State, which presents all the characteristics of a distinct market". Second, the Commission may refer a case to an EFTA State where the concentration "affects competition in a market within that EFTA State, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the territory covered by the Agreement".[8]

As regards **post-notification referral of cases to the Commission**, an EFTA State may only join a referral request made by an EC Member State; it may not initiate such a request itself. This is consistent with the "two-pillar" system of the EEA-Agreement, and means that the powers of the EFTA States are in this regard somewhat more limited than those of the EC Member States.

Accordingly, where a concentration may affect trade between one or more EC Member States and one or more EFTA States, and it threatens to significantly affect competition in one or more EFTA States, that State or these States may join a request for referral put forward by one or more EC Member States[9].

6 See Article 6 (4) of Protocol 24 to the EEA Agreement, and Article 4 (4) of the Merger Regulation.

7 See Article 6 (1) of Protocol 24 to the EEA Agreement.

8 These provisions closely correspond to the provisions in Article 9(2)(a) and 9(2)(b) of the Merger Regulation, but are not identical to them. In particular, it should be noted that the Commission has no discretion regarding a case meeting the requirements set out in Article 9(2)(b) of the Merger Regulation, but does enjoy discretion regarding referral of the corresponding category of cases under Article 6 (1) of Protocol 24 to the EEA Agreement.

9 See Article 6(3) of Protocol 24 to the EEA Agreement.

As under the Merger Regulation, the EEA Agreement provides that when the EFTA States receive the request by an EC Member State to refer a case to the Commission, all national time limits relating to the concentration shall be suspended in all the EFTA States competent to review the case until it has been decided whether the Commission will examine the case or not. Once an EFTA State has informed the Commission that it does not wish to join the request, that EFTA State retains its competence to examine the case and its national time limits start running anew. If the Commission decides to examine the referred concentration, the EFTA State or the EFTA States that joined the request are no longer competent to examine the case under their national competition law. An EFTA State that does not join the request can apply its national competition law to the concentration.

### *4. Calculation of time limits*

In general, the procedure governing referral requests including the EFTA States is the same as for requests applicable to requests involving only EC Member States. However, although the time limits are the same for the EFTA States as for the EC Member States, the manner in which they are calculated differs somewhat. The time limits start to run, for pre- and post notification referrals involving the EFTA States, upon receipt of the request for referral and other relevant documents by the EFTA Surveillance Authority, and not upon the receipt by the EFTA States of the documents in question[10].

### *5. Submission of pre-notification referral requests*

As regards the submission of requests for pre-notification referrals, an unofficial version of the Form RS, which is intended to give guidance on the information undertakings may wish to provide should they seek a referral involving any of the EFTA States, has been published on the web site of DG Competition.[11] Merging parties are therefore encouraged to use this form.

According to Section D of that unofficial version of the Form RS, where a reasoned submission is made according to the EEA Agreement[12] in an official language of an EFTA State which is not an official language of the Community, the submission must simultaneously be supplemented by a translation into an official language of the Community.

10 See Article 13 of Protocol 24 to the EEA Agreement.

11 http://europa.eu.int/comm/competition/mergers/legislation/regulation/regulation139/form_rs_eea_en.pdf

12 See Article 12 of Protocol 24 to the EEA Agreement.

# F. INTERNATIONAL COOPERATION

# US-EU Merger Working Group

# BEST PRACTICES ON COOPERATION IN MERGER INVESTIGATIONS

This document sets forth best practices which the United States federal antitrust agencies and the Commission of the European Union will seek to apply, to the extent consistent with their respective laws and enforcement responsibilities, when they simultaneously review the same merger transaction.[1] A number of these best practices already are routinely employed informally between the US and EU. With that in mind, this statement of best practices seeks to set out the conditions under which trans-Atlantic inter-agency cooperation in merger investigations should be conducted, while at the same time confirming and building upon current good practice.

**Objectives**

1. In today's global economy, many sizeable transactions involving international businesses are likely to be subject to review by the EU and by the US. Where the US and EU are reviewing the same transaction, both jurisdictions have an interest in reaching, insofar as possible, consistent, or at least non-conflicting, outcomes.[2] Divergent approaches to assessment of the likely impact on competition of the same transaction undermine public confidence in the merger review process, risk imposing inconsistent requirements on the firms involved, and may frustrate the agencies' respective remedial objectives.

2. These best practices are designed to further enhance cooperation in merger review between the United States Department of Justice ("DOJ") or the U.S. Federal Trade Commission ("FTC") (hereafter referred to as the "US"),[3] on the one hand, and the European Commission (hereafter referred to as the "EU"), on the other. They are intended to promote fully-informed decision-making on the part of both sides' authorities, to minimize the risk of divergent outcomes on both sides of the Atlantic, to facilitate coherence and compatibility in remedies, to enhance the efficiency of their respective investigations, to reduce burdens on merging parties and third parties, and to increase the overall transparency of the merger review processes.

---

[1] This document is intended to set forth an advisory framework for interagency cooperation. The agencies reserve their full discretion in the implementation of these best practices and nothing in this document is intended to create any enforceable rights.

[2] Cooperation between the US and EU agencies is based primarily upon the 1991 US-EC Agreement on the Application of their Competition Laws, a principal purpose of which is to avoid conflict in the enforcement of their antitrust laws.

[3] This document assumes that, consistent with past practice, only one US agency – either the DOJ or FTC – reviews each pertinent transaction and, accordingly, coordinates with the EU regarding that transaction.

3. Given legal constraints existing in both jurisdictions, effective inter-agency coordination between the US and the EU depends to a considerable extent on the cooperation and good will of the merging parties, and to a lesser extent on third parties. In particular, cooperation is more complete and effective when the merging parties allow the agencies to share information the disclosure of which is subject to confidentiality restrictions. In addition, coordination between the agencies is most effective when the investigation timetables of the US and the EU run more or less in parallel so that the investigative staffs of each agency can engage with one another and with the parties on substantive issues at similar points in their investigations. The agencies intend, therefore, to work cooperatively with one another and with the parties, as appropriate, to promote such timetable coordination. At the same time, the EU and US agencies recognize that many considerations go into confidentiality waiver and transaction timing and/or notification decisions and that these decisions are within the discretion of the merging parties. Accordingly, it should be emphasized that any party's choice not to abide by some or all of the agencies' recommendations will not in any way prejudice the conduct or outcome of the agencies' investigations.

**Coordination on Timing**

4. Cooperation is most effective when the investigation timetables of the reviewing agencies run more or less in parallel, recognizing there are differences between US and EU merger review processes. To that end, the agencies should endeavor to keep one another apprised of important developments related to the timing of their respective investigations throughout the course of their reviews of merger transactions subject to review by the US and the EU.

5. In appropriate cases, the reviewing agencies should offer the merging parties an opportunity to confer with the relevant EU and US staffs jointly to discuss timing issues. Such a conference will be most beneficial if held as soon as feasible after the transaction has been announced. At this conference, the agencies and parties should be prepared to discuss ways to synchronize the timing of the US and EU investigations, to the extent possible under EU and US law respectively. Topics addressed may include the appropriate times to file in the US and EU, suggested timeframes for the submission of documents or other information, and, where appropriate, the prospect of a timing agreement (in the US) and/or a waiver from the obligation to notify within seven days of the conclusion of a binding agreement (in the EU). The success of this effort depends on the active participation and cooperation of the parties, and would, in most cases, require the parties to discuss timing with the agencies before filing in either jurisdiction.

**Collection and Evaluation of Evidence**

6. In significant matters under review by both jurisdictions, the agencies should seek to coordinate with one another throughout the course of their investigations and keep one another apprised of their progress. This may include sharing publicly available information and, consistent with their confidentiality obligations, discussing their respective analyses at various stages of an investigation, including tentative market definitions, assessment of competitive effects, efficiencies, theories of competitive harm, economic theories, and the empirical evidence

needed to test those theories. Views on necessary remedial measures, and similar past investigations and cases, also may be discussed. The agencies also may discuss and coordinate information or discovery requests to the merging parties and third parties, including exchanging draft questionnaires to the extent permitted by the respective jurisdictions' laws and regulations.

7. Waivers of confidentiality executed by merging parties enable more complete communication between the reviewing agencies and with the merging parties regarding evidence that is relevant to the investigation. This results in more informed decision-making and more effective coordination between the reviewing agencies, thereby helping to avoid divergent analyses and outcomes, as well as expediting merger review. Accordingly, as soon as feasible after the announcement of a transaction that requires review by the US and EU, the staffs of the reviewing agencies should, in appropriate cases, enter into discussion with the parties with a view to requesting the possible execution by the merging parties of confidentiality waivers, providing sample waiver letters if necessary. The reviewing agencies should, where appropriate and feasible, also encourage the merging parties to allow joint EU/US agency interviews with party executives and joint conferences with the parties.

8. Similarly, waivers of confidentiality executed by third parties enable more complete communication between the reviewing agencies and with third parties and can reduce the investigative burden imposed on third parties. Where appropriate, the reviewing agencies may, therefore, request that third parties waive confidentiality, or simply request that third parties provide the same information divulged to one reviewing agency to the other. The agencies may also encourage joint interviews and conferences with third parties, where appropriate and feasible.

**Communication Between the Reviewing Agencies**

9. The reviewing agencies will, via liaison officers or otherwise, contact one other upon learning of a transaction that appears to require review by both the US and EU.

10. At the start of any investigation in which it appears that substantial cooperation between the US and EU may be beneficial, each agency should designate a contact person who will be responsible for: setting up a schedule for conferences between the relevant investigative staffs of each agency; discussing with the merging parties the possibility of coordinating investigation timetables (see Section II above); and coordinating information gathering or discovery efforts, including seeking waivers from the merging parties and from third-parties.

11. At the start of any investigation in which it appears that substantial cooperation between the US and EU may be beneficial, the relevant DOJ Section Chiefs/FTC Assistant Directors and the EU Merger Task Force Unit Head (or their designees) should seek to agree on a tentative timetable for regular consultations between them on the progress of their investigations. The timetable for consultations will take into account the nature and timing of the transaction. Consultations normally should occur: (a) before the US closes its investigation without taking action; (b) before the US issues a second request; (c) no later than three weeks following the initiation of a Phase I investigation in the EU; (d) before the EU

opens a Phase II investigation or clears the merger without going to Phase II; (e) before the EU closes a Phase II investigation without issuing a Statement of Objections or approximately two weeks before the EU anticipates issuing its Statement of Objections; (f) before the relevant US DOJ/FTC section/division investigating the merger makes its case recommendation to the relevant DOJ DAAG or the FTC Bureau Director; and (g) at the commencement of remedies negotiations with the merging parties. Discussions may also take place at any other point the DOJ Chiefs/FTC Assistant Directors and the EU Unit Head find useful.

12. In some cases, consultations may be appropriate between senior competition officials for the EU (the Competition Commissioner, Director General for Competition, or Deputy Director General for Mergers, as appropriate) and their counterparts at the Antitrust Division of the Department of Justice (the Assistant Attorney General for Antitrust or the relevant DOJ Deputy Assistant Attorney General ("DAAG"), as appropriate) or the Federal Trade Commission (the Chairman, Director of the Bureau of Competition, or Deputy Director of the Bureau of Competition, as appropriate). In such cases, consultations are likely to be particularly useful: (a) shortly before or after the US issues a second request and the EU initiates a Phase II investigation; (b) approximately one week before the EU anticipates issuing its Statement of Objections; (c) approximately one week after the relevant DOJ/FTC section/division investigating the merger makes its case recommendation to the relevant DOJ DAAG or FTC Bureau Director; and (d) prior to a decision by the Antitrust Division or FTC to challenge a merger or by the Competition Commissioner to recommend that the European Commission prohibit a merger. Consultations may also take place between their economic counterparts. These officials may find it useful to confer at other points in the investigation as well.

13. Pursuant to the terms of the Administrative Arrangements on Attendance of 1999, the US and EU, as appropriate, may attend certain key events in the other's investigative process. These include (a) the EU's Oral Hearing and (b) the merging parties' presentations to the Assistant Attorney General or Deputy Assistant Attorney General or to the Director or Deputy Director of the Bureau of Competition at which the parties present their arguments prior to the agency's decision whether to take enforcement action.

**Remedies/Settlements**

14. The reviewing agencies recognize that the remedies offered by the merging parties may not always be identical, in particular because the effects of a transaction may be different in the US than in the EU. Nevertheless, a remedy accepted in one jurisdiction may have an impact on the other. To the extent consistent with their respective law enforcement responsibilities, the reviewing agencies should strive to ensure that the remedies they accept do not impose inconsistent obligations upon the merging parties. The agencies should, therefore, advise that the parties consider coordinating the timing and substance of remedy proposals being made to the EU and US agencies, so as to minimize the risk of inconsistent results or subsequent difficulties in implementation.

15. Consistent with their confidentiality and/or non-disclosure obligations, the reviewing agencies should seek to keep one another informed of remedy offers being considered and of other relevant developments with respect to remedies to the extent they may impact the other jurisdiction's review. Where appropriate, and consistent with confidentiality and/or non-disclosure obligations, the agencies should share draft remedy proposals or settlement papers**,** on which they may provide comments to one another, and participate in joint conferences with the parties, buyers, and trustees.

# COMMISSION WAIVER MODEL OF CONFIDENTIALITY IN MERGER INVESTIGATIONS

***WAIVER***

1. On behalf of Company X and Company Y we confirm that each of X and Y agree to waive the confidentiality restrictions which govern the European Commission under EC Council Regulation 139/04 and other applicable laws (hereinafter referred to as "the confidentiality rules") to the extent necessary to permit the European Commission to disclose, for the purpose of its enquiries and analysis into the proposed merger/acquisition between X and Y (hereinafter referred to as the "proposed transaction"), to [*competition authority B*] any information obtained from Company X and/or Y during the course of its enquiry into the proposed transaction.

2. A corresponding waiver has or will be submitted to [*competition authority B*], enabling that authority to share information, obtained from Company X or Y during the course of its enquiry into the proposed transaction and which would otherwise be subject to the confidentiality rules of that jurisdiction, with the European Commission.

3. Specifically Company X and Y agree that the staff of the European Commission may share with [*competition authority B*] any documents, statements, data and information, supplied by Company X and /or Y, as well as the Commission's own internal analysis that contain or refer to X and Y's materials that would otherwise be prevented by the confidentiality rules.

***CAVEAT***

4. This letter does not constitute a waiver by X or Y of their rights under the confidentiality rules with respect to the protection afforded to X or Y against the direct or indirect disclosure of information to any third party other than [*competition authority B*]. This waiver is limited to information obtained by the Commission in relation to its review of the proposed transaction and does not apply to information obtained in the course of any other review of any case either now or in the future.

***CONDITIONS***

*- Use of Information by Receiving Jurisdiction ("Competition Authority B")*

5. For the avoidance of doubt information transmitted pursuant to this waiver may be used by [*competition authority B*] only for the purposes of conducting its enquiry into the proposed transaction and for no other purpose. Disclosure is made openly on the basis and subject to the express condition that such information remains confidential to [*competition authority B*] and may not be

disclosed to any third party. It is understood and agreed that failure by [*competition authority B*] to comply with the foregoing does not engender any liability on the part of the European Commission

- *Use of Information by Sending Jurisdiction ("Competition Authority A")*

6. The waiver referred to in the first paragraph of this letter is subject to the following conditions:

(1) that the European Commission shall itself maintain the confidentiality of the information and/or documentation provided to [*competition authority B* ] by X and/or Y and which is subsequently obtained from [*competition authority B*] and shall treat such information as if it had been obtained directly from X and /or Y;

(2) that the European Commission shall consider all information and/or documentation obtained from [*competition authority B*] pursuant to this waiver as confidential information or business secrets unless it is clearly identified as having been obtained from a publicly accessible source;

(3) that the European Commission shall not make any information and/or documentation obtained from [*competition authority B*] available to any third party including competitors, customers and suppliers of X and Y;

(4) that the information and/or documentation obtained from [*competition authority B*] shall be used only for the purposes of the European Commission's review of the proposed transaction under Council Regulation 139/04 and for no other purpose; and

(5) that the European Commission shall not disclose to [*competition authority B*] any information or documentation obtained from X and /or Y in relation to which either X or Y has asserted a claim of legal privilege in [*the jurisdiction in competition authority B*] and that is clearly identified as being subject to such client/attorney privilege. It is understood and agreed that Company X or Y is responsible for informing the Commission of the existence of such privileged information.

Each of Company X or Y has obtained the consent of its affiliates to the sharing of their documents and information produced by each of Company X or Y respectively on the same conditions as outlined above.

If you wish to discuss any matter arising form this waiver, please contact [name of responsible representative(s)]. A copy of this letter has been sent to the [competition authority B].

(Signed by the duly authorised representative of )

(Signatures)

Company X Company Y

# G. BEST PRACTICE GUIDELINES

# 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.

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

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.

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].

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

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 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.

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 cooperation 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.

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 before the expiry of 3 weeks[12] into Phase I. 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) normally within 2 weeks following the adoption of the Article 6(1)(c) decision. 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.

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

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

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).

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

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 nontechnical 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/

# 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.

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, p13.

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.

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.

The 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.

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).

The Monitoring Trustee may allow the disclosure of 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).

29. 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.

# Commission model text for divestiture commitments

**By hand and by fax: 00 32 2 296 4301**
European Commission – Merger Task Force
DG Competition
Rue Joseph II 70 Jozef-II straat
B-1000 BRUSSELS

## 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.

Structure and definition of the Divestment Business

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, knowhow, 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 cooperation, 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*].

# Commission model text for the Trustee mandate

## 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.

## Monitoring of Divestiture

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 subpowers 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.

# H. PRACTICAL INFORMATION

# MARKET SHARE RANGES IN NON-CONFIDENTIAL VERSIONS OF MERGER DECISIONS

In order to prepare non-confidential versions of final decisions in merger cases the notifying party(ies) has/have to provide the Commission within seven days with a proposal for a non-confidential version of the decision by replacing all business secrets by […] and replacing market shares by ranges.

Save exceptional circumstances, DG Competition considers that the following market share ranges are suitable for protecting business secrets contained in a decision:

Ranges to be used in non-confidential version:

| | |
|---|---|
| Between 0 and 4.99% | [0-5]% |
| Between 5.0 and 9.99% | [5-10]% |
| Between 10.0 and 19.99% | [10-20]% |
| Between 20.0 and 29.99% | [20-30]% |
| Between 30.0 and 39.99% | [30-40]% |
| Between 40.0 and 49.99% | [40-50]% |
| Between 50.0 and 59.99% | [50-60]% |
| Between 60.0 and 69.99% | [60-70]% |
| Between 70.0 and 79.99% | [70-80]% |
| Between 80.0 and 89.99% | [80-90]% |
| Between 90.0 and 100% | [90-100]% |

# Communication pursuant to Article 3(2) of Commission Regulation (EC) No 802/2004 [1] implementing Council Regulation (EC) No 139/2004 [2] on the control of concentrations between undertakings.

(2006/C 251/02)

**(Text with EEA relevance)**

## Introduction

The Commission hereby lays down, pursuant to Article 3(2) of Commission Regulation (EC) No 802/2004 [3], the format in which notifications and reasoned submissions should be delivered. Article 3(2) of Regulation 802/2004 requires notifications and reasoned submissions to be delivered in one original and 35 copies.

## Notifications: Form CO and Short Form CO (Annexes I and II to Commission Regulation (EC) No 802/2004)

1) One signed original on paper.

2) Five paper copies of the entire Form CO or Short Form CO and its annexes ('notification').

3) Thirty copies of the notification in CD- or DVD-ROM format (the 'medium'). The following specifications shall be adhered to:

   a) The files comprising the notification in this medium shall be in Portable Document Format (*.pdf) and should preferably not exceed 5 MB (mega-bytes) each in size. The copy of the notification may be contained on several CD- or DVD-ROMs. Documents which were originally produced in *.doc, *.xls and *.ppt format shall also be saved in this format in the same medium.

   b) Files should be named in a way which allows easy identification of the section in the Form CO or Short Form CO they refer to.

   c) A list of all files in the medium shall be delivered as a separate file in the medium.

   d) Each file shall bear the number and name of the proceeding for which the notification is submitted.

## Reasoned submissions [4]: — Form RS (Annex III to Commission Regulation (EC) No 802/2004)

1) One signed original on paper.

2) Five paper copies of the entire Form RS and its annexes ('Reasoned submission')

3) One CD- or DVD-ROM (the 'medium') which contains the complete reasoned submission. The following specifications shall be adhered to:

   a) The files comprising the reasoned submission in this medium shall be in Portable Document Format (*.pdf) and may not exceed 1 MB (mega-byte) each in size. Documents which were originally produced in *.doc, *.xls and *.ppt format shall also be saved in this format in the same medium.

   b) Files should be named in a way which allows easy identification of the section in the Form RS they refer to.

   c) A list of files in the medium shall be delivered as a separate file in the medium itself.

   d) Each file shall bear the number and name of the proceeding for which the Reasoned submission is made.

---

[1] OJ L 133, 30.4.2004, pages 1-39.
[2] OJ L 24, 29.1.2004, pages 1-22.
[3] Article 3(2) should be read together with Article 6(2) of Commission Regulation (EC) No 802/2004.
[4] Reasoned submissions within the meaning of Article 4(4) and 4(5) of Council Regulation (EC) No 139/2004.

4) If the files on the CD- or DVD-ROM cannot be kept under 1MB (mega-byte) each in size and/or if the total size of the files on the CD- or DVD-ROM exceeds 5MB, the instructions for submitting Form CO should be followed instead, i.e. 30 copies in CD- or DVD-ROM format should be submitted.

**Date of applicability of this communication**

The instructions contained in this communication shall be applicable 20 days following the date of publication of this communication in the *Official Journal of the European Union*.

## COMMUNICATION FROM THE COMMISSION

# Communication pursuant to Article 23(1) of Commission Regulation (EC) No 802/2004 [1] implementing Council Regulation (EC) No 139/2004 [2] on the control of concentrations between undertakings

(2004/C 139/02)

**(Text with EEA relevance)**

Address of the Commission's Directorate General for Competition

European Commission
Directorate General for Competition
Merger Registry
Rue Joseph II / Jozef II Straat, 70
B-1000 Bruxelles / Brussel

---

[1] OJ L 133, 30.04.2004, pages 1-39.
[2] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.01.2004, pages 1-22.

# Allocation of cases

In order for DG Competition to be able to allocate staff to cases in an efficient manner which best meets the requirements of individual cases, we kindly request that you use the standard case allocation request below. Requests should be sent to the Merger Registry by email or by fax by 12 o' clock on Fridays at the latest. Items received after this time would risk being dealt with at a later Management Meeting.

## Case team allocation request

To be sent by email to COMP-MERGER-REGISTRY@ec.europa.eu or by fax to +32-2-296.43.01

**Please fill in the information below:**

**1] Your contact details:**

**Name:**

**Company/law firm:**

**Telephone number:**

**Email:**

**2] Dossier type Pre-notification**

☐ Form CO
☐ Form CO simplified
☐ Form RS Art. 4(4)
☐ Form RS Art. 4(5)
☐ Consultation

**2) Extended level of confidentiality in the pre-notification phase**

Information submitted in pre-notification is protected by Article 17 of the Merger Regulation and pre-notification contacts are kept confidential. Nevertheless, some highly market sensitive transactions may require additional protection. If this is the case, please indicate this below providing a justification for the need for additional protection.

Only where requests for an extended level of confidentiality are considered justified, the Commission will use a code name for the transaction. Please indicate below the code name to be used.

**An extended level of confidentiality is requested because:**

☐ a) the transaction involves publicly traded companies, is not yet known to the market and is highly market sensitive
☐ b) other reason (please explain)

**Suggested code name:**

**3] Companies involved country of origin, role and turnover[1]:**

| Companies | Country | Role[2] | Turnover (million EUR) | | Year of turnover[3] |
|---|---|---|---|---|---|
| | | | World | Community | |
| -<br>-<br>-<br>- | | | | | |

**4] Name the main product(s) / Economic activities**

| Name of product(s)/activities | NACE code |
|---|---|
| | |
| | |
| | |
| | |
| | |

**5] Brief description of the parties, the transaction, the markets involved and complexity of the case**

**6] Is case linked with or related to any other current or previous case?**

☐ Yes, case number
☐ No

**7] Expected date of first draft :**

**8] Expected date of notification :**

**11] Proposed case language**

CS – DA - DE – ET - EL – EN - ES - FR - IT – LV – LT - HU – MT - NL – PL - PT – SK – SL - FI - SV *(please choose)*

**13] Any other information you want to submit at this stage:**

1 For pre-notification, complete turnover if available.

2 A/P = Acquirer/Parent(s)
A = Acquirer
T =Target
NC = Newly created company constituting a JV
MP = Merging Party

3 If fiscal year does not fall together with calendar year, indicate end of fiscal year in full date format (dd/mm/yyyy)

# Merger Correspondence

**In all your correspondence, please specify the name of the case and the case number**
It is essential that the correspondents use only the fax numbers and/or addresses for any official communication relating to merger cases. This will facilitate and accelerate the treatment of your correspondence. Fax communications sent to other numbers/addresses may inevitably be treated with delay.

**Delivery by post:**
Merger Registry
European Commission
Directorate-General for Competition
Merger Registry
1049 Bruxelles/Brussel
BELGIQUE/BELGIË
Fax: +32 2 296.43.01

**Delivery by hand:**
European Commission
DG Competition
Merger Registry
rue Joseph II / Jozef II straat 70
1000 Bruxelles/Brussel

## Delivery of merger-related documents

- Please note that the delivery at the above mentioned address is a legal obligation pursuant to Article 23(1) of Commission Regulation No. (EC) 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings. (See the Commission Communication published in the Official Journal C 139, 19.05.2004, p. 2)

- Security procedures :
    1. Prior to delivery, at Rue Joseph II / Jozef II straat 70 the law firm or the legal representative of the notifying company must call the Merger Registry (phone numbers: +32 2 296.55.77 or 32 2 295.68.27, fax number: +32 2 296.43.01)
    2. An estimated delivery time and the name of the individual from the firm or company who will be making the delivery must be provided along with a description of the item to be delivered (number of envelopes, packages or boxes
    3. Packages and envelopes to be submitted must clearly indicate the name of the office delivering the filing
    4. The Registry will confirm the receipt of the items being delivered

- Key features of the EC notification system and procedural requirements

For similar summaries of the notification requirements and procedure in other jurisdictions, please refer to the web-site of the International Competition Network, and to the information and links displayed there.

## Email

For general queries only, you may also send an e-mail to the Merger Control, General Queries mailbox (comp-mergers@ec.europa.eu). Please note that notifications and all other case-related submissions may not be sent to this address and shall not be considered valid if sent to this address. Please do not send queries of a general nature falling outside the scope of EU Merger Control Policy to this mailbox as it is not to be used for general queries unrelated to EU Merger Control Policy.

## Commission holidays

Please see http://ec.europa.eu/competition/mergers/legislation/regulations.html#holidays

European Commission

EU Competition Law – Rules Applicable to Merger Control
Luxembourg, Office for Official Publications of the European Union, 2010

2010 — 345 pp.— 21 x 29.7 cm

ISSN 1831-497X
ISBN 978-92-79-15361-7
doi 10.2763/42134

The Handbook on EU Competition Law – Rules Applicable to Merger Control gives an overview about EU legislation applicable in the field of Merger Control. The new 2010 edition includes the changes introduced by the Lisbon Treaty.

KD-AF-10-001-EN-N

ISSN 1831-497X

http://ec.europa.eu/competition/publications/