Dealing with the Commission

Notifications, complaints, inspections and fact-finding powers under Articles 85 and 86 of the EEC Treaty

EUROPEAN COMMISSION

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Directorate-General Competition

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General Introduction

This booklet explains the most important aspects of the relationship which develops when firms, business enterprises or individuals deal with the European Commission in the area of competition policy. Starting with a summary of the competition rules themselves and the role of European Union institutions in their enforcement, it examines how firms come into contact with the Commission. This may be when one firm approaches the Commission to complain about the anti-competitive conduct of another, or when a firm decides to notify certain agreements to the Commission. The conduct of investigations by the Commission under the competition rules is explained, with a focus on how the Commission is able to obtain information from those concerned, and on the legal guarantees of secrecy and fairness it must give. It examines the procedures the Commission must follow when it adopts a decision applying or enforcing the competition rules. Details of the most important Community legislative provisions are set out where necessary in the text. The booklet concludes with six Annexes, providing a wide variety of additional information, including facts about the Commission and its staff, lists of relevant legislation, and details on notifying agreements.

I. Introduction: the competition rules and the role of the EU institutions in their enforcement

1.1 The competition rules

One of the principal objectives of the EU is to create and maintain a single or common market. This is an area "without internal frontiers in which the free movement of goods, persons, services and capital is ensured" (Article 7A EC). Within that market, it is vital that there should be fair and free competition between firms, big or small, public-sector or private-sector. In order to protect consumers, firms must be prevented from unfairly using their market power to improve their share of the market or to enhance their profits, and from colluding to exclude other competitors. The actions of firms must not have the effect of dividing up the internal EU market. Competition policy is recognised as part of the EU's overall industrial policy, since the actions of companies to close off markets can be as damaging as governmental action which puts up barriers to trade. An effective competition policy is therefore necessary to protect the open and integrated market. The pursuit of such a policy is among the core activities required by the EC Treaty (Article 3(g) EC).

The most important provisions of the EC Treaty are:

- Article 85, which prohibits as "incompatible with the common 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..." (Article 85(1)). Any such agreements or decisions are automatically void (Article 85(2)). However, certain types of arrangement can be exempted from this prohibition by the Commission, on the grounds that they have beneficial effects for consumers and do not contain unnecessary or excessive restrictions on competition ("exemption" under Article 85(3)).

- Article 86, which prohibits "any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it...as incompatible with the common market in so far as it may affect trade between Member States." Examples of prohibited abuses set out in Article 86 include the imposition of unfair prices, production or marketing restrictions, discrimination between customers and tying provisions in contracts. No exemption is possible from Article 86.

Articles 85 and 86 apply not only to private undertakings, but also to public-sector firms. However, Article 90(2) contains a limited exception for some undertakings (either public or private) which have been "entrusted with the operation of services of a general economic interest".

The competition rules are only concerned with agreements or conduct which may affect "trade between Member States". Anti-competitive conduct which is purely national in scope may be controlled under the competition laws of individual Member States. Agreements which do not have an appreciable effect on either competition, or trade between Member States, fall outside the scope of Article 85(1) and are not prohibited (the *de minimis* doctrine). A Notice on Minor Agreements (Annex 2) should assist firms in applying these principles.

A further important component of the EC's competition policy is the 1989 Merger Regulation which lays down specific rules and procedures on the evaluation by the Commission of large mergers with a "Community dimension". Mergers and merger procedures are not covered in this booklet. Not covered either are rules on state aids (Articles 92-94 EC). These allow the Commission to control aids granted to companies by Member States which are incompatible with the common market.

1.2 The role of the Commission

Under Council Regulation 17, adopted in 1962, the Commission is the Community institution entrusted with the task of applying and enforcing the competition rules. Regulation 17, along with other supplementary measures, sets up the legal machinery which comes into play when the Commission investigates alleged infringements of these rules, responds to complaints and deals with requests from firms for an exemption or a declaration that Articles 85(1) or 86 do not apply to their agreements or conduct (a "negative clearance"). The Commission has extensive powers of investigation. If it finds that there has been an infringement of the rules, Regulation 17 allows it to order the termination of the infringement and, in certain circumstances, to impose heavy fines on the offending firms.

In addition to its role in enforcement, the Commission takes the lead in determining the general direction of the EU's competition policy. It does this when it interprets the provisions of the Treaty or implementing Regulations; when it initiates investigations into particular sectors of the economy; or when it decides that particular categories of agreements can benefit from a block or group exemption. Only the Commission can decide that an agreement may benefit from individual exemption under Article 85(3). It also has some discretion in deciding which infringements to follow up. It may choose to pursue only those which pose a particularly serious threat to the integrity of the internal market. The Commission issues an Annual Report on Competition Policy which is a useful source of information about its current activities and priorities. The Report also contains important policy statements on Commission practices. Policy statements are sometimes published as Notices in the *Official Journal* (C series), or as Written Answers to questions put by Members of the European Parliament. These are also published in the *Official Journal* (C series).

At one level, the Commission is a college of 20 individuals who exercise executive and policy-making functions within the EU's political system. For the period 1995-1999, the Commissioner responsible for competition matters is Mr. Karel Van Miert. The Commission is also an administrative body, dealing with the various policy areas in which the EU operates. It has a Directorate-General which deals specifically with competition matters (DG IV), headed by a Director General and comprising seven separate Directorates (A-G).

Directorates C-F are the operational directorates which take cases through from beginning to end. Each Directorate is subdivided into units dealing with different sectors of the economy. The other three Directorates are concerned with general competition policy and co-ordination (A), mergers (B), and state aid (F). Whenever the Commission embarks upon a formal investigation of alleged infringements of the competition rules it must also involve the officials of the Legal Service, who will advise on the legal conditions under which officials must proceed. Within DG IV there is also an independent Hearing Officer charged with ensuring the proper conduct of any oral hearings

which take place during the investigation, and with resolving disputes between the Commission and firms over questions of confidentiality and observance of due process.

Contact between the Commission and a firm concerning the competition rules is most frequently triggered in one of four ways:

- Regulation 17 sets up mechanisms for firms to notify agreements to the Commission, asking either for negative clearance or an exemption under Article 85(3).

- Firms which consider themselves victims of anti-competitive conduct in breach of Articles 85 and 86 may complain to the Commission.

- The Commission may itself begin the investigation of an alleged infringement, on the basis of information obtained from the firm in question, the press, questions in the European Parliament, third party complainants, the national authorities or even anonymous informants.

- Under Regulation 17, the Commission has the power to initiate general enquiries into sectors of the economy where it suspects infringements are occurring. Such an enquiry may result in an investigation into specific firms.

Part II discusses these mechanisms in more detail, showing how the Commission can take its concerns further by issuing requests for information or by conducting on-the-spot investigations.

Regulation 17 is the most important source of the written rules which govern the procedures of the Commission in the competition field. It covers the enforcement of the rules in most sectors of the economy, except for transport (see Annex 1). Regulation 17 is supplemented by Commission Regulation 3385/94 concerning applications and notifications, Commission Regulation 99/63 on hearings and Commission Decision 94/810 on the terms of reference of hearing officers. *Official Journal* references for these measures can be found in Annex 1. The full text of all these Regulations can be found in the *Official Journal* or the compendium *Competition law in the European Communities*, Volume 1A, Rules applicable to undertakings. This is updated regularly (see Annex 6). As the written rules have been interpreted and applied over a number of years by the EU authorities, an important source of information about the precise content of the relevant procedures is the case law of the Court of Justice and the Court of First Instance. For example, in addition to the formal written rules, the Commission is also bound by a body of general legal principles developed by these courts protecting the rights and interests of firms affected by competition law investigations. The role of the two EC courts in ensuring legal protection is covered in para. 1.4.

1.3 Formal and informal decisions

Contact between the Commission and a firm can have one of two outcomes. Either the Commission will reach a formal decision determining, for example, how the compettion rules will be applied; or it will produce an informal resolution of the issue. In view of the limited resources at its disposal and the heavy demands placed upon it, particularly by formal investigations of infringements, the Commission prefers, in many cases, to resolve matters informally. It may also take this route for speed and for the convenience of those involved. For example, many applications for negative clearance and for exemption under Article 85(3) are dealt with by means

of "comfort letters". These are letters signed by a senior official in DG IV which state the Commission's intention of closing a file because, in its view, the requirements for what the company is requesting have been met. A firm willing to accept a comfort letter will often receive a response much more quickly than one that insists that only a formal decision will suffice. Sometimes the Commission closes a case by issuing a letter warning the parties that their conduct may be in breach of the competition rules, but declining to take action on the grounds that there is only a weak impact on competition. In all cases involving informal letters, the Commission reserves the right to reopen the file. Alternatively, in cases where it would otherwise proceed to a formal decision finding an infringement, the Commission may be able to secure a settlement by persuading a firm to amend its agreement or to desist in the future from conduct it considers abusive. Firms may give undertakings about their future conduct, but these do not prevent the Commission from proceeding in respect of past conduct.

Formal decisions may only be adopted once the required safeguards for those affected have been observed. Investigations are often lengthy affairs. Details of the final decisions which the Commission may take are given in Part VIII. Less onerous procedural formalities apply to comfort letters. However, the nature of the outcome of an investigation, whether formal or informal, does not affect the extent of the investigative powers which the Commission can use under Regulation 17. The Commission is often able to proceed with its investigation with the full cooperation of the firms concerned. However, if necessary, it can require firms to comply with its requests by issuing decisions. The Commission may even fine firms for failing to cooperate with its investigation.

The most important final decisions which the Commission may adopt at the conclusion of an investigation are:

- negative clearance (Art 2 of Reg 17);
- exemption (Article 85(3) EC; Art 6 of Reg 17);
- finding of an infringement. When an infringement is found, the Commission will order its termination (Art 3 of Reg 17) and, in some cases, impose a fine (Art 15).

The Commission also has the power to adopt an interim decision in urgent cases ordering the immediate cessation of an infringement (see below para. 8.2).

1.4 The role of the Court of First Instance and the Court of Justice

The work of the Commission in interpreting and applying the competition rules is subject to the supervisory jurisdiction of the two EU courts, which ensure the observance of the rule of law by the institutions (Article 164 EC). All decisions taken by the Commission can be challenged before the Court of First Instance. The judgments of this body are in turn subject to review on points of law by the Court of Justice itself (Article 168A EC). All formal decisions adopted by the Commission must be properly reasoned (Article 190 EC), and can only be taken after the required preliminary procedure has been followed. Firms may challenge decisions which are addressed to them, or decisions addressed to other firms by which they are "directly and individually concerned" (Article 173 EC). For example, a complainant may challenge the Commission's decision to grant an exemption in respect of an agreement about which its original complaint was made.

In certain circumstances, firms may also challenge the Commission's "failure to act" (Article 175 EC). For example, all complainants are entitled to a basic examination of the terms of their complaint (as opposed to a detailed investigation of the infringement which they allege). They may force the Commission to take a position on the complaint by using a Court action.

Both EU courts ensure that the Commission complies with the following principles:

- the Commission must act within the limits of the powers which it is granted under Regulation 17;
- the Commission must act in accordance with the general principles of Community law, including the principles of proportionality, equality and legal certainty;
- to this end, the Commission must not infringe the fundamental rights of firms under investigation, in particular the "rights of defence" of such firms; the most important of these rights are the right to a fair hearing, the right to protection of business secrets and the right to obtain legal advice.
- the Commission must give adequate reasons for its decisions.

In other words, the Commission cannot exercise its powers arbitrarily, without regard for the interests of the firm under investigation. Where these principles are applied to the initial stages of Commission investigations, it is incumbent on the Court to strike a balance between fairness to the parties and administrative efficiency. The question of how these principles affect the Commission's conduct is dealt with at greater length below (paras. 4.1 and 5.4; Part VI).

1.5 Other avenues of redress against infringements

Firms which think they are the victims of infringements of the competition rules may, instead of, or as well as, complaining to the Commission, seek redress in a national court. Articles 85(1) and 86 have direct effect; they confer rights on individuals which national courts must safeguard.[1] In practice, this should mean that national courts can award compensation for loss caused, and/or can grant an injunction or declaratory remedy prohibiting conduct in breach of the rules. National rules govern the precise conditions under which remedies are available. National courts will also be able to grant interim relief in cases where the urgency of the matter makes a complaint to the Commission unlikely to be effective.

In 1993 the Commission issued a *Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the Treaty*. In this it strongly encouraged complainants to take action before national courts and indicated that it would in future adopt a policy of investigating in full only those complaints which demonstrated a sufficient Community interest. The Commission's policy is motivated by a desire for efficiency, since in some cases the litigants will be better served by going before a national court. It also allows the Commission to target its limited resources on important violations. However, any aggrieved firm may still complain to the Commission under Regulation 17. The basic legal framework is sketched out in para. 2.2 and the duties of the Commission are examined in Part VII.

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1 Case 127/73 *BRT* v *SABAM* [1974] ECR 51.

1.6 When and how to approach the Commission

The first point of contact between firms and the Commission is often DG IV's Information Service (address: Annex 4). This publishes a Competition Policy Newsletter, as well as having access to general information about the work of DG IV and being able to redirect firms with specific enquiries to the appropriate authorities. Detailed contact with DG IV on competition matters is most likely to involve the staff of Directorates C-F, who have responsibility for conducting cases. The Commission encourages pre-notification contacts between itself and firms proposing to notify their agreements or practices to it; this can facilitate completion of the necessary forms and lead to a speedier outcome (see para. 2.1). Full confidentiality is guaranteed in such cases. The Commission also maintains close contact with firms which have submitted notifications and applications. This is so that it can discuss with them the practical and legal problems arising out of the notification documents, and seek a resolution of any such problems by mutual agreement.

II. Coming into contact with the Commission

2.1 Notifications and applications for exemption and negative clearance

2.1.1 Reasons for notifying

There is no obligation on firms to notify agreements to the Commission, even if they do infringe Article 85(1) and might therefore lead to a Commission investigation and the imposition of a fine. However, notification is a prerequisite for obtaining an exemption (Article 4(1) of Reg 17), unless the agreement falls within Article 4(2) (see Box 1).

Article 4 Notification of new agreements, decisions and practices

1. Agreements, decisions and concerted practices of the kind described in Article 85(1) of the Treaty which come into existence after the entry into force of this Regulation and in respect of which the parties seek application of Article 85(3) must be notified to the Commission. Until they have been notified, no decision in application of Article 85(3) may be taken.

2. Paragraph 1 shall not apply to agreements, decisions and concerted practices where:

   (1) the only parties thereto are undertakings from one Member State and the agreements, decisions or practices do not relate either to imports or to exports between Member States;

   (2) not more than two undertakings are party thereto, and the agreements only:

      (a) restrict the freedom of one party to the contract in determining the prices or conditions of business upon which the goods which he has obtained from the other party to the contract may be resold; or
      (b) impose restrictions on the exercise of the rights of the assignee or user of industrial property rights - in particular patents, utility models, designs or trade marks - or of the person entitled under a contract to the assignment, or grant, of the right to use a method of manufacture or knowledge relating to the use and to the application of industrial processes;

   (3) they have as their sole object:
      (a) the development or uniform application of standards or types; or
      (b) joint research and development;
      (c) specialization in the manufacture of products, including agreements necessary for achieving this,
         - where the products which are the subject of specialization do not, in a substantial part of the common market, represent more than 15% of the volume of business done in identical products or those considered by consumers to be similar by reason of their characteristics, price and use, and
         - where the total annual turnover of the participating undertakings does not exceed 200 million units of account.

These agreements, decisions and practices may be notified to the Commission.

Box 1: Article 4 of Regulation 17

In practice, the exceptions in Article 4(2) rarely apply.

The Commission cannot even issue an informal exemption type comfort letter if it has no "official knowledge" of the existence of an agreement. A firm which seeks negative clearance must likewise apply to the Commission. Special rules apply to agreements existing when Regulation 17 came into force (November 1 1962) and for "accession agreements", agreements in place when new Member States join the EU. These must be notified to the Commission by dates specified in the Act of Accession.

One major benefit of notifying an agreement to the Commission is that it confers immunity from fines on the parties concerned, from the date of notification until the date the Commission grants or refuses the negative clearance or exemption (Article 15(5), or until it decides to withdraw that immunity following a preliminary investigation. (Article 15(6) of Reg 17) (see Box 2).

Article 15 Fines

....

5. [Fines] shall not be imposed in respect of acts taking place:

   (a) after notification to the Commission and before its decision in application of Article 85(3) of the Treaty, provided they fall within the limits of the activity described in the notification;

   (b) before notification and in the course of [old or accession] agreements, decisions or concerted practices...provided that notification was effected within the [time limits imposed]...

6. Paragraph 5 shall not have effect where the Commission has informed the undertakings concerned that after preliminary examination it is of the opinion that Article 85(1) of the Treaty applies and that application of Article 85(3) is not justified.

Box 2: Article 15 of Regulation 17

2.1.2 Block exemptions and individual exemptions

For the purposes of notification, a distinction can be drawn between agreements which are covered by existing block exemptions and those which are not. Many common types of agreements which in principle infringe Article 85(1) fall under block exemptions and need not be notified to the Commission (see Box 3).

Agreements covered by block exemption Regulations

- exclusive distribution agreements;
- exclusive purchasing agreements;
- patent licensing agreements;
- motor vehicle distribution and servicing agreements;
- specialization agreements;
- research and development cooperation agreements;
- franchise agreements;
- technology transfer agreements;
- certain types of agreements in the insurance sector.

Box 3: Agreements covered by block exemption regulations

In cases like these, an exemption is granted automatically. A full list of block exemption regulations, with references, is contained in Annex 1.

The position is a little different if the Regulation in question provides for a so-called "opposition procedure". If the agreement contains one of the "grey list" clauses defined in the Regulation (i.e. clauses which may or may not be capable of exemption, depending upon the precise circumstances) then notification is necessary. An exemption will automatically be granted after notification if the Commission does not raise an objection within six months.

Box 4 sets out some of the common types of agreement which may fall within Article 85(1) and require individual exemption before they can lawfully be operated. They must therefore be notified.

Agreements requiring individual exemption

- most types of joint venture agreements which do not fall under the Research and Development block exemption and which do not amount to mergers;
- most exclusive licences of industrial property which do not fall within the technology transfer block exemptions;
- restructuring agreements or "crisis cartels";
- agreements establishing joint sales or buying agencies;
- information agreements.
- agreements establishing the rules of a trade association;
- agreements or decisions establishing trade fairs.

Box 4: Agreements requiring individual exemption

2.1.3 Form A/B

Form A/B is the form for notifying agreements. The required form and content of applications and notifications is set out in Commission Regulation 3385/94. Attached to the Regulation as an Annex is Form A/B, which consists of two main parts. An Introduction explains the reasons for and purposes of notifications and applications, and tells firms how to submit them and what

consequences will flow from them. An operational Part is divided into Chapters covering basic information about the parties to the agreement or arrangement, facts about the relevant markets (for a definition see Box 6) and reasons for the application. The text explains in detail what information should be given, and what supporting documentation must be provided. These matters are summarized in Boxes 5 and 6.

Information about the parties and the agreement

- identity of firms submitting the notification;
- information on the parties to the agreement and any corporate groups to which they belong;
- details of the agreements or arrangements notified, including any provisions which may restrict the parties in their freedom to take independent commercial decisions;
- a non-confidential summary which the Commission can publish in the *Official Journal* inviting comments from third parties;
- reasons why the Commission should grant negative clearance or exemption;
- supporting documentation (eg. annual reports and accounts for all parties for the last three years; copies of in-house or external long-term market studies or planning documents.

Box 5: Information about the parties and the agreement

Information on relevant market to be supplied with notification

- identification of the relevant product market defined by the Commission as comprising "all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices or their intended use";
- identification of the relevant geographic market defined by the Commission as comprising "the area in which the undertakings concerned are involved in the supply 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.
- position of the parties, competitors and customers on the relevant product market(s);
- market entry and potential competition in the product and geographic markets.

Box 6: Information on relevant market to be supplied with notification

One reason for the change in approach is to place the onus on the firms concerned to provide information about relevant markets. Frequently, on receiving a notification, the Commission has been required to formulate a request for information under Article 11 of Regulation 17 (see para. 4.2) as a preliminary measure. Asking for this information in the notification itself simplifies the Commission's task. The Commission can now also "waive" the obligation to provide all the information requested by the form. Firms are encouraged to contact the Commission if they believe that the information is not relevant or necessary to their case. The Commission may agree and the notification is then considered complete, even though some details have not been provided (Article 3(3) of the Commission implementing Regulation). Overall, the new arrangements should limit the need for external legal advice by making the procedure more straightforward.

Special arrangements are made for the notification of structural co-operative joint ventures (JVs). Such JVs involve major changes in the structure of the participating firms, amounting to more than a legal arrangement to coordinate their commercial policies. An entity in its own right is created. This category of agreements has been treated as a special case since 1993. The Commission has committed itself, on a voluntary non-binding basis, to provide a first reaction to

properly notified co-operative JVs involving important structural change within two months. This first reaction may be a comfort letter, effectively allowing the parties to proceed with implementing their arrangements. This measure is supported by a requirement on firms wishing to take advantage of this accelerated procedure to provide detailed information (see Box 7).

Information on relevant market for structural JVs

- identification of relevant product and geographic markets as above (Box 6), plus additional questions on the products or services directly or indirectly affected by the agreement notified and products or services which are close economic substitutes and more detailed questions on the geographic market;
- information on group members oper ating in the same markets;
- questions on parties, competitors and customers as above (Box 6);
- questions on market entry and potential competition as above (Box 6), plus additional details, eg. on minimum viable scale for entry into the relevant product market(s).

Box 7: Information on relevant market for structural Joint Ventures

2.1.4 Incomplete or inaccurate information

Failure to provide complete and accurate information will mean that the Commission cannot proceed to grant an exemption or negative clearance. Intentionally or negligently providing misleading or incorrect information on Form A/B can result in a fine of between ECU 100 and 5000 (Article 15(1)(a) of Reg 17). For such a fine to be imposed it is not necessary for there to be a proven or even alleged infringement of Articles 85 or 86; it is sufficient that the Commission should have been misled.

2.1.5 After notification

Copies of the notification documents will be forwarded to the authorities of the Member States. Information supplied on Form A/B will be protected from disclosure by the Commission, the authorities of the Member States and their servants and officials under Article 20(2) of Regulation 17 if it is covered by the obligation of "professional secrecy". Parties are advised to indicate when making a notification what information they regard as confidential. Further details on the arrangements for the protection of business secrets in dealings with the Commission are given below (para. 6.2).

After notification, a period of informal contact between the Commission and the parties will often follow, before the Commission decides what procedure to follow. The procedure leading to an adverse decision will involve an investigation and is examined in Parts III-VI. Fewer formalities attach to a favourable decision. These are examined in para. 8.1. Of course, many notifications do not lead to formal decisions. Informal resolutions are dealt with in para. 8.2.

The Commission has often been criticised for failing to deal quickly enough with notifications. It has attempted to resolve some of the difficulties caused by delay by settling more cases by means of comfort letters. The internal deadlines it has imposed for structural JVs are also important in this context.

2.2 Complaining to the Commission

Complaints can be made to the Commission about alleged infringements of the competition rules by any "natural or legal persons who claim a legitimate interest" (Article 3(2) of Reg 17). The Commission interprets this broadly as any person who could plausibly claim to have suffered as the result of an infringement. This would include the parties to an agreement, third parties who suffered from the effects of an agreement or an anti-competitive practice, as well as bodies representing such persons (eg. consumer groups). The only formal requirement for a valid complaint is the disclosure of the identity of the complainant and the signature of the complainant or an authorised representative. In practice, however, a complaint should ideally contain as much information as possible to assist the Commission (Box 8).

Information to be supplied to the Commission in a complaint

- details about the complainant and about the firm(s) complained of;
- details about the substance of the complaint;
- evidence as to why the complainant has a legitimate interest;
- details of whether a similar complaint has been made to any other authorities (eg. national authorities) or is the subject of proceedings in a national court;
- details of any products or services involved and a description of the relevant market;
- a statement of what remedies are sought form the Commission (including interim remedies).

Box 8: Information to be supplied to the Commission in a complaint

The same guarantees protecting business secrets and confidential documents apply as in the case of notifications. A "formal" complainant also has certain rights of participation and access to information during administrative proceedings, if the Commission decides to take up the complaint and pursue an investigation.

Informal or even anonymous complaints can be made, but the Commission will not be required to observe the same formalities in its consideration of the complaint. The procedures which the Commission must follow in respect of formal complaints are set out in Part VII below. On the other hand, the Commission may be required to conceal the identity of an informal complainant from the firm complained about, if confidentiality is requested.

The Commission now has a policy of pursuing only complaints with a sufficient EU interest. This might be because of the gravity of the alleged infringement, the size of the undertakings concerned, the impact on trade between the Member States or on market integration, the existence of similar problems in different Member States, or the difficulty for the victims of obtaining alternative means of redress. Nevertheless, complaints remain an important source of information for the Commission.

2.3 *Ex officio* investigations of infringements

Contact between the Commission and a firm may be initiated by the Commission, where it wishes to investigate an alleged infringement which has come to its attention. Contact is especially likely to be initiated in this way when firms are engaged in secret practices which may infringe Article

85(1) or 86. Just some of the many practices which are likely to lead to an infringement investigation are highlighted in Box 9.

Practices likely to infringe Articles 85(1) or 86 and lead to an investigation

- a secret cartel between competing firms governing prices or market shares;
- a pricing regime pursued by a dominant firm not with the requirements of the market in mind, but with a view to driving a smaller competitor out of the market ("predatory pricing");
- refusal to supply by a dominant firm;
- a distribution system which rigidly divides the EU market into separate territories and which prevents parallel imports of the contract product.

Box 9: Practices likely to lead to an investigation

The Commission may obtain the information to initiate proceedings from a variety of sources including the press and complainants. Sometimes the first time the firm under investigation hears of the proceedings is when it receives a formal request for information, or even a surprise visit from the Commission's inspectors. These matters are dealt with in detail in Parts IV-VI. The course of a typical infringement investigation is charted in para. 3.2.

2.4 Enquiries into sectors of the economy

The Commission's power to conduct enquiries into sectors of the economy (Article 12(1) of Reg 17) has rarely been used. Under the terms of Article 12(1), an enquiry can be undertaken if "price movements, inflexibility of prices or other circumstances suggest that in the economic sector concerned, competition is restricted or distorted within the common market". There does not need to be specific evidence of particular firms acting in breach of Articles 85 and 86. Article 12(1) gives the Commission the power to request firms in the sector to supply "the information necessary for giving effect to the principles formulated in Articles 85 and 86 of the Treaty and for carrying out the duties entrusted to the Commission." The Commission cannot take general action against an entire sector on the basis of the investigation, but if individual infringements are revealed, an investigation must be undertaken before sanctions can be imposed. Information can be requested under Article 12 from every firm in the particular sector. Two early examples of sector inquiries date from the 1960s and involved margarine and brewing. In 1989, the Commission used Article 12 to launch an investigation into the brewing industry. The Commission can make general informal enquiries about particular sectors without recourse to Article 12, which requires a formal decision to begin and end the proceedings. In informal enquiries, the Commission will have no special powers to request information. Even so, firms may choose to cooperate of their own volition.

III. How the Commission investigates infringements

3.1 Investigations: general comments

Regulation 17 does not give a full picture of the procedures which will be followed if an investigation is conducted. Nor does it state clearly when investigations may be started or who might be investigated.

The purpose of an investigation is to obtain the information which the Commission needs to perform its duty of applying and enforcing Articles 85 and 86. It follows that an investigation will be initiated when the Commission considers that practices brought to its notice may be in breach of the competition rules. The aim of the investigation is to enable it to acquire the additional information it will need if it is to give a ruling on the legality of the practices in question. It can only give such a ruling if it has firm evidence of unlawful practices. Without adequate evidence, the Commission will find that its decision does not stand up to scrutiny before the Court of First Instance and Court of Justice. However, it should not be assumed that all investigations lead to decisions with negative consequences for those investigated: the Commission may also need to obtain information to assess the economic and legal circumstances of agreements notified to it by firms with a view to securing negative clearance or exemption.

Regulation 17 gives the Commission two main investigatory powers: the power to collect information (Article 11); and the power to conduct "on-the-spot" inspections at the business premises of firms (Article 14). It has equivalent powers in the transport sector, although these are not examined here in detail. Articles 11 and 14 are examined in detail in Parts IV and V. The Commission can collect any information which is "necessary" and has a wide discretion in deciding when information is needed.

The Commission's powers of investigation must be interpreted and exercised in a manner compatible with the general principles of Community law, as sketched out in para. 1.4; they are subject to the control of the two EU courts. The so-called "rights of the defence", which ensure that the process will be fair, are not limited to the protection of firms under investigation after the fact-finding process is over and when the Commission is moving towards a final decision (para. 3.2; Part VI). Certain important principles must also be respected during the fact-finding stage, in order to ensure that during any subsequent administrative procedure before the Commission, effective protection can be given. In particular, all investigations are subject to the principle of proportionality. This principle and the specific restraints on the use of information supplied are examined in more detail below, along with other safeguards for firms involved in Commission investigations (paras. 4.1 and 5.5; Part VI).

There are no restrictions imposed by Regulation 17 on either the number or categories of firms which might be investigated by the Commission. It may seek information not only from the firm alleged to have committed a given infringement, but also from its suppliers, customers or competitors. The Commission often requests further information from complainants using Article 11 of Regulation 17. The main criterion is that the information sought by the Commission must be necessary for the enforcement of the competition rules, regardless of where it comes from. There are no restrictions on when the Commission can seek information under either Article 11 or Article 14. For example, the Commission frequently uses Article 11 to try to clarify facts which emerge during the progress of the administrative proceedings described below.

The Commission has only limited powers to obtain information from firms situated outside the EU. Under international law, the Commission is not empowered to conduct investigations outside the bounds of its territorial competence if they would impinge upon the national sovereignty of the non-member country in whose territory it was purporting to act. Accordingly, "on-the-spot" inspections of firms based in third countries are out of the question. In such cases, the Community can - and does - send out requests for information, but it cannot impose sanctions if a firm fails to comply. One option open to the Commission is to direct a request for information to a subsidiary of a non-EU firm which is based in the EU. A different situation prevails for firms based in the EFTA countries which are party to the Agreement on a European Economic Area (Norway, Iceland and Liechtenstein). These states have expressly agreed that the Commission can send requests to firms based on their territory, provided that copies are sent to the EFTA Surveillance Authority. The US/EU Co-operation Agreement on Competition Laws also provides for a high level of cooperation between the EU and US competition authorities. This makes it easier for the Commission to initiate effective investigations of alleged infringements which cut across both the EU and the US. However, the agreement does not give the Commission greater powers than it would have if the infringement occurred purely within the territory of the Union.

The Commission may also seek information from the authorities of the Member States and from the national Governments (see further para. 3.3).

The Commission attaches special importance to written evidence. Unlike some other competition authorities, it cannot take oral evidence under oath. It will, however, offer an opportunity to a firm under investigation at a relatively advanced stage of the proceedings to make oral representations about the case against it (the hearing). This is part of the "rights of the defence" of the defendant (see below).

3.2 After the investigation

After the initial investigation, a case moves into a new phase, although it continues to be handled by the same DGIV officials. This consists of an administrative process that must be gone through before the Commission can adopt a formal decision establishing an infringement. This process is intended to protect the "rights of the defence" of the firm alleged to have committed the infringement. The Commission issues a **Statement of Objections** setting out what it believes to be the infringements, and gives the firm an opportunity to be heard. The Commission will give the firm access to the documents on which it is basing its case (**access to the file**). On this basis the firm will make written representations. Normally an **oral hearing** will be held, presided over by the independent Hearing Officer (see Part VI).

Once the hearing has been completed, the Commission can proceed to take a formal decision, following the strict procedures laid down in Regulation 17. It must, for example, consult the **Advisory Committee on Restrictive Practices and Monopolies** (see para. 3.3). All decisions ordering the termination of an infringement and/or the payment of a fine must be considered by the full college of Commissioners before they can be imposed. The Commission may impose fines of up to 10 per cent of a firm's turnover in the preceding business year, for intentional or negligent participation in an infringement of either Article 85(1) or Article 86. The gravity and duration of the infringement are taken into account when setting a fine. The Commission may also impose fines or periodic (i.e. daily or weekly) penalties on firms which fail in some way to comply with their responsibilities during the fact-finding phase of the investigation. Periodic

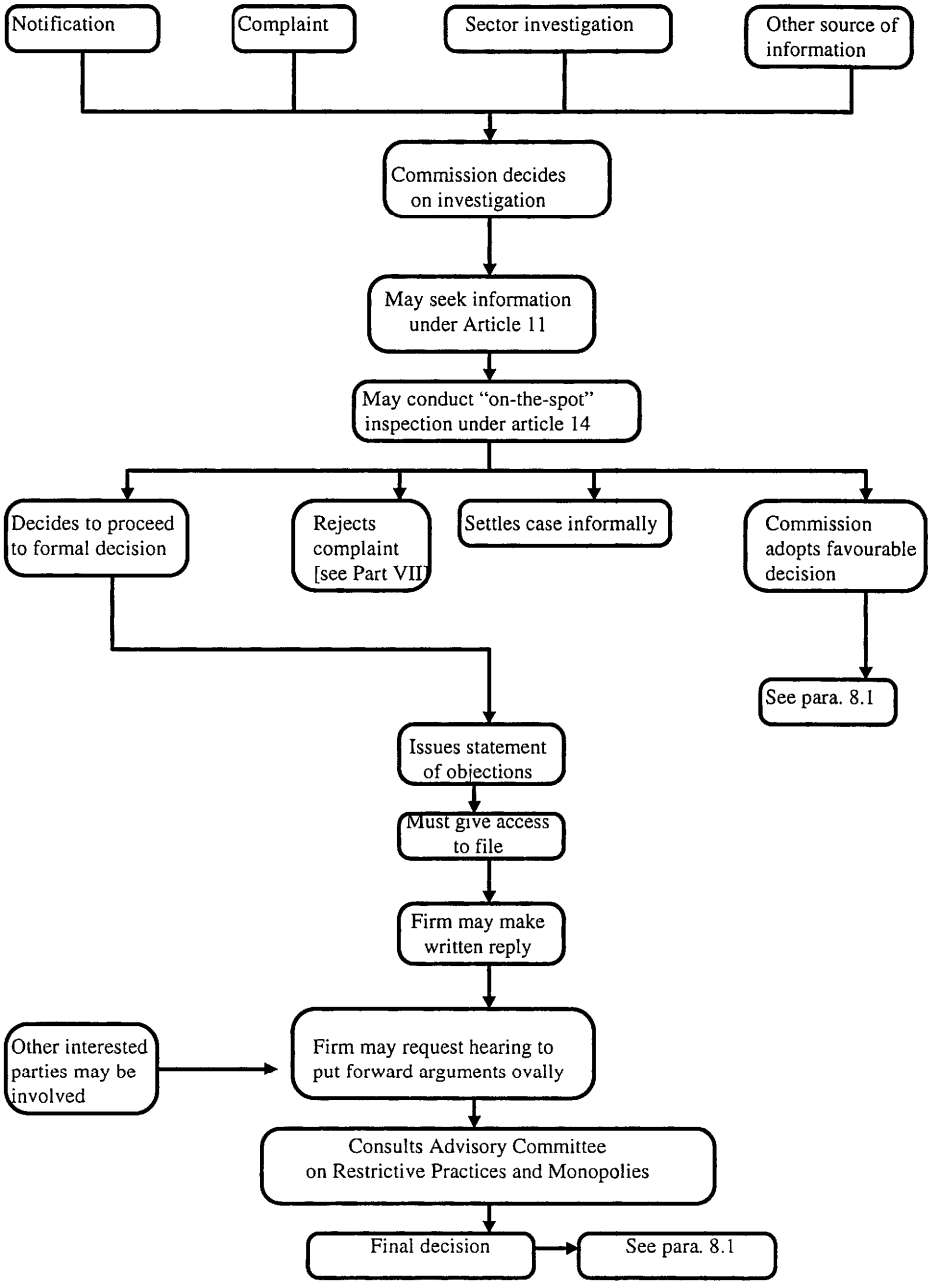
penalty payments may also be used by the Commission when ordering the termination of an infringement in order to compel compliance with its decision. The Commission's final decision can be challenged before the Court of First Instance. A firm can challenge the finding of an infringement and/or the imposition of, or level of, the fine.

If, during the course of proceedings, the firm or firms under investigation have been able to demonstrate to the Commission that there has been no infringement, the Commission will close the file without adopting a formal decision.

Figure 1 sets out in diagrammatic form how an investigation proceeds from the beginning to the final decision.

Figure 1

How an investigation proceeds from initiation of proceedings to final decision (example only)



3.3 The role of the national authorities

It is a general principle under Regulation 17 that the Commission must act "in close and constant liaison with the competent authorities of the Member States" (Article 10(2)); that is to say administrative authorities, generally entrusted with enforcing competition law under each national jurisdiction. Box 10 sets out the information the Commission must give to national authorities.

The Commission must:
- send the national authorities copies of notifications and applications which are mad e to it, as well as copies of the most important documents lodged with it;
- notify the authorities that it has taken certain procedural steps, including:
  - the sending of a request for information (Article 11(2));
  - its intention to carry out an "on-the-spot" inspection, in "good time" (Article 14(2));
  - the initiation of formal proceedings;
  - the holding of a Hearing under Regulation 99/63 (Article 8(2) of Reg 99/63).

Box 10

The obligation on the Commission to supply information is limited by the general principle that business secrets must be protected (see para. 6.8). In some specific factual situations, the obligation on national officials not to disclose the information they are sent by the Commission does not provide a sufficient guarantee. In such a case, the Court of Justice recently held that the Commission should not send the Dutch authorities a copy of a gas supply contract between an electricity company and a Norwegian company because it might fall into the hands of officials responsible for the commercial policy decisions of the Netherlands' monopoly gas supplier. This enterprise had previously supplied gas to the electricity company.[2] The obligation on national officials not to disclose the information they are sent under Article 10(1) does not provide a sufficient guarantee of professional secrecy *vis-à-vis* other government officials with different functions.

Even when the information has been supplied, the national authorities are not permitted to make unlimited use of it. They cannot, for example, use it to begin parallel proceedings under national competition law against the firm to which the information relates. However, national officials cannot be expected to pretend they have completely forgotten about the information which comes to them. Consequently, they are permitted to use it to justify beginning their own investigation, which can then uncover the same evidence.

National authorities are, in turn, subject to certain duties. These are set out in Box 11.

2 Case C-36/92P *SEP* v *Commission* [1994] ECR I-1911.

Duties of the competent national authorities

- they must respond to requests for information from the Commission under Article 11(1) of Regulation 17;
- they must assist the officials of the Commission when they are carrying out "on-the-spot" inspections under Article 14 of Regulation 17, especially where a firm is resisting an inspection (see para. 5.4 below);
- they may, at the request of the Commission, carry out an inspection on behalf of the Commission (Article 13 of Reg 17).

Box 11

There is another way in which Member States are involved in the enforcement of the competition rules: namely the Advisory Committee on Restrictive Practices and Monopolies. The composition, role and functions of this Committee are set out in Article 10(3)-(6) of Regulation 17. It is composed of national civil servants appointed by each Member State, with an expertise in competition law and policy. This Committee must be consulted before the Commission can take a decision:

- establishing the existence of an infringement;
- granting negative clearance;
- granting an exemption;
- amending, revoking or extending an exemption;
- imposing a fine or periodic penalty payment.

A copy of the "report of the outcome of the consultative proceedings" is annexed to the draft decision which goes before the Commission for adoption (Article 10(6) of Reg 17). In practice the Committee's opinion itself is normally attached. However, the opinion is secret and is not shown to the firms concerned, although sometimes it is passed to the Court if the decision is challenged.

IV. Requests for information

4.1 The Commission's power to request information

The way the Commission most often seeks to obtain information is to request it from a firm (or the national authorities) under Article 11 of Regulation 17 (Box 12).

Article 11

Requests for information

1. In carrying out the duties assigned to it by Article 89 and by provisions adopted under Article 87 of the Treaty, the Commission may obtain all necessary information from the governments and competent authorities of the Member States and from undertakings and associations of undertakings.

2. When sending a request for information to an undertaking or association of undertakings the Commission shall at the same time forward a copy of the request to the competent authority of the Member State in whose territory the seat of the undertaking or association of undertakings is situated.

3. In its request the Commission shall state the legal basis and the purpose of the request and also the penalties provided for in Article 15(1)(b) for supplying incorrect information.

4. The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or of associations having no legal personality, the persons authorized to represent them by law or by their constitution, shall supply the information requested.

5. Where an undertaking or association of undertakings does not supply the information requested within the time limit fixed by the Commission, or supplies incomplete information, the Commission shall by decision require the information to be supplied. The decision shall specify what information is required, fix an appropriate time limit within which it is to be supplied and indicate the penalties provided for in Article 15(1)(b) and Article 16(1)(c) and the right to have the decision reviewed by the Court of Justice.

6. The Commission shall at the same time forward a copy of its decision to the competent authority of the Member State in whose territory the seat of the undertaking or association of undertakings is situated.

Box 12

Article 11 envisages two separate stages to this procedure:

- an initial "simple" request (Article 11(3));
- or, in the event of the Commission not being satisfied by the response (or lack of response) to its initial request, it may be reformulated as a decision, formally adopted by the Commission, with financial penalties for failure to comply (Article 11(5)).

These will be examined below.

Requests for information can be made at any stage of the procedure, and may be addressed to firms other than the one(s) directly suspected of infringing the competition rules. A single firm may receive several requests for information during the course of a full investigation. The Commission is not required to issue a request before it makes an "on-the-spot" inspection. In fact, it may often request information afterwards to follow up what it has found in the course of an investigation. For example, the Commission may seek to obtain confirmation from firm X of information it has obtained from firm Y, which its inspectors have visited (for example, to

discover if firm X has copies of incriminating documents found at the premises of firm Y). On the other hand, full and frank answers may offset the need for an "on-the-spot" inspection.

All requests for information must clearly state the object of the enquiry. This is necessary so that for the firm concerned can determine the scope of its duty to cooperate and whether or not it has good reason to refuse to accede to an initial "simple" request or to seek annulment of a formal decision. The EU courts also need to be able to judge whether the request for information conforms to the general principles of Community law.

The information sought by the Commission must be necessary for the purposes of the investigation. This means that the Commission must reasonably assume, at the time when the request is made, that any document sought will assist it in proving the alleged infringement. In other words, a request that was unrelated to the application of Articles 85 and 86 would be improper. The request must also respect the principle of proportionality. This general principle (which can be found in Article 3B EC as well as in the case law of the Court of Justice) requires the Commission's measures to be proportionate to the objectives pursued. The steps the Commission takes must not only be necessary, they must also be carefully adapted and limited to the purpose for which it is seeking information. A good yardstick is to assess the Commission's measures against the seriousness of the alleged infringement. Any information sought must relate to the case in point. The request must be neither arbitrary nor likely to impair unduly the normal operations of the firm. The legality of a decision requesting information is subject to review by the EU courts.

The Court of Justice has stated that a duty of active cooperation falls upon firms under investigation, or other firms which receive a request for information. This is necessary to preserve the effectiveness of the Commission's powers of investigation. Not only are there penalties for supplying incorrect information under Regulation 17, but there is no right to silence or privilege against self-incrimination that can be used by firms as the basis for withholding information which they believe would reveal an infringement or strengthen the case against them. The Court has held that there is no such general principle in Community law. Thus if the Commission has issued a request in the form of a decision, there is no limit upon the duty of firms to answer factual questions addressed to them, provided they are relevant. Even business secrets must be disclosed to the Commission, although confidentiality obligations will prevent their disclosure to third parties and restrict the use to which they can be put (paras. 3.2, 6.2, 6.3). On the other hand, the Commission is not permitted to ask leading questions, where giving a truthful answer would lead the firm to confess to an infringement. A rather crude example would be the question: "How many meetings with your competitors have you participated in which contravene Article 85?". This would be permissible if it was phrased as: "How many meetings did you attend with your competitors?". It remains the task of the Commission to prove that the facts, as it has found them, support the conclusion that there has been an infringement of the competition rules. Requiring firms to answer oppressive questions would effectively deprive them of their right to a hearing in the subsequent adjudicatory stage of the proceedings.

Certain documents are protected by the limited Community concept of the confidentiality of communications between lawyer and client. This concept is examined in more detail in para. 6.7 below. The general procedure is that a firm cannot refuse to produce a particular document, but it can appeal to the Court of First Instance against the decision ordering it to produce the document. The Court will then decide whether a particular document is covered by this principle of confidentiality. The appeal against the decision will not automatically have suspensory effect, but

there may be a case for the Court granting a suspension. This requires a separate application to the Court.

4.2 Simple requests for information

"Simple" requests must be in writing, and are usually sent in the form of a registered letter, a telex or a fax. A copy will be sent to the relevant national authority under Article 11(2). The letter will state the Community rule under which the request is made and the purpose of the request, give a time limit for replying, and set out the penalties for supplying incorrect information provided for in Article 15(1)(b) of Regulation 17. There is no obligation to comply with the "simple" request, although in practice firms almost invariably choose to do so. It is, however, a prerequisite for a formal decision ordering a firm to provide certain information.

4.3 Requests for information in the form of a binding decision

The Commission may issue a binding decision under Article 11(5) requiring the disclosure of information whenever it is not satisfied with the replies given by a firm to its "simple" request, or when a firm has not responded within the time stipulated. The power to take such decisions on behalf of the Commission has been delegated by the college of Commissioners to the Commissioner responsible for competition. The Commission is not precluded from issuing a decision just because a firm has responded partially and has indicated a willingness to discuss further disclosures with the Commission. The use of the formal request based on a decision is not confined to cases where firms simply refuse outright to provide the Commission wit the information requested. Obstructive behaviour such as denying or challenging the Commission's right to take an interest in the conduct or agreements in question will justify the Commission in turning its "simple" request into a decision, with all the legal consequences which attach to this. The Commission is entitled to issue the decision without entering into correspondence or a programme of informal contacts with the firm to which the request was addressed.

The decision must specify what information is required, fix a time limit for supplying it, and indicate the penalties for failing to supply it and for supplying incorrect information. It must also state clearly that the firm has a right to have the decision reviewed by the Court of First Instance. The time limit may be quite short (eg. two weeks). If the information will take longer to assemble, then an appropriate time limit will be fixed. An excessively short time limit would be an infringement of the rights of the defence of the firm. Firms can and do request extensions to the time limit, and these are usually granted when the arguments put forward are reasonable. The decision will be sent to the firm to which it is addressed, and takes effect when it is notified. A copy is also sent to the competent authority of the Member State where the firm is based. It will sometimes be published in the *Official Journal*, although this is not compulsory.

Like all Commission decisions, it must be properly reasoned. In practice this means setting out the purposes for which the information is required in the same form as it was under the simple request, if no information has been supplied. If some information has been supplied, the Commission must identify those questions to which incomplete answers have been given.

4.4 Replying to the Commission's request

Article 11(4) lists the persons who should supply the information requested. This provision is designed to ensure that a request for information is dealt with at an appropriately senior level

within a firm. But if correct information is supplied by somebody else, no penalty will attach. It is the firm, not its representatives, which will be liable if fines or penalties are imposed. But if incorrect information is given by a person not competent under Article 11(4), who has nevertheless been entrusted with the task of replying to the Commission's questions, the firm will be bound by the answers given on its behalf and is therefore liable to be fined.

Firms are under a duty to reply in full to the request. Failure to do so may result in the imposition of a fine (para. 4.5). A request may legitimately require a firm to produce specific documents, as well as general information. The Commission does not have to mount an "on-the-spot" investigation if it wishes to obtain documents. To ensure the secrecy of documents and information supplied to the Commission, firms should mark clearly which items are confidential. Although this does not necessarily determine which ones will be treated as confidential, it will guide the Commission in performing its duties.

4.5 Financial penalties

Article 15(1)(b) of Regulation 17 empowers the Commission to impose fines of between ECU 100 and 5000 on firms for intentionally or negligently:

- providing incorrect or misleading information in response to either a "simple" request or a request in the form of a decision;
- failing to comply with a request for information in the form of a binding decision.

Article 16(1) of Regulation 17 empowers the Commission to impose "periodic penalty payments" of between ECU 50 and 1000 per day on firms for:

- failing to supply complete and correct information requested by decision of the Commission under Article 11(5).

There is no requirement on the Commission to show that the firm acted intentionally or negligently. A periodic penalty payment is a daily fine imposed until the firm corrects the infringement in respect of which it was levied. Designed to encourage rapid compliance, the periodic penalty payment is of potentially unlimited duration and amount.

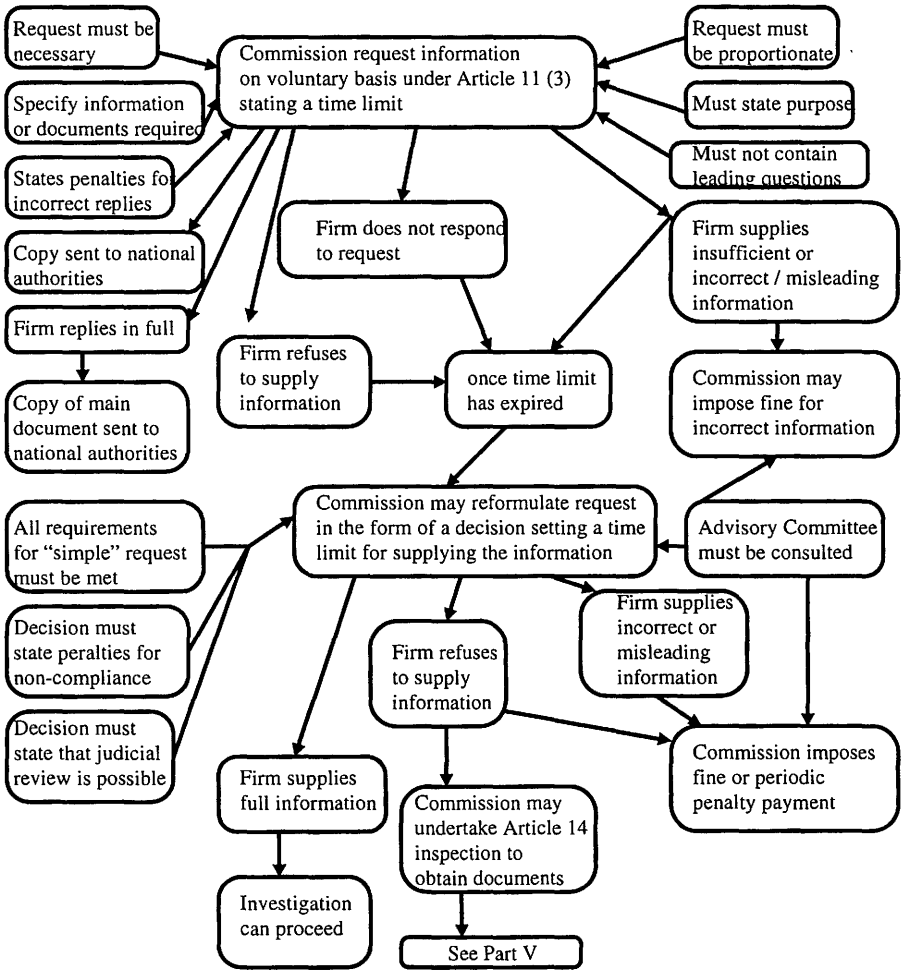
The Commission is required to consult the Advisory Committee on Restrictive Practices and Monopolies before it can impose such fines and penalty payments. The general practice of the Commission has been to impose the maximum fine, although fines have been imposed on fewer than ten occasions. Article 15(1)(b) also applies to requests for information made in the context of a sector investigation under Article 12 of Regulation 17.

The concept of "incorrect or misleading information" is interpreted broadly. The Commission has fined firms under Article 15(1)(b) for supplying information which gives a distorted picture of the true facts requested, and which departs significantly from reality on major points. The key question is whether the statement will mislead the Commission. Firms must give an extensive response to the request which is sent to them; they must carefully interpret the questions posed in the light of the objective pursued and the spirit and purpose of the investigation. Sometimes giving too much information will mislead the Commission and consequently attract the threat of a fine. Quite frequently, the Commission discovers when carrying out an "on-the-spot" investigation under Article 14 of Regulation 17 that information previously given under Article 11 was incorrect.

Figure 2 sets out in diagrammatic form the procedures regarding requests for information under Article 11.

ARTICLE 11 - REQUESTS FOR INFORMATION

THE PROCEDURE IN DETAIL



V. On-the-spot investigations

5.1 The Commission's power to carry out "on-the-spot" investigations

Perhaps the most high profile of the powers given to the Commission under Regulation 17 is the right to carry out "on-the-spot" investigations, if necessary without prior warning - so-called "dawn raids". This power makes the Commission a formidable competition law enforcement agency. Article 14 (Box 13) governs "on-the spot" investigations and provides that "the Commission may undertake all necessary investigations into undertakings." It is part of a firm's duty of active collaboration with Commission investigations established by the Court of Justice to submit to them and to assist the Commission's inspectors in carrying them out. Fines and periodic penalty payments may be imposed for obstructing the Commission in the conduct of an investigation.

Article 14

Investigating powers of the Commission

1. In carrying out the duties assigned to it by Article 89 and by provisions adopted under Article 87 of the Treaty, the Commission may undertake all necessary investigations into undertakings and associations of undertakings. To this end the officials authorized by the Commission are empowered:
(a) to examine the books and other business records;
(b) to take copies of or extracts from the books and business records;
(c) to ask for oral explanations on the spot;
(d) to enter any premises, land and means of transport of undertakings.

2. The officials of the Commission authorized for the purpose of these investigations shall exercise their powers upon production of an authorization in writing specifying the subject matter and purpose of the investigation and the penalties provided for in Article 15(1)(c) in cases where production of the required books or other business records is incomplete. In good time before the investigation, the Commission shall inform the competent authority of the Member State in whose territory the same is to be made of the investigation and of the identity of the authorized officials.

3. Undertakings and associations of undertakings shall submit to investigations ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the investigation, appoint the date on which it is to begin and indicate the penalties provided for in Article 15(1)(c) and Article 16(1)(d) and the right to have the decision reviewed by the Court of Justice.

4. The Commission shall take decisions referred to in paragraph 3 after consultation with the competent authority of the Member State in whose territory the investigation is to be made.

5. Officials of the competent authority of the Member State in whose territory the investigation is to be made may, at the request of such authority or of the Commission, assist the officials of the Commission in carrying out their duties.

6. Where an undertaking opposes an investigation ordered pursuant to this Article, the Member State concerned shall afford the necessary assistance to the officials authorized by the Commission to enable them to make their investigation. Member States shall, after consultation with the Commission, take the necessary measures to this end before 1 October 1962.

Box 13

A number of basic distinctions can be drawn between different types of "on-the-spot" inspections:

- "voluntary" inspections carried out upon production of an authorization by the Commission inspectors (Article 14(2));

- "mandatory" inspections ordered by a decision (Article 14(3)).

However, there is no formal two-stage procedure. The Commission does not have to attempt to conduct a voluntary inspection before it can proceed to take a decision. In recent years there has been a shift towards mandatory inspections. The reason that Article 14 does not incorporate a two stage procedure is the need to sustain the effectiveness of Commission inspection procedures. There may be circumstances where the Commission needs to move directly to adopt a decision ordering a firm to submit to an inspection; this may happen when the Commission wishes to carry out a surprise visit, or when it has previously encountered resistance on the part of the firm where it wishes to carry out the inspection.

Thus the second basic distinction is between:

- inspections about which the firms have previously been notified - if only by telephone the previous day;
- unannounced inspections, where inspectors turn up without prior warning; such inspections are likely to be ordered by a decision so that the firm will be obliged to allow it to take place.

Like requests for information under Article 11, Article 14 inspections must be "necessary". It is arguable that they must also conform to the principle of proportionality. They certainly must not be "arbitrary or excessive" (para. 5.4.1). However, in reality the Commission has a good deal of discretion in deciding whether and when to carry out "on-the-spot" inspections. Once the Commission has established why it wishes to conduct an inspection, it does not have to justify specifically issuing a binding decision ordering the firm to submit. A firm can challenge a decision ordering an inspection before the Court of First Instance. However, making an application to the Court does not automatically suspend the application of the decision and consequently, the Commission will be able to carry out the inspection. The Court of First Instance can then carry out a subsequent examination of whether or not it was lawful. If it was unlawful, the Commission will not be able to use evidence that it acquired during the course of the inspection in any later proceedings.

The firm investigated does not have to be one suspected of infringing Article 85 or Article 86. This is because the Commission has a general power to collect evidence, but obviously it must not conduct itself towards firms in a way which is oppressive. Decisions ordering inspections are not published in the *Official Journal*, although the fact that an "on-the-spot" inspection was undertaken may be revealed when the procedural steps undertaken by the Commission are set out in the final decision.

5.2 Inspections conducted "upon production of an authorization"

A voluntary inspection is conducted upon production by Commission inspectors of a simple mandate or authorization in the form outlined by Article 14(2). This must specify the subject-matter and purpose of the inspection and the penalties provided for in Article 15(1)(c) for producing incomplete business records or documentation. It will be produced when the inspectors arrive at the firm's premises; the inspectors will also show their Commission staff cards in order to prove their identity. They may be accompanied by an official from the competition authorities of the Member State where the premises to be inspected are situated. The inspectors will hand the representatives of the firm a copy of an Explanatory Note. This is an informal document which

does not affect the formal powers of the inspectors, but explains how they prove their identity and the position of officials from the national authorities who may be present. It also sets out the basic rights of the firm being inspected (e.g the right to have a lawyer present, although the inspectors will not allow the inspection to be unduly delayed while a lawyer is fetched). Where the inspection is carried out under simple authorization, the inspectors can be requested to provide explanations of the subject-matter of the proposed inspection and on procedural matters.

There is no requirement to submit to a voluntary inspection, but once a firm has submitted it must collaborate actively (see para. 5.6). Refusing to submit to a voluntary inspection carried out under authorization will not necessarily buy much time, as the power to adopt Article 14(3) decisions has been delegated by the Commission to the Commissioner responsible for competition matters. The Commissioner will be able to act very quickly, where necessary. A refusal to submit is recorded by the Commission's inspectors in a minute, a copy of which is passed to the firm.

5.3 Inspections ordered by binding decision

Where an inspection is ordered by a binding decision, the Commission inspectors have exactly the same powers as when the firm submits upon production by the inspectors of an authorization (Article 14(2)). These powers are discussed in para. 5.6 below.

Box 14 sets out some of the reasons why the Commission might decide to undertake a mandatory inspection.

Reasons why the Commission might decide to undertake a mandatory inspection

- the firm has refused entry to the Commission's inspectors acting under authorization;
- the Commission suspects the existence of particularly serious infringements and is concerned that documents or other evidence might disappear;
- in the past the firm has refused to cooperate voluntarily with the Commission's inspectors, or to respond willingly to requests for information;
- the firm has previously made false statements to the Com mission or otherwise misled it when acting on a voluntary basis;
- the investigation involves a number of different firms located in more than one Member State and it is important for the effectiveness of the investigation for the Commission to be able to conduct simultaneous inspections at a number of premises;

Box 14

In some of these cases, the Commission might choose to issue a decision without first attempting a voluntary inspection and might, moreover, undertake the inspection without giving a prior warning. In recent years, there has been a marked shift towards unannounced inspections, as these are seen as being more effective.

5.3.1 Formal requirements

Under Article 14(3) the decision must:

- specify the subject-matter and purpose of the inspection;
- set a date on or after which it is to begin; and
- indicate:
  - the penalties provided for in Articles 15(1)(c) and 16(1)(d) (for (for failure to submit and for production of incomplete records); and
  - that the firm has the right to have the decision reviewed by the Court of First Instance.

The document explaining the subject-matter and purpose of the inspection also acts as the statement of reasons which is essential for every Commission decision. It should state in general terms the facts which the inspection is intended to investigate, and identify the type of infringement which is suspected. The Commission does not have to give reasons which specifically justify why an inspection has been ordered by decision rather than conducted on the basis of authorization. The Commission inspectors hand a copy of the decision to the representatives of the firm on arrival. They also complete a minute of notification which certifies that this has been done and which a representative of the firm is requested to sign. However, signing the minute does not signify submission by the firm to the investigation.

The Commission inspectors will also bring with them an authorization, and an Explanatory Note similar to the one used in the context of voluntary inspections, This note states that the inspectors need not provide any further information about the subject matter as set out in the decision or justify the taking of the decision. They need only answer procedural questions, such as whether a firm is entitled to have a lawyer present.

5.3.2 Duties of firms under investigation

Once an inspection has been ordered by decision, a firm is under a duty to submit. Failure to submit can lead to the imposition of a fine under Article 15(1)(c) or of a periodic penalty payment under Article 16(1)(c). The latter will accrue for every day admission is refused. However, the Commission has no power to gain forcible entry either to the firm as a whole, or specific parts of its premises. In such cases, the Commission inspectors must seek the assistance of the national authorities under Article 14(6).

The Commission, backed up by the Court, has consistently rejected arguments put forward by firms for refusing entry. For example, a firm cannot refuse admission on the grounds that the office contains papers belonging to undertakings based outside the Community and therefore outside the jurisdiction of the Commission. The Commission's view is that it can determine, initially, what records to examine, and that it is then for the Court of First Instance to exercise a supervisory jurisdiction. In other words, the aggrieved firm must bring an action before the Court, although this normally means first submitting to the investigation, because bringing an action has no suspensory effect.

Asking for a postponement until a particular designated representative of the firm or a particular lawyer can be present can also constitute a refusal to submit, leading to the imposition of a fine. In one case, the Commission's inspectors were refused the right to carry out the investigation on the grounds that the appropriate person was not there. So they requested the assistance of officials of the competent French authorities. They, in turn, ordered the police to seal the premises until the inspection could begin the following day. This ensured the effectiveness of the inspection by

preventing any tampering with records or other documents. A fine was imposed under Article 15(1)(c).[3]

The duty to submit is a continuing one, just like the duty of active collaboration. Hence a firm may not raise an obstacle to the Commission's inspection at any point, for example, by refusing the inspectors access to or copies of particular documents (see para. 5.6). This can lead to the imposition of a fine and, once again, if the inspectors encounter resistance during the course of the inspection they must seek the assistance of the national authorities who may be able to obtain an order from a national court or call upon the assistance of the police. They can then proceed without the cooperation of the firm being inspected.

5.4 The role of the competent national authorities

Under Article 14, the competent authorities of the Member States in which the firms to be inspected are located have been ascribed an important role in the context of "on-the-spot" inspections.

- In the case of voluntary inspections, the Commission must inform the national authorities "in good time" about the inspection and the identity of the authorised officials (Article 14(2)).
- In the case of mandatory inspections, the Commission must consult the competent authorities (Article 14(4)), although that consultation can be informal and undertaken by telephone, in order to preserve the effectiveness of the Commission's investigative powers.
- National officials may attend inspections, and assist the Commission in carrying out its duties, at either the Commission's or their own request (Article 14(5)).
- The competent national authorities can undertake inspections on behalf of the Commission at its request (Article 13). This option has been used relatively rarely by the Commission, mainly because it is unsuitable for cases involving inspections in more than one Member State.
- Under Article 14(6), the national authorities must afford the Commission whatever assistance it requires to enforce decisions adopted under Article 14(3) where the firm resists the inspection.

5.4.1 The duty to provide assistance

The Court of Justice ruled on the nature of the assistance which national authorities must provide in the case of *Hoechst*.[4] When the Commission wishes to carry out an inspection without the consent of the parties involved, the national authorities help it to do so. They cannot substitute their assessment of the situation or whether or not an inspection is needed for that of the Community institutions. This assistance can involve whatever measures are necessary under the relevant national law to secure entry for the Commission's inspectors. This may include obtaining a judicial order (eg. a search warrant or mandatory injunction). In such cases, the national court may, once it has checked the authenticity of the decision, consider whether the measures envisaged (ie. entry without consent) are arbitrary or excessive in relation to the purpose of the

3 *MEWAC* OJ 1993 L20/6.

4 Case 46/87 *Hoechst* v *Commission* [1989] ECR 2859.

investigation. It may also ensure that the rules of national law are complied with in the application of those measures. This is because, once a national order has been obtained, failure by the firm and its representatives to comply may lead to sanctions unavailable under Community law, such as imprisonment for contempt of court. Since these rules were established by the Court of Justice, the Commission has acted in close cooperation with national officials. In one case, the refusal by a firm based in the United Kingdom to submit to an investigation ordered by a decision led, the same afternoon, to the UK authorities obtaining, on behalf of the Commission, an interim *ex parte* order before the High Court in London requiring the firm to submit.[5]

5.5 Safeguards for firms

Given the sweeping nature of the Commission's powers, it is not surprising that firms have sought to challenge both their existence and the way they are exercised before the Court of Justice and, latterly, the Court of First Instance. In general, the Court of Justice has upheld the actions of the Commission in accordance with Regulation 17, protecting the right of the Commission to undertake unannounced inspections, as an essential component of an effective system of investigation. But it has also built additional safeguards into the system of Regulation 17, which is generally silent on the rights of the defence of firms under investigation. This ensures that the Commission can collect the maximum amount of evidence, while guaranteeing that the right of a firm under investigation to a fair hearing is not compromised by events which occur during the fact finding process.

Firms can ask for their legal advisers to be present. Indeed, the Court of Justice has recognised the right to legal representation as one of the rights of the defence of firms under investigation. However, the presence of legal advisers is not a prerequisite for the investigation to be valid, and the investigation must not be unduly delayed on this account. The Commission has a policy of allowing firms a reasonable time to secure the services of an in-house legal adviser or lawyer of its choice. This is subject to two conditions:

- the firm's management must undertake that the business records will not be interfered with during the delay; and
- the inspectors must be allowed to enter and occupy whichever offices they want.

During the inspection, firms can protect their interests by drawing the attention of the inspectors to factors in their favour which might emerge from documents that have not been examined. They may also provide subsequent written explanations for documents which might appear incriminating when taken out of context.

The Court of Justice has rejected the argument that firms are protected against being required to submit to inspections by the fundamental right to the inviolability of the domicile. The Court was not able to find a common strand in the approaches of the various legal systems of the Member States to this question. On the other hand, as noted above, firms are entitled to protection against arbitrary and excessive interventions, and, where national procedures so require, to judicial scrutiny of the Commission's decision if they refuse to submit to it. This element of judicial scrutiny is not otherwise present in the system of Community law, which does not require, for example, the issuing of a warrant by a judge of the Court of First Instance as a precondition for an "on-the-spot" inspection.

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5 *UKWAL* OJ 1992 L121/45.

Community law also protects the confidentiality of certain communications between lawyer and client. This legal principle, along with the protection of business secrets contained in documents obtained by the Commission during an inspection, is examined in more detail in Part VI.

In the case of all these safeguards, however, the general approach is the same. A firm must submit to an inspection ordered by a decision, backed up if necessary by a national court or police order, but may challenge the Commission's decision in the Court of First Instance. Thus if documents which have been sought are covered by the confidentiality of communications between lawyer and client, then it is for the Commission in the first instance to decide whether this is so, and then, if it issues a decision ordering the production of the documents, the firm must comply and can then seek a review of that decision before the Court of First Instance. The application to the Court will not automatically have suspensory effect, although in appropriate cases the Court may grant a suspension of the decision so that it can review the documents before they can be seen by the Commission.

5.6 The scope of the Commission's powers of inspection

The scope of the powers of the Commission's inspectors is summarised in Article 14(1) (see Box 14):

What makes the exercise of these powers so effective is the duty of active collaboration which falls on any firm subject to a Commission investigation. First and foremost, there must be no undue delays. Second, the firm has the responsibility of designating competent representatives to deal with requests from the Commission's inspectors. Such persons must be well informed and able to provide the inspectors with the assistance they require.

The concept of business records, as set out in Article 14, is widely construed and is not confined to official company documentation. The Commission may look at any documents in order to determine their relevance. Box 15 contains a non-exhaustive list of the types of documents which it may inspect. The form of the records is irrelevant. The Commission can inspect records held on any form of storage system, be it tape, microfilm, fiche or computer records.

Examples of documents which the Commission may inspect

- financial records;
- sales records;
- production records;
- travel records;
- diaries;
- minutes or notes of meetings held either internally, or with third parties;
- records and copies of correspondence (internal and external), personal memoranda, including telephone numbers and fax numbers used during particular periods, records of electronic mail.
- photographic materials.

Box 15

A problem may arise with records and documents which have been destroyed, perhaps in accordance with a systematic document destruction policy, to save storage space. More difficult to

explain to the inspectors, however, will be a policy of ad hoc document destruction ordered by the directors or managers of the firm.

Since the inspectors have the power to take copies of business records, firms usually make photocopying facilities available to the inspectors, although there is no obligation to do so. This will avoid unduly extending the length of the inspection and the disruption it will inevitably cause. The Commission will reimburse photocopying expenses when requested to do so.

The extent of the inspectors' powers to request on-the-spot oral explanations has never been fully clarified by the Court of Justice or the Court of First Instance. The inspectors are certainly entitled to demand oral explanations where these arise directly out of the documents produced (or not produced), and they may ask for more extensive explanations. However, this power must be read in the light of Article 11 and the safeguards it contains for firms requested to provide information. In particular, the power should not be used to pressure the officials of a firm into making oral admissions which they would not make if they had the time for reflection afforded them by a written request under Article 11.

No independent record of the results of the inspection is kept. The Commission's inspectors will keep their own record, containing, in particular, an inventory of the documents copied. The firm is entitled to a copy of the inventory. A firm can also make its own record, to ensure consistency. Generally the Commission inspectors make two photocopies of every piece of paper inspected, and leave one behind. There is no general rule under Regulation 17 that firms must be kept informed of the results of an inspection. The record of an inspection is generally treated as an internal Commission document. It is not among the documents made available to firms after a statement of objections has been issued and access to the file is granted.

5.7 Financial penalties

The Commission may impose fines of between ECU 100 and 5000 on firms for:

- producing incomplete books and records, whether the inspection was conducted under authorization or ordered by a decision (Article 15(1)(c);
- failing to submit to an inspection ordered by a decision (Article 15(1)(c)).

In the second case, the Commission can also impose a periodic penalty payment of between ECU 50 and 1000 per day that the firm maintains its refusal to submit. In practice, this type of penalty is likely to be the most significant deterrent.

Box 16 lists some of the situations in which the Commission has imposed fines on firms.

Fines imposed by the Commission in the context of on-the-spot investigations

- refusal to allow the inspectors to make copies of all the documents which they wished to copy;
- refusal to allow access to documents or records on the grounds that they are confidential;
- failure to provide the requisite assistance, making it more difficult for the inspectors to find all the records they were looking for, even though access to individual documents had not actually been refused;
- delaying an inspection ordered by a decision, and refusing to allow it to take place on the day determined by the Commission.

Box 16

Figure 3 sets out in diagrammatic form the procedure for conducting on-the-spot investigations.

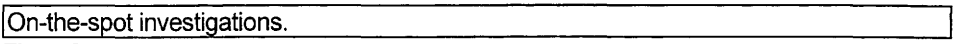
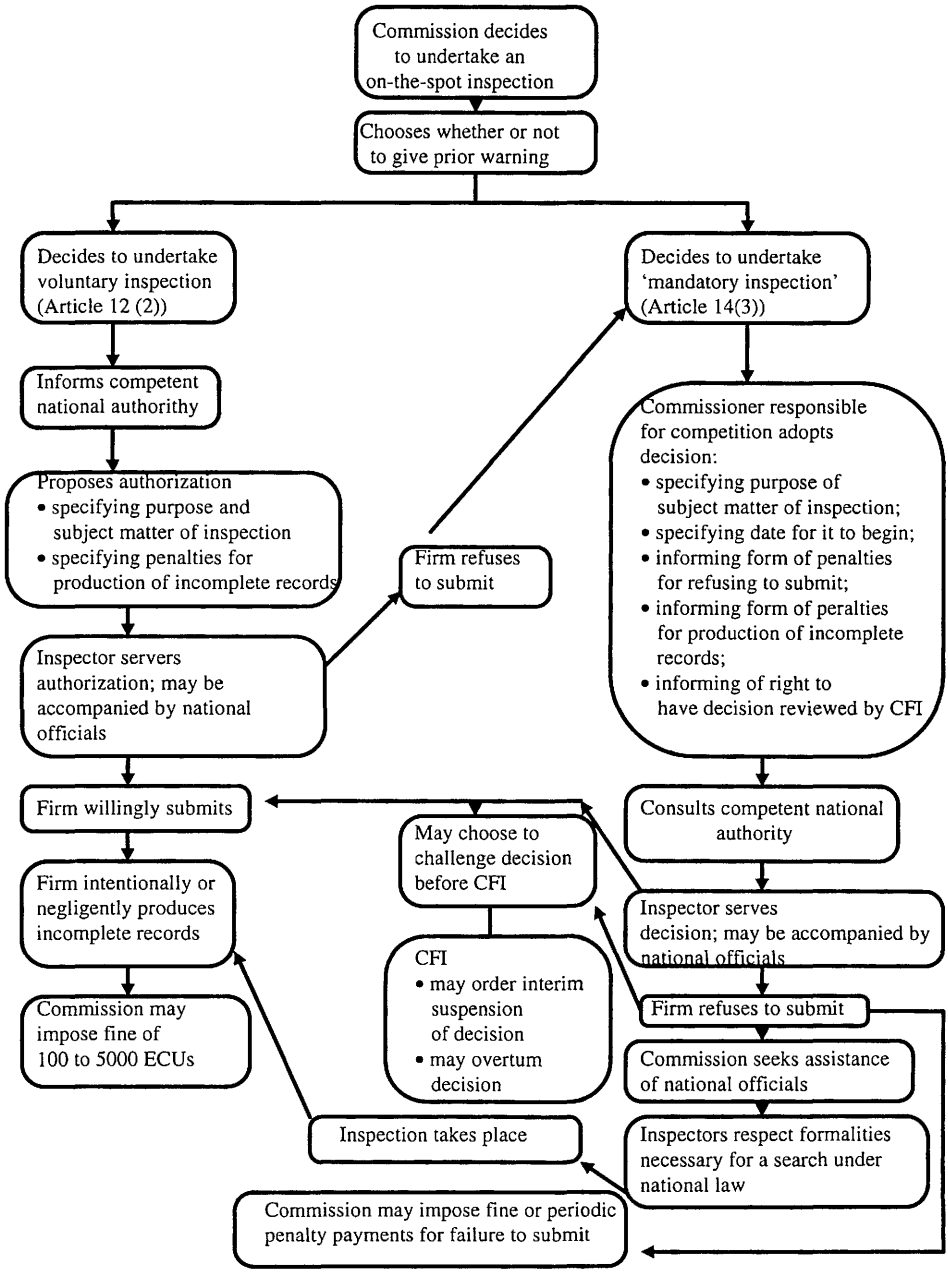


Figure 3

FIGURE 3: ARTICLE 14 - ON THE SPOT INSPECTIONS

THE PROCEDURE IN DETAIL



VI Infringement proceedings

6.1 Beginning infringement proceedings

If an investigation finds what appears to be an infringement of the competition rules, the Commission may choose to begin formal administrative proceedings. Its assessment will be based on its view both of the facts of the case and a legal evaluation of these facts. However, before the Commission can adopt a decision applying Article 85 or Article 86, it must give the firm under investigation the **opportunity to be heard**. This is required by Article 19(1) of Regulation 17, and Regulation 99/63, which lays down the provisions on hearings in detail. Firms under investigation have the **right to a fair hearing**. But to exercise that right, they need to know what objections the Commission has to their conduct. Consequently, Article 2(1) of Regulation 99 requires the Commission to inform firms in writing of the objections raised against them. This document is known as the **statement of objections**.

In recent years the most significant change in the Commission's approach to infringement proceedings has been the enhanced role accorded to the Hearing Officer. This official now has a wide-ranging brief to mediate disagreements between the operational staff working on a particular case, and firms under investigation or complainant firms. The object of the change is partly to improve the level of transparency in the Commission's procedures. The Hearing Officer's decisions, like any decisions of the Commission, are subject to judicial review by the Court of First Instance. Detailed aspects of his/her role are discussed in paras. 6.3, 6.5 and 6.8 below.

6.2 The statement of objections

The issuing of a statement of objections marks the formal initiation of proceedings which may culminate in a finding that Articles 85(1) or 86 have been breached. In these proceedings the Commission is acting in part as adjudicating authority and in part as prosecutor. Consequently, it is of the utmost importance that the rights of the defence of firms under investigation should be protected. To this end the Court of Justice has defined the statement of objections as "a procedural and preparatory document intended solely for the undertakings against which the procedure is initiated with a view to enabling them to exercise effectively their right to a fair hearing."[6]

It will normally be contained in a letter signed by the Director General of DGIV, and must set out clearly all the essential facts which form the basis of the Commission's case, as well as outlining the Commission's legal evaluation. The content of the statement of objections determines the scope of the infringements which the Commission may find (Art 4 of Reg 99/63: Box 17).

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6 Joined Cases 142 & 156/84 *BAT and Reynolds Industries* v *Commission* [1987] ECR 4487 at para. 14.

Article 4 of Regulation 99/63

The Commission shall in its decisions deal only with those objections raised against undertakings and associations on undertakings in respect of which they have been afforded the opportunity of making known their views.

Box 17

If, in the course of the procedure, the Commission decides that there have been other infringements, it must issue a fresh or supplementary statement of objections. Even, if there are legal defects in the statement of objections, the firm to which it has been sent may not challenge it immediately in the Court of First Instance. A statement of objections is not a decision in the legal sense. It does not change the legal position of those involved. It simply represents a new stage in a continuing procedure. However, defects in the statement of objections, or serious discrepancies between what it contains and the final decision, can be raised in a challenge to the final decision applying Articles 85 and 86.

6.3 Access to the file

After issuing the statement of objections, the Commission must allow the firm or firms under investigation **access to its file** on their case. The Commission can use as the basis of its decision only facts which are known to the firm, and on which it has had the opportunity of making its views heard.

The Commission's current practice on access to files is set out in its Notice of 23 January 1997 on the internal rules of procedure for processing requests for access to the file in cases under Articles 85 and 86 of the EC Treaty, Articles 65 and 66 of the ECSC Treaty and Council Regulation (EEC) No 4064/89 (see Box 18) and in a 1994 Decision on the terms of reference of Hearing Officers in competition procedures (Box 19). The need to protect confidential information (see para. 6.8), which can restrict the ability of the Commission to reveal the contents of files, must also be taken into account. In order to prove an infringement, the Commission may not rely on material which it is precluded from disclosing to the alleged infringer because it constitutes the business secrets of another firm. The Commission has a policy of making extensive disclosure, however. It appends to the Statement of Objections a list of key documents upon which it relies. The Hearing Officer is now empowered to make a binding determination upon any decision taken by DG IV officials in the application of this policy, when, for example, a firm under investigation asks for additional documents to be disclosed and can give a reasonable indication of the existence of documents which it believes to be in the file but which have not been disclosed.

Extracts from the Commission's Notice on Access to the File
(OJ C 23, 23.1.1997, p. 3)

Access to the file is an important procedural stage in all contentious competition cases (prohibitions with or without a fine, prohibitions of mergers, rejection of complaints, etc.). The Commission's task in this area is to reconcile two opposing obligations, namely that of safeguarding the rights of the defence and that of protecting confidential information concerning firms.

The purpose of this notice is to ensure compatibility between current administrative practice regarding access to the file and the caselaw of the Court of Justice of the European Communities and the Court of First Instance, in particular the "Soda ash" cases. The line of conduct thus laid down concerns cases dealt with on the basis of the competition rules applicable to enterprises: Articles 85 and 86 of the EC Treaty, Regulation (EEC) No 4064/89, and Articles 65 and 66 of the ECSC Treaty.

Access to the file, which is one of the procedural safeguards designed to ensure effective exercise of the right to be heard provided for in Article 19(1) and (2) of Council Regulation No 17 and Article 2 of Commission Regulation No 99/63/EEC as well as in the corresponding provisions of the regulations governing the application of Articles 85 and 86 in the field of transport, must be arranged in all cases involving decisions on infringements, decisions rejecting complaints, decisions imposing
interim measures and decisions adopted on the basis of Article 15(6) of Regulation No 17.
...
...
...

As the purpose of providing access to the file is to enable the addressees of a statement of objections to express their views on the conclusions reached by the Commission, the firms in question must have access to all the documents making up the "file" of the Commission (DG IV), apart from the categories of documents identified in the Hercules judgment, namely the business secrets of other undertakings, internal Commission documents and other confidential information.

Box 18

Extract from Commission Decision 94/810/ECSC,EC of December 12 1994
on the terms of reference of hearing officers
in competition procedures before the Commission
(OJ 1994 L330/67)

Article 5

1. Where a person, an undertaking or an association of persons or undertakings who or which has received one or more of the letters listed in Article 4(3) * 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, he or it may draw attention to the matter by 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.

* these are: letters communicating a statement of objections, inviting the written comments of an interested third party, 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, and informing a natural or legal person that in the Commission's view that person has not shown sufficient interest to be heard as a third party.

Box 19

6.4 Written Reply

Once it is aware of the case against it, the firm will have the opportunity to reply in writing to the statement of objections. It will have a specified time period (which varies according to the nature and urgency of the case, but cannot be less than two weeks) within which to do this. Objections to the length of the time limit imposed for the reply in the statement of objections are dealt with by the Hearing Officer. The firm is not obliged to reply to the statement of objections, but in practice a written reply will almost invariably be made. Admissions made during the administrative proceedings can be refuted at a later stage before the EU courts. The firm under investigation will also be informed that it may request an *oral hearing* and the Commission must accede to such a request if it wishes to impose a fine.

6.5 Oral Hearing

Oral hearings are a vital part of the administrative process. Not only the parties under investigation, but also "natural or legal persons showing a sufficient interest" (eg. complainants) may be heard by the Commission. The Commission must also afford the right to be heard where it proposes to issue an exemption for an agreement subject to onerous conditions, even though this is not expressly provided for in Regulation 17. Parties can either appear in person, or be represented by lawyers or other representatives or agents. Members of the staff of DG IV with responsibility for the case will attend and present a brief summary. After an oral presentation by the parties, the Commission staff and the Hearing Officer may ask questions. Representatives of the competent national authorities may also attend and ask questions. A record of the hearing is kept and must be read and approved by the parties involved. Copies of the minutes are sent to the Advisory Committee on Restrictive Practices and Monopolies (para. 3.3).

To ensure fair play, hearings are conducted by the Hearing Officer, a senior official whose post was created by the Commission in 1982, in response to concern that there might be insufficient impartiality in its arrangements for hearing firms under investigation. Administratively, the Hearing Officer is located within DG IV, but he/she is independent and has the right of direct access to the Commissioner responsible for competition matters. He/she also reports directly to the Director-General for Competition. In 1994 the Commission significantly extended the role of the Hearing Officer. His/her main responsibilities are summarized in Box 20. The Oral Hearing is closely linked to the question of access to the file, for if the firm under investigation brings forward favourable documents, these will be recorded in the Oral Hearing.

6.6 Rights of the defence

Both the Commission and the EU's judicial authorities believe the proper observance of the rights of the defence of firms under investigation for alleged infringements of the competition rules is of great importance. The need for protection extends from the initiation of the fact-finding process to the culmination of any subsequent administrative proceedings. The Court of Justice makes no distinction regarding the protection of the rights of the defence between the two phases of the process. Rather it has ruled that it is vital to ensure that proper safeguards are allowed during the investigatory phase, in order to ensure that the right to be heard guaranteed in Regulation 17 and Regulation 99/63 is not compromised. The Court of Justice has consistently denied that the Commission's investigative powers interfere with the principles of natural justice or the rights of

defence. What is vital is that the Court has been prepared to moderate the application of Regulation 17 and associated legislation where necessary to ensure effective protection of fundamental rights. This has to be balanced against the public interest in the effective enforcement of the competition rules, which is crucial to the continuing progress of economic integration within the EU.

Summary of responsibilities of the Hearing Officer under Commission Decision 94/810

The Hearing Officer:

- determines the date, duration and location of the hearing;
- may supply the firms concerned prior to the hearing with a list of questions on which he/she wishes them to explain their point of view;
- may hold a preparatory meeting involving the Commission staff and the parties before the hearing;
- may ask for prior written notification of the essential contents of statements the parties intend to make;
- ensures the proper conduct of the oral hearing and the accurate mi nuting of the statements made by each party;
- decides whether fresh documents should be admitted during the hearing;
- decides who may be heard on behalf of the parties;
- reports to the Director-General for Competition on the hearing and makes observations on the further progress of the proceedings;
- seeks to ensure that in the preparation of draft Commission decisions in competition cases due account is taken of all the relevant facts, whether favourable or unfavourable to the parties concerned;
- balances respect for rights of the defence and the need for the effective application of the competition rules;
- decides on applications by third parties to be heard orally, where they have been rejected by the Commission;
- decides on applications for the extension of time limits for the submission of observations or for the postponement of the oral hearing;
- resolves disputes between the Commission and the parties about access to the file (see Box 19 and para. 6.6).

Box 20

6.7 The confidentiality of communications between lawyer and client

Regulation 17 does not deal with the question of the confidentiality of lawyer-client relations, which are protected in some Member States under the principle of legal professional privilege. The principles of Community law which now govern this question of confidentiality were established by the Court of Justice in the *AM & S* case.[7] This case was concerned with Article 14(3) investigations, but the principles must be taken also to apply to Article 11 requests for information.

The Court had to resolve two questions:

- is there a doctrine of privilege under Community law?
- if so, how should it be implemented in practice?

The Court established that there exists a general principle of Community law protecting the confidentiality of some lawyer/client communications and that this principle extends not only to proceedings before the Court itself, but also to administrative proceedings before the Commission. It exists "for the purposes and in the interests of the client's rights of defence". It covers principally:

7 Case 155/79 *A.M. & S.* v *Commission* [1982] ECR 1575.

- correspondence between a client and an independent lawyer established within the European Union;

and within that context only applies to:

- correspondence following the initiation of proceedings by the Commission concerned with the defence of the client; and

- correspondence before the initiation of proceedings which is closely linked with their subject matter.

Documents and letters emanating from the both the lawyer and the client are covered. By contrast, EU legal professional privilege does not cover:

- correspondence between a client and an independent lawyer established in a third country;

- dealings with an in-house lawyer, unless that lawyer is simply reporting the statements of an independent lawyer.

The procedure for determining whether particular documents are covered by legal professional privilege requires the firm seeking protection to make a case for them to be so. If the Commission rejects the firm's argument, it will adopt a decision ordering the documents to be handed over by the firm. It is then for the firm to challenge the decision before the Court of First Instance, which will reach a determination, having itself reviewed the documents. The application to the Court does not automatically have a suspensory effect upon the Commission's decision, but there may be a case for the Court to grant suspension, if the firm applies for one.

6.8 Business secrets and the confidentiality of documents

The Commission is committed to protecting the business secrets of the firms with which it deals; it relies upon the cooperation of firms which voluntarily supply it with information to make enforcement of the competition rules possible and recognises their legitimate interest in confidentiality.

The Commission itself is bound by Article 20(2) of Regulation 17 and Article 214 EC not to disclose information covered by the "obligation of professional secrecy" (see Box 21). These provisions also bind the officials of the competent national authorities. Article 21(2) of Regulation 17 further provides that where a decision taken under Regulation 17 must be published, what is placed in the *Official Journal* will take heed of the legitimate interest of firms in protecting their "business secrets". Finally, when the Commission publishes notices in the *Official Journal* that it intends to give negative clearance or an exemption to an agreement or practice, it must similarly have "regard to the legitimate interest of undertakings in the protection of their business secrets" (Art 19(3) of Reg 17).

Article 214 EC

The members of the institutions of the Community, the members of committees and the officials and other servants of the Community shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.

Article 20 of Regulation 17

Professional secrecy

1. Information acquired as a result of the application of Articles 11, 12, 13 and 14 shall be used only for the purpose of the relevant request or investigation.

2. Without prejudice to the provisions of Articles 19 and 21, the Commission and the competent authorities of the Member States, their officials and other servants shall not disclose information acquired by them as a result of the application of this Regulation and of the kind covered by the obligation of professional secrecy.

3. The provisions of paragraphs 1 and 2 shall not prevent publication of general information or surveys which do not contain information relating to particular undertakings or associations of undertakings.

Box 21

However, the legislative provisions do not provide answers to all the questions which concern the protection of business secrets and confidential information in competition proceedings. First, there is nothing in them to permit firms to refuse to disclose business secrets to the Commission. It is the Commission's position that disclosure of information to it cannot be refused on the grounds of the protection of business secrets. This approach can be justified on the grounds that the essence of business secrets is that they should not be disclosed to competitors, or other third parties, not that they should be concealed from the Commission, which sees them not as "secrets" but as part of the evidence it needs to collect. This point was made particularly clearly in *SEP*[8] where the Court of Justice held that a firm must hand over a copy of a contract with a supplier to the Commission. It dealt with SEP's fears about confidentiality by ordering the Commission not to send the contract to the Dutch authorities. By withholding the contract in this way, the Commission could ensure that the information did not reach Dutch officials responsible for the commercial policy affairs of the Dutch monopoly gas supplier, with whom SEP also did business.

Disclosure of information by the Commission to other parties involved in the investigation can also cause difficulties. Since the Commission cannot use information which it does not disclose as part of its case against an alleged infringer, it may have to edit documents which it does disclose in order to protect business secrets. It may blank out parts of documents, or aggregate sales figures in order to avoid giving genuinely secret information to the defendant firm. The Commission may also run into difficulties where it wishes to disclose information given to it by the defendant firm to a third party complainant in order to obtain its comments, or in order to enable it to participate in an oral hearing.

The case law of the EU courts has assisted the Commission in developing practices on the effective management of confidential information. In part, these practices are now restated in the Notice of 23 January 1997. A distinction is drawn between **confidential information in general** and **business secrets**, as a particularly sensitive category of the former. Business secrets may in

[8] Case C-36/92P *SEP* v *Commission* [1994] ECR I-1911.

no circumstances be disclosed. Other confidential information may be disclosed by the Commission. According to the Court:

> "The Commission may communicate to such a party certain information covered by the obligation of professional secrecy in so far as it is necessary to do so for the proper conduct of the investigation".[9]

In other words, the protection of such information, which is expressly stated in Article 20(2) to be subject to the provisions of Article 19 (on hearings) and Article 21 (on publication in the *Official Journal*), is qualified by the public interest in ensuring effective enforcement of the competition rules, and by the private interest of the other parties to the investigation (i.e. other defendants, complainants, etc.). Disclosure of some such information may be necessary to protect their rights of the defence. This general principle applies:

- to the disclosure of information about third parties or fellow defendants to the defendant firm; and
- to the disclosure of information about defendants to third parties.

The procedure for determining questions of disclosure was laid down by the Court of Justice in *AKZO* and has been further elaborated by the Commission in its 1994 decision on the Terms of Reference for the Hearing Officer (see Box 22).

Commission Decision 94/810/ECSC,EC

Terms of Reference of Hearing Officers

Article 5

3. 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.

4. Where the undertaking concerned objects to the disclosure of 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.

Box 22

The approach laid down by the Court in *AKZO*[10] required the Commission, if it proposed to disclose documents containing business secrets, first to give the firm the opportunity to make known its views, and then to take a decision which the firm can challenge before the Court of First Instance. The effect of the new Terms of Reference is to give the Hearing Officer the role of making that decision. The challenge before the Court of First Instance will not necessarily have suspensory effect, but an additional request can be put before the Court for the decision to be suspended. The Court itself will decide on this after examining the documents in question.

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9 Case 53/85 [1986] ECR 1985.

10 See above.

6.9 Restrictions on the use of information

Related to the duty of the Commission and the national authorities to respect the confidentiality of the information they acquire is the duty not to use information acquired pursuant to investigations undertaken under Articles 11 and 14 for any purpose other than the one for which it was requested. The Court of Justice has emphasised that this rule operates in order to ensure protection for the rights of defence of firms to whom the information relates. Thus if the Commission is investigating Firm A, and in the course of an "on-the-spot" inspection of Firm A it discovers incriminating information about Firm B, it cannot use this as evidence in proceedings against Firm B. It cannot, however, be forced to pretend that it does not know the information and it may start a new and separate investigation of Firm B, and acquire independent evidence during the course of it. The same principles apply to information acquired by the national authorities under Article 10 of Regulation 17. This information cannot itself constitute evidence for the purposes of an investigation under national competition law, but the national authorities cannot be expected to suffer from what the Court has called "acute amnesia" (that is, forget all they know).[11] The information may accordingly trigger a separate investigation under national law.

6.10 Judicial review of Commission decisions

Perhaps the most important safeguard of all for firms which become involved in the enforcement of the competition rules by the Commission, whether as complainants or as defendants, is the availability of judicial review by the Court of First Instance of any Commission actions which can be characterised as "decisions". This includes not only measures taken by the Commission which are formally described as decisions (eg. ordering inspections, requiring a firm to answer questions or requiring the disclosure of certain documents), but also actions which could be said to change the legal situation of the party (eg. disclosing confidential documents to a third party complainant). Any such measure or action can be challenged under Article 173 EC. The Court also has an unlimited right to review any decisions of the Commission which impose pecuniary sanctions (Article 172 EC and Article 17 of Reg 17). A substantial part of the case law of the Court of Justice and, latterly, the Court of First Instance comprises challenges to various aspects of the Commission's investigative powers. While the two Courts have generally been quite supportive of the Commission's need for to an efficient and effective administrative process, they have nonetheless been sensitive to areas where Regulation 17 provides insufficiently clear protection for the fundamental rights or rights of defence of the parties. They have intervened to resolve the issue on the basis of general principles of Community law.

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11 Case C-67/91 *Asociación Española de Banca Privada* [1992] ECR I-4785.

VII Third parties and complaints

7.1 The situation of complainants dealing with the Commission

The right of any person with a legitimate interest to complain to the Commission about conduct allegedly in breach of the competition rules, as well as the basic form which a complaint should take, was introduced in para. 2.2. The Commission welcomes complaints; they are a vital source of information. Many of the most important cases which it has taken up on cartels and monopolies began as complaints. It is not only firms which can present complaints. Many interest groups, including in particular consumer groups, can and do complain to the Commission, and the Court of First Instance has upheld their right to do so.

The complainant may be full involved in the Commission's investigative procedures. It may well find itself the subject of a request for information under Article 11 of Regulation 17. The complainant also has a right to participate in the Commission's administrative procedure.

However, as was noted in para. 1.5, the Commission now has a policy of encouraging complainants to seek redress in national courts, wherever possible. The Commission itself plans to concentrate on cases "having particular political, economic and legal significance for the Community" (Commission, *Cooperation Notice*, para. 14; see Box 23). This shift in policy has also been supported by the Court of First Instance and is justified by reference to the limited resources given to the Commission to undertake the extensive task of enforcing the competition rules. The Commission is keen to share that burden wherever possible with national courts. That said, by virtue of its special position in the enforcement system of EU competition law, the Commission has a "duty of vigilance" in relation to the complaints it receives. Consequently it has a duty to conduct at least a preliminary investigation into each complaint which is brought before it. If the Commission chooses not to pursue the complaint, it may issue a decision rejecting it. The disappointed complainant can challenge this decision before the Court of First Instance. If the complainant expresses a wish to see its complaint rejected through a definitive act which is reviewable by the Court, it is the Commission's practice normally to give such a ruling.

Extract from Commission's Notice on Cooperation with National Courts

13. As the administrative authority responsible for the Community's competition policy, the Commission must serve the Community's general interest. The administrative resources at the Commission's disposal to perform its task are necessarily limited and cannot be used to deal with all the cases brought to its attention. The Commission is therefore obliged, in general, to take all organizational measures necessary for the performance of its task and, in particular, to establish priorities.

14. The Commission intends, in implementing its decision-making powers, to concentrate on notifications, complaints and own-initiative proceedings which have particular political, economic or legal significance for the Community. Where these features are absent in a particular case, notifications will normally be dealt with by means of a comfort letter and complaints should, as a rule, be handled by national courts or authorities.

15. The Commission considers that there is not normally a sufficient Community interest in examining a case when the plaintiff is able to secure adequate protection of his rights before the national courts. In these circumstances the complaint will normally be filed.

Box 23

The position of complainants is not regulated in detail by the implementing legislation on the competition rules. Article 5 of Regulation 99/63 on hearings requires the Commission to afford third parties who wish to be heard an opportunity of making known in writing their views. Article 7 of the same Regulation provides for the possibility of an oral hearing, but this is rarely used (Box 24). Disputes between the Commission and complainants on these questions are now resolved by the Hearing Officer (see para. 6.5). If the Commission wishes to reject a complaint as unfounded, it must, before doing so, inform the applicants of this in writing and give them an opportunity to make further comments, in writing (Article 6 of Reg 99/63). An "Article 6 letter" is the functional equivalent of a Statement of Objections (see para. 6.2).

Beyond these provisions, the legal position of the complainant before the Commission has been fleshed out in the case law of the two EU courts. These cases confirm that the Commission is under a duty to investigate all complaints to the extent of ascertaining whether there is enough evidence or sufficient Community interest to warrant a full enquiry into the alleged infringements. This will involve a review of questions of fact and law. If the Commission is minded not to pursue the complaint, it must, after issuing an Article 6 letter, review any comments made by the complainant. Finally, the Commission must inform the complainant of any decision it makes to reject the complaint. If the Commission fails to take any of these steps, a judicial remedy may be available (see para. 7.3). The decision to reject the complaint as unfounded can also be challenged. The arrangements for judicial review of the Commission's procedures in dealing with complaints are a vital component of the system of complaints under Regulation 17 and Articles 85 and 86. They are dealt with in detail in para. 7.3.

Regulation 99/63

Article 5

If natural or legal persons showing a sufficient interest apply to be heard pursuant to Article 19(2) of Regulation No 17, the Commission shall afford them the opportunity of making known their views in writing within such time limit as it shall fix.

Article 6

Where the Commission, having received an application pursuant to Article 3(2) of Regulation No 17, considers that on the basis of the information in its possession there are insufficient grounds for granting the application, it shall inform the applicants of its reasons, and fix a time limit for them to submit any further comments in writing.

Article 7

1. The Commission shall afford to persons who have so requested in their written comments the opportunity to put forward their arguments orally, if those persons show a sufficient interest...

2. The Commission may likewise afford to any other person the opportunity of orally expressing his views.

Box 24

7.2 Access to the file

Should the Commission decide to embark upon a detailed investigation into the substance of a complaint, a crucial question for the complainant becomes whether it can have access to the Commission's file, so as to be able to present its informed written observations on the case and

represent its interests at any oral hearing in which it might participate. Since the complainant will often be intervening in support of the Commission, the latter will understandably be quite supportive of its wish to be fully informed, but the complainant has no legal right to obtain access to the file. However, the Commission is bound by the general principle that "business secrets" may under no circumstances be disclosed to complainants.

7.3 Judicial review of Commission decisions

The Court of Justice has said several times that it is in the interests of the satisfactory administration of justice and proper application of the competition rules that a firm entitled to complain under Article 3 of Regulation 17 should be able, if the complaint is dismissed, to institute proceedings to protect its legitimate interests. In the absence of clear legislative rules on the position of complainants, both EU courts have been active in recent years in clarifying the situation.

The position can now be summarised as follows:

- When a complaint has been received, the Commission must carry out a basic investigation of its factual and legal aspects and then define its position; failure to do so will open it up to an action under Article 175 EC.

- The Commission is not obliged to give a definitive ruling on whether or not the complaint reveals a breach of the competition rules; a complainant is not entitled to force the Commission to undertake a full investigation of its complaint.

- The issue by the Commission of an "Article 6" letter informing the complainant of its intention to reject the complaint will constitute a definition of its position, and bar an action under Article 175; however, the Article 6 letter itself, as the equivalent to a statement of objections, is not classed as a "decision" and therefore cannot be challenged as a reviewable act under Article 173.

- In deciding which complaints to pursue, the Commission is entitled to take into account what it sees as the public interest; it is entitled to target its resources, and pursue only cases revealing a significant Community interest.

- Although the Court of Justice and the Court of First Instance have not given a definitive ruling on whether such a measure is strictly compulsory, it is now Commission practice to give a definitive ruling (a "decision") to a complainant whose request for action has been rejected. This enables it to bring an action before the Court of First Instance under Article 173.

- The Court of First Instance will review the rejection to the extent of ascertaining whether the Commission has undertaken an adequate review of the facts and law as presented by the complaint, whether it has followed the correct procedural steps (giving the complainant the right to a hearing), and whether it has given adequate reasons for its rejection of the complaint; the Court of First Instance will not look to see if there has been a breach of Articles 85 and 86.

Alternatively, if the outcome of the complaint is a decision aimed principally at the firm about which the complaint was made (eg. the award of an exemption under Article 85(3)), the complainant will also be able to challenge it, providing it can show a sufficient interest. Making a complaint under Article 3 of Regulation 17 will give a complainant such an interest. In such cases, the Court of First Instance will examine whether the Commission has sufficient reasons for granting the exemption, whether it has followed the correct procedural steps and whether it has given adequate reasons for granting an exemption. Since granting an exemption involves an element of discretion on the part of the Commission, the Court of First Instance will not substitute the Commission's judgment with its own. A complainant may be able to intervene in an action before the Court of First Instance, such as an appeal brought by a firm which has been fined and ordered to terminate an infringement. In such cases, the complainant may intervene to make sure that its point of view is given an independent hearing in submissions before the Court. It must establish an interest in the result of the case, and its submissions can only support or oppose the submissions of one of the parties to the original case (that is, the Commission or the firm alleged to have committed an infringement).

VIII. The resolution of the Commission's investigation

8.1 Formal decisions by the Commission

The main types of formal decision which the Commission may adopt at the culmination of an investigation were summarised in para. 1.3. The Commission must always justify its decisions by reference to the law and available factual evidence. Every decision must be adequately reasoned (Article 190 EC) and duly notified to those to whom it is addressed (Article 191). Notification involves communication to the addressee, with the decision taking effect upon receipt. However, different procedural conditions attach to the adoption of different decisions:

- **Negative clearance:** in a decision granting negative clearance taken under Article 2 of Regulation 17, the Commission certifies that "on the basis of facts in its possession, there are no grounds under Article 85(1) or Article 86 of the Treaty for action on its part in respect of an agreement, decision or practice". A negative clearance is granted "upon application" by the firm (see para. 2.1). Under Article 19(3) of Regulation 17, the Commission must publish in the *Official Journal* a summary of the relevant application and invite all interested third parties to submit their observations within a time limit of not less than one month. The Advisory Committee on Restrictive Practices and Monopolies must be consulted (see para. 3.3). The investigation may involve a process of fact-finding, but is unlikely to involve an Article 14 inspection. Because there is no infringement, a statement of objections will not be issued and no oral hearings are held. Decisions granting negative clearance must be published in the *Official Journal*.

- **Exemption:** exemptions are granted by the Commission under Article 85(3) EC, and Articles 6, 8 and 9(1) of Regulation 17, after notification of the agreement (para. 2.1). As with negative clearance, a summary of the notification must be published in the *Official Journal*. The Advisory Committee on Restrictive Practices and Monopolies must be consulted. After the Commission has established the facts to its satisfaction, it may begin administrative proceedings with a statement of objections to persuade the firms to remove from their agreements any clauses which cannot be exempted under Article 85(3). The Commission may attach conditions to the granting of an exemption. Exemptions are granted for a limited period, from a specified day, and can be revoked or amended at any time. Renewal is also possible, but may involve a further administrative procedure. Exemptions are published in the *Official Journal*.

- **Finding of an infringement:** the basic procedure for the adoption of a final decision finding an infringement, ordering its termination and, where appropriate, imposing a fine (see below) was set out in paras. 3.2 and 6.1-6.6. The decision itself must be fully reasoned. This means that the Commission must not only state its own case and the findings of fact it has made, as well as its legal evaluation, but also set out concisely the arguments of the parties. The Commission may issue a single decision relating to an investigation in which a number of defendants have committed a variety of infringements. This is possible providing it is clear from the decision what findings have been made against each defendant and what fines have been imposed. The decision itself must be adopted by the full college of Commissioners; the task cannot be delegated to the Commissioner for competition matters. A decision may contain negative and positive

obligations. It may, for example, order a firm found to be abusing a dominant position in breach of Article 86:

- to cease predatory pricing activities which are driving a smaller competitor out of the market; and
- to begin supplying a customer which it has been refusing to supply.

- **Fines and penalties:** the imposition of fines and periodic penalty payments for procedural infringements was dealt with in paras. 4.5 and 5.7. Article 15(2) of Regulation 17 (Box 25) empowers the Commission to impose fines in respect of the following substantive infringements of the competition rules which are committed intentionally or negligently:
  - infringements of Articles 85(1) and 86 EC;
  - breach of an obligation or condition imposed in an exemption granted under Article 85(3) EC (this power has never been used).

Article 15 of Regulation 17

2. The Commission may be decision impose on undertakings or associations of undertakings fines of from 1,000 to 1,000,000 units of account, or a sum in excess thereof but not exceeding 10% of turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently:
(a) they infringe Article 85(1) or Article 86 of the Treaty; or
(b) they commit a breach of any obligation imposed pursuant to Article 8(1).
In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.

Box 25

Fines under Article 15(2) can be between ECU 1000 and ECU 1 million, or up to 10 per cent of a firm's turnover in the preceding business year. The Commission has imposed some very heavy fines in recent years:

- a total of ECU 23.5 million on the 14 members of a PVC cartel;
- ECU 11 million on German Railways for abuse of a dominant position;
- ECU 75 million on Tetra Pak for abuse of a dominant position;
- a total of ECU 132.15 million on the 19 members of a cartel in the cartonboard market, including a fine of ECU 22.75 million on one operator;
- a total of ECU 248 million on 8 associations and 33 firms in EU and EFTA countries responsible for a cement cartel (the highest total yet).

There is no fixed scale for fines, but the Commission now has a policy of setting amounts closer to the 10 per cent of turnover limit, and also of taking into account the financial benefit the firm may have derived from the infringement. The Commission seeks to ensure that companies never profit from breaking the competition rules. In assessing the question of

gravity under Article 15(2) the Court of Justice has held that the Commission must have regard to a large number of factors, including the conduct of the firms, the role played by each of them, any profit derived from the wrongdoing, the nature and cost of the goods, and the size of the firms and their market power. Fines are intended as deterrents as well as punishments. They do not provide compensation for victims of infringements. Such compensation has to be sought through the national court. Mitigating circumstances may include the level of co-operation with the Commission during its investigation, whether a firm is willing to terminate the infringement and any delay on the part of the Commission in pursuing the infringement.

In addition to fines for substantive infringements, the Commission may impose periodic penalty payments of between ECU 50 and ECU 1000 per day to compel undertakings to:

- put an end to an infringement of Article 85(1) or Article 86;
- refrain from breaching a condition under which an exemption was granted.

8.2 Interim measures

The Commission has the power to adopt interim measures in order to protect the interests of complainant firms, or to prevent serious harm to EU competition policy. This power is not spelt out explicitly in the Treaty or in legislation. However, the Court of Justice has held that it is implicit in the Commission's powers under Article 3 to adopt infringement decisions. The Commission has not used this power very extensively; so far it has taken fewer than ten interim decisions on the applicability of Articles 85 and 86. The following conditions must be satisfied:

- the Commission must establish a *prima facie* case of an infringement of Article 85(1) and/or Article 86;
- there must be an element of urgency either
  - to prevent serious or irreparable harm to the party seeking the interim measures; or
  - to protect the public interest.
- The measures must be "temporary and conservatory" and proportionate to the infringement alleged.

The Commission will act upon an application, which will normally be linked to a formal complaint. The rights of defence of both the defendant and the complainant must be observed, including the opportunity to make written comments. An oral hearing will usually be held. Steps the Commission may decide to take could include ordering the defendant to supply the complainant with certain goods, or to desist from predatory pricing. Its decision may be challenged before the Court of First Instance. Furthermore, a complainant may challenge a refusal to grant interim measures.

8.3 Informal resolution of competition cases by the Commission

In numerical terms, the informal settlements the Commission makes are of much greater significance than formal decisions. The comfort letters it issues (see para. 1.3) are particularly

important in this regard. Clearly, the Commission cannot use comfort letters to find infringements or to deal with big "flagship" cases where it wishes to set out a firm policy on a particular practice. However, for routine cases involving negative clearance and exemption, a comfort letter may be the best answer for the firms concerned. The advantages and disadvantages of comfort letters can be summarised as follows:

Advantages:

- a comfort letter can be issued relatively quickly; the informal procedure involves the commitment of fewer resources by both the Commission and the parties concerned than would be necessary under a formal procedure;

- the procedure may involve only a minimum of publicity for the firm; the Commission does not always publish a notice of its intention to issue a comfort letter in the *Official Journal*;

- a comfort letter cannot be challenged by a third party in the Court of First Instance since, because of its informality, it does not constitute a "decision".

Disadvantages:

- the lack of legal security:
  - the Commission may easily be able to reopen the case if new facts or legal circumstances emerge;

  - while preventing actions by third parties in the EU courts, a comfort letter in no way prevents an aggrieved third party from taking action on the agreement which is its subject matter in a national court; on the other hand, the view of the Commission will strongly influence the national court.

8.4 Judicial review of final decisions

Judicial review of the Commission's final decision by the Court of First Instance provides an essential guarantee of the respect for the rule of law by the EU institutions. A firm found guilty of an infringement can seek annulment of the decision under Article 173 EC, providing that it applies to the Court within 2 months of being notified of the decision. It can challenge the decision principally on the following grounds:

- the decision is inadequately reasoned; the Court will require particularly detailed reasoning where the Commission is proposing a novel application of the competition rules;

- the evidence as presented by the Commission does not support the infringement alleged to have taken place (this would especially be the case in the context of an allegation of membership of a cartel, or one relating to the duration of an infringement);

- the Commission has not correctly and carefully presented the evidence which it claims to have found;

- incorrect legal evaluation of the economic evidence (this would be the case where the Court found that, contrary to the Commission's view, a particular type of conduct was not actually in breach of the competition rules);

- the Commission has not properly observed the procedural rights of the defendant by, for example, failing to give it the adequate opportunity to make its views known or providing an inadequate statement of reasons for its decision.

The Court's powers are limited to annulling a decision in whole or in part. It cannot change the decision to match its own evaluation of the issue. If the decision is annulled on procedural grounds, it may be possible for the Commission to correct the procedural impropriety without embarking upon a full re-investigation of the alleged infringement.

The Court of First Instance has unlimited jurisdiction under Article 172 EC and Article 17 of Regulation 17 in relation to fines and penalties. That means it can cancel, reduce, or even increase the fine or periodic penalty imposed. In practice, the Court has frequently reduced fines to reflect some deficiency in the Commission's case leading, on occasion, to a partial annulment of the decision.

Claims brought by complainants were dealt with in para. 7.3 above.

An appeal can be made against the judgment of the Court of First Instance to the Court of Justice but only on points of law (Article 168A(1) EC). This does not include challenges to the appraisal of factual evidence made by the first Court. Since the Court of First Instance took over the task of reviewing competition law decisions from the Court of Justice in 1989, it has instituted a much more intensive form of review. This includes both the legal and factual evaluations made by the Commission. The work of the Court of First Instance to date has shown that it is prepared to take a more proactive attitude in its factual examination of the cases brought before it.

8.5 Interim relief

The Court of First Instance may grant two forms of interim relief:

- under Article 185 EC it may order the suspension of the Commission's decision;
- under Article 186 EC it may order any necessary interim measures.

Only exceptionally will the Court accede to a request to suspend the application of a decision made by the Commission. It will do so where applying the decision might have very substantial effects, for example, throughout an entire sector of the economy. The Court has consistently refused to order the suspension of Commission decisions requiring firms to provide information under Article 11 or ordering them to submit to investigations under Article 14.

Under Article 186, the Court cannot substitute its view of the substantive merits of interim relief for that of the Commission. It can, however, overturn a Commission decision refusing interim relief to a complainant (for example, for misapplying the substantive conditions for awarding relief; see para. 8.2). In this way, it can require the Commission to review the question again.

ANNEXES

Annex 1

Major legislative instruments applying Articles 85 and 86, including block exemption Regulations.

General

Council Regulation 17 of February 6 1962 (OJ 13, 21.2.1962, p. 204; Special Edition 1959-62, p. 87) (basic implementing regulation).

Commission Regulation (EC) No. 3385/94 of December 21 1994 (OJ 1994 L377/28) (applications and notifications, and Form A/B) (see Annex 3 for details of Form A/B).

Commission Regulation 99/63 of July 25 1963 (OJ 127, 20.8.1963, p. 2268; Special Edition 1963-64, p. 47) (hearings).

Commission Decision 94/810 (OJ 1994 L330/3) (mandate of the Hearing Officer).

Transport (most important only)

Council Regulation 141/62 of November 26 1962 (OJ 124, 28.11.1962, p. 2751; Special Edition 1959-62, p. 291) (excludes transport from Regulation 17).

Council Regulation (EEC) 1017/68 of July 19 1968 (OJ 175, 23.7.1968, p. 1; Special Edition 1968 I, p. 302) (application of competition rules to transport by rail, road and inland waterway).

Commission Regulation (EEC) 1629/69 of August 8 1969 (OJ L209, 21.8.1969, p. 1; Special Edition 1969 II, p. 371) (complaints under Regulation 1017/68).

Commission Regulation (EEC) 1630/69 of August 8 1969 (OJ L209, 21.8.1969, p.11; Special Edition 1969 II, p. 381) (hearings under Regulation 1017/68).

Council Regulation (EEC) 4056/86 of December 22 1986 (OJ 1986 L378/4) (application of competition rules to maritime transport).

Commission Regulation (EEC) 4260/88 of December 16 1988 (OJ 1988 L376/1) as amended by Commission Regulation (EC) 3666/93 of December 15 1993 OJ 1993 L336/1) (communications, complaints and applications, and hearings in the field of maritime transport).

Council Regulation (EEC) 3975/87 of December 14 1987 (OJ 1987 L374/1) (application of competition rules to air transport).

Commission Regulation (EEC) 4261/88 of December 16 1988 (OJ 1988 L376/10) as amended by Commission Regulation (EC) 3666/93 of December 15 1993 (OJ 1993 L336/1) (complaints, applications and hearings in the air transport sector).

Block Exemption Regulations

Commission Regulation (EEC) 1983/83 of June 22 1983 (OJ 1983 L173/1) (exclusive distribution agreements).

Commission Regulation (EEC) 1984/83 of June 22 1983 (OJ 1983 L173/5) (exclusive purchasing agreements).

Commission Regulation (EEC) 123/85 of December 12 1984 (OJ 1984 L15/16) (motor vehicle distribution and servicing agreements).

Commission Regulation 2349/84 of July 23 1984 (OJ 1984 L219/15) as amended by Commission Regulation (EEC) 151/93 of December 23 1992 (OJ 1993 L21/8) (patent licensing agreements).

Commission Regulation (EEC) 556/89 of November 30 1988 (OJ 1989 L61/1) as amended by Commission Regulation (EEC) 151/93 of December 23 1992 (OJ 1993 L21/8) (know-how licensing agreements).

Commission Regulation (EEC) 417/85 of December 19 1984 (OJ 1985 L53/1) as amended by Commission Regulation (EEC) 151/93 of December 23 1992 (OJ 1993 L21/8) (specialization agreements).

Commission Regulation (EEC) 418/85 of December 19 1984 (OJ 1985 L53/5) as amended by Commission Regulation (EEC) 151/93 of December 23 1992 (OJ 1993 L21/8) (research and development agreements).

Commission Regulation (EEC) 4087/88 of November 30 1988 (OJ 1988 L359/46) (franchise agreements).

Commission Regulation (EEC) 3932/92 of December 21 1992 (OJ 1992 L398/7) (certain agreements in the insurance sector).

Annex 2

Notices on Competition Policy issued by Commission

Notice on exclusive dealing contracts with commercial agents (OJ No. 139, 24.12.1962, p. 2921/62).

Notice on cooperation between enterprises (OJ No C75, 29.7.1968, p. 3).

Notice on certain subcontracting agreements (OJ 1979 C1/2).

Notice on minor agreements (OJ 1986 C231/2) as amended by Commission notice (OJ 1994 C368/20).

Guidelines on the application of EEC competition rules in the telecommunications sector (OJ 1991 C233/2).

Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 (OJ 1993 C39/6).

Notice on the assessment of cooperative joint ventures (OJ 1993 C43/2).

Notice on Regulations 1983/83 and 1984/83 (exclusive distribution and exclusive purchasing agreements) (OJ 1984 C101/2 as amended by OJ 1992 C121/1).

Notice of Regulation 123/85 (motor vehicle distribution and servicing agreements) (OJ 1985 C17/4).

Annex 3

Form A/B: Introduction and Operational Part (appended to Commission Regulation 3385/94)

(Published in the Official Journal. Only the published text is authentic: OJ L 377, 31.12.94 P. 0028)

FORM A/B

INTRODUCTION

Form A/B, as its Annex, is an integral part of the Commission Regulation (EC) No 3385/94 of 21 December 1994 on the form, content and other details of applications and notifications provided for in Council Regulation No 17 (hereinafter referred to as 'the Regulation'). It allows undertakings and associations of undertakings to apply to the Commission for negative clearance agreements or practices which may fall within the prohibitions of Article 85 (1) and Article 86 of the EC Treaty, or within Articles 53 (1) and 54 of the EEA Agreement or to notify such agreement and apply to have it exempted from the prohibition set out in Article 85 (1) by virtue of the provisions of Article 85 (3) of the EC Treaty or from the prohibition of Article 53 (1) by virtue of the provisions of Article 53 (3) of the EEA Agreement.

To facilitate the use of the Form A/B the following pages set out:

- in which situations it is necessary to make an application or a notification (Point A),
- to which authority (the Commission or the EFTA Surveillance Authority) the application or notification should be made (Point B),
- for which purposes the application or notification can be used (Point C),
- what information must be given in the application or notification (Points D, E and F),
- who can make an application or notification (Point G),
- how to make an application or notification (Point H),
- how the business secrets of the undertakings can be protected (Point I),
- how certain technical terms used in the operational part of the Form A/B should be interpreted (Point J), and
- the subsequent procedure after the application or notification has been made (Point K).

A. In which situations is it necessary to make an application or a notification?

I. Purpose of the competition rules of the EC Treaty and the EEA Agreement

1. Purpose of the EC Competition Rules

The purpose of the competition rules is to prevent the distortion of competition in the common market by restrictive practices or the abuse of dominant positions. They apply to any enterprise trading directly or indirectly in the common market, wherever established.

Article 85 (1) of the EC Treaty (the text of Articles 85 and 86 is reproduced in Annex I to this form) prohibits restrictive agreements, decisions or concerted practices (arrangements) which may affect trade between Member States, and Article 85 (2) declares agreements and decisions containing such restrictions void (although the Court of Justice has held that if restrictive terms of agreements are severable, only those terms are void); Article 85 (3), however, provides for exemption of arrangements with beneficial effects, if its conditions are met. Article 86 prohibits the abuse of a dominant position which may affect trade between Member States. The original procedures for implementing these Articles, which provide for 'negative clearance' and exemption pursuant to Article 85 (3), were laid down in Regulation No 17.

2. Purpose of the EEA competition rules

The competition rules of the Agreement on the European Economic Area (concluded between the Community, the Member States and the EFTA States [1]) are based on the same principles as those contained in the Community competition rules and have the same purpose, i. e. to prevent the distortion of competition in the EEA territory by cartels or the abuse of dominant position. They apply to any enterprise trading directly or indirectly in the EEA territory, wherever established. Article 53 (1) of the EEA Agreement (the text of Articles 53, 54 and 56 of the EEA Agreement is reproduced in Annex I) prohibits restrictive agreements, decisions or concerted practices (arrangements) which may affect trade between the Community and one or more EFTA States (or between EFTA States), and Article 53 (2) declares agreements or decisions containing such restrictions void; Article 53 (3), however, provides for exemption of arrangements with beneficial effects, if its conditions are met. Article 54 prohibits the abuse of a dominant position which may affect trade between the Community and one or more EFTA States (or between EFTA States). The procedures for implementing these Articles, which provide for 'negative clearance' and exemption pursuant to Article 53 (3), are laid down in Regulation No 17, supplemented for EEA purposes, by Protocols 21, 22 and 23 to the EEA Agreement[2] .

II. The scope of the competition rules of the EC Treaty and the EEA Agreement

The applicability of Articles 85 and 86 of the EC Treaty and Articles 53 and 54 of the EEA Agreement depends on the circumstances of each individual case. It presupposes that the arrangement or behaviour satisfies all the conditions set out in the relevant provisions. This question must consequently be examined before any application for negative clearance or any notification is made.

1. Negative clearance

The negative clearance procedure allows undertakings to ascertain whether the Commission considers that their arrangement or their behaviour is or is not prohibited by Article 85 (1), or Article 86 of the EC Treaty or by Article 53 (1) or Article 54 of the EEA Agreement. This procedure is governed by Article 2 of Regulation No 17. The negative clearance takes the form of a decision by which the Commission certifies that, on the basis of the facts in its possession, there are no grounds pursuant to Article 85 (1) or Article 86 of the EC Treaty or under Article 53 (1) or Article 54 of the EEA Agreement for action on its part in respect of the arrangement or behaviour. There is, however, no point in making an application when the arrangements or the

[1] See list of Member States and EFTA States in Annex III

[2] Reproduced in Annex I

behaviour are manifestly not prohibited by the abovementioned provisions. Nor is the Commission obliged to give negative clearance. Article 2 of Regulation No 17 states that '... the Commission may certify...'. The Commission issues negative clearance decisions only where an important problem of interpretation has to be solved. In the other cases it reacts to the application by sending a comfort letter. The Commission has published several notices relating the interpretation of Article 85 (1) of the EC Treaty. They define certain categories of agreements which, by their nature or because of their minor importance, are not caught by the prohibition (3).

2. Exemption

The procedure for exemption pursuant to Article 85 (3) of the EC Treaty and Article 53 [3] of the EEA Agreement allows companies to enter into arrangements which, in fact, offer economic advantages but which, without exemption, would be prohibited by Article 85 (1) of the EC Treaty or by Article 53 (1) of the EEA Agreement. This procedure is governed by Articles 4, 6 and 8 and, for the new Member States, also by Articles 5, 7 and 25 of Regulation No 17. The exemption takes the form of a decision by the Commission declaring Article 85 (1) of the EC Treaty or Article 53 (1) of the EEA Agreement to be inapplicable to the arrangements described in the decision. Article 8 requires the Commission to specify the period of validity of any such decision, allows the Commission to attach conditions and obligations and provides for decisions to be amended or revoked or specified acts by the parties to be prohibited in certain circumstances, notably if the decisions were based on incorrect information or if there is any material change in the facts.

The Commission has adopted a number of regulations granting exemptions to categories of agreements[4]. Some of these regulations provide that some agreements may benefit from exemption only if they are notified to the Commission pursuant to Article 4 or 5 of Regulation No 17 with a view to obtaining exemption, and the benefit of the opposition procedure is claimed in the notification.

A decision granting exemption may have retroactive effect, but, with certain exceptions, cannot be made effective earlier than the date of notification (Article 6 of Regulation No 17). Should the Commission find that notified arrangements are indeed prohibited and cannot be exempted and, therefore, take a decision condemning them, the participants are nevertheless protected, between the date of the notification and the date of the decision, against fines for any infringement described in the notification (Article 3 and Article 15 (5) and (6) of Regulation No 17).

Normally the Commission issues exemption decisions only in cases of particular legal, economic or political importance. In the other cases it terminates the procedure by sending a comfort letter.

B. To which authority should application or notification be made?

The applications and notifications must be made to the authority which has competence for the matter. The Commission is responsible for the application of the competition rules of the EC Treaty. However there is shared competence in relation to the application of the competition rules of the EEA agreement.

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[3] See Annex II

[4] See Annex II

The competence of the Commission and of the EFTA Surveillance Authority to apply the EEA competition rules follows from Article 56 of the EEA Agreement. Applications and notifications relating to agreements, decisions or concerted practices liable to affect trade between Member States should be addressed to the Commission unless their effects on trade between Member States or on competition within the Community are not appreciable within the meaning of the Commission notice of 1986 on agreements of minor importance[5].

Furthermore, all restrictive agreements, decisions or concerted practices affecting trade between one Member State and one or more EFTA States fall within the competence of the Commission, provided that the undertakings concerned achieve more than 67 % of their combined EEA-wide turnover within the Community[6]. However, if the effects of such agreements, decisions or concerted practices on trade between Member States or on competition within the Community are not appreciable, the notification should, where necessary, be addressed to the EFTA Surveillance Authority. All other agreements, decisions and concerted practices falling under Article 53 of the EEA Agreement should be notified to the EFTA Surveillance Authority (the address of which is given in Annex III).

Applications for negative clearance regarding Article 54 of the EEA Agreement should be lodged with the Commission if the Dominant position exists only in the Community, or with the EFTA Surveillance Authority, if the dominant position exists only in the whole of the territory of the EFTA States, or a substantial part of it. Only where the dominant position exists within both territories should the rules outlined above with respect to Article 53 be applied.

The Commission will apply, as a basis for appraisal, the competition rules of the EC Treaty. Where the case falls under the EEA Agreement and is attributed to the Commission pursuant to Article 56 of that Agreement, it will simultaneously apply the EEA rules.

C. The Purpose of this Form

Form A/B lists the questions that must be answered and the information and documents that must be provided when applying for the following:

- a negative clearance with regard to Article 85 (1) of the EC Treaty and/or Article 53 (1) of the EEA Agreement, pursuant to Article 2 of Regulation No 17, with respect to agreements between undertakings, decisions by associations of undertakings and concerted practices,
- an exemption pursuant to Article 85 (3) of the EC Treaty and/or Article 53 (3) of the EEA Agreement with respect to agreements between undertakings, decisions by associations of undertakings and concerted practices,
- the benefit of the opposition procedure contained in certain Commission regulations granting exemption by category.

This form allows undertakings applying for negative clearance to notify, at the same time, in order to obtain an exemption in the event that the Commission reaches the conclusion that no negative clearance can be granted.

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[5] OJ No C 231, 12.9.1986, p.2.

[6] For a definitiion of 'turnover' in this context, see Articles 2, 3 and 4 of Protocol 22 to the EEA Agreement reproduced in Annex I.

Applications for negative clearance and notifications relating to Article 85 of the EC Treaty shall be submitted in the manner prescribed by form A/B (see Article 2 (1), first sentence of the Regulation).

This form can also be used by undertakings that wish to apply for a negative clearance from Article 86 of the EC Treaty or Article 53 of the EEA Agreement, pursuant to Article 2 of Regulation No 17. Applicants requesting negative clearance from Article 86 are not required to use form A/B. They are nonetheless strongly recommended to give all the information requested below to ensure that their application gives a full statement of the facts (see Article 2 (1), second sentence of the Regulation).

The applications or notifications made on the form A/B issued by the EFTA side are equally valid. However, if the agreements, decisions or practices concerned fall solely within Articles 85 or 86 of the EC Treaty, i. e. have no EEA relevance whatsoever, it is advisable to use the present form established by the Commission.

D. Which chapters of the form should be completed?

The operational part of this form is sub-divided into four chapters. Undertakings wishing to make an application for a negative clearance or a notification must complete Chapters I, II and IV. An exception to this rule is provided for in the case where the application or notification concerns an agreement concerning the creation of a cooperative joint venture of a structural character if the parties wish to benefit from an accelerated procedure. In this situation Chapters I, III and IV should be completed.

In 1992, the Commission announced that it had adopted new internal administrative rules that provided that certain applications and notifications - those of cooperative joint ventures which are structural in nature - would be dealt with within fixed deadlines. In such cases the services of the Commission will, within two months of receipt of the complete notification of the agreement, inform the parties in writing of the results of the initial analysis of the case and, as appropriate, the nature and probable length of the administrative procedure they intend to engage.

The contents of this letter may vary according to the characteristics of the case under investigation:

- in cases not posing any problems, the Commission will send a comfort letter confirming the compatibility of the agreement with Article 85 (1) or (3),
- if a comfort letter cannot be sent because of the need to settle the case by formal decision, the Commission will inform the undertakings concerned of its intention to adopt a decision either granting or rejecting exemption,
- if the Commission has serious doubts as to the compatibility of the agreement with the competition rules, it will send a letter to the parties giving notice of an in-depth examination which may, depending on the case, result in a decision either prohibiting, exempting subject to conditions and obligations, or simply exempting the agreement in question.

This new accelerated procedure, applicable since 1 January 1993, is based entirely on the principle of self-discipline. The deadline of two months from the complete notification - intended

for the initial examination of the case - does not constitute a statutory term and is therefore in no way legally binding. However, the Commission will do its best to abide by it. The Commission reserves the right, moreover, to extend this accelerated procedure to other forms of cooperation between undertakings.

A cooperative joint venture of a structural nature is one that involves an important change in the structure and organization of the business assets of the parties to the agreement. This may occur because the joint venture takes over or extends existing activities of the parent companies or because it undertakes new activities on their behalf. Such operations are characterized by the commitment of significant financial, material and/or non-tangible assets such as intellectual property rights and know how. Structural joint ventures are therefore normally intended to operate on a medium- or long-term basis.

This concept includes certain 'partial function' joint ventures which take over one or several specific functions within the parents' business activity without access to the market, in particular research and development and/or production. It also covers those 'full function' joint ventures which give rise to coordination of the competitive behaviour of independent undertakings, in particular between the parties to the joint venture or between them and the joint venture.

In order to respect the internal deadline, it is important that the Commission has available on notification all the relevant information reasonably available to the notifying parties that is necessary for it to assess the impact of the operation in question on competition. Form A/B therefore contains a special section (Chapter III) that must be completed only by persons notifying cooperative joint ventures of a structural character that wish to benefit from the accelerated procedure.

Persons notifying joint ventures of a structural character that wish to claim the benefit of the aforementioned accelerated procedure should therefore complete Chapters I, III and IV of this form. Chapter III contains a series of detailed questions necessary for the Commission to assess the relevant market(s) and the position of the parties to the joint venture on that (those) market(s).

Where the parties do not wish to claim the benefit of an accelerated procedure for their joint ventures of a structural character they should complete Chapters I, II and IV of this form. Chapter II contains a far more limited range of questions on the relevant market(s) and the position of the parties to the operation in question on that (those) market(s), but sufficient to enable the Commission to commence its examination and investigation.

E. The need for complete information

The receipt of a valid notification by the Commission has two main consequences. First, it affords immunity from fines from the date that the valid notification is received by the Commission with respect to applications made in order to obtain exemption (see Article 15 (5) of Regulation No 17). Second, until a valid notification is received, the Commission cannot grant an exemption pursuant to Article 85 (3) of the EC Treaty and/or Article 53 (3) of the EEA Agreement, and any exemption that is granted can be effective only from the date of receipt of a valid notification[7]. Thus, whilst there is no legal obligation to notify as such, unless and until an arrangement that falls within the scope of Article 85 (1) and/or Article 53 (1) has not been notified and is,

[7] Subject to the qualification provided for in Article 4 (2) of Regulation No 17.

therefore, not capable of being exempted, it may be declared void by a national court pursuant to Article 85 (2) and/or Article 53 (2)[8].

Where an undertaking is claiming the benefit of a group exemption by recourse to an opposition procedure, the period within which the Commission must oppose the exemption by category only applies from the date that a valid notification is received. This is also true of the two months' period imposed on the Commission services for an initial analysis of applications for negative clearance and notifications relating to cooperative joint ventures of a structural character which benefit from the accelerated procedure.

A valid application or notification for this purpose means one that is not incomplete (see Article 3 (1) of the Regulation). This is subject to two qualifications. First, if the information or documents required by this form are not reasonably available to you in part or in whole, the Commission will accept that a notification is complete and thus valid notwithstanding the failure to provide such information, providing that you give reasons for the unavailability of the information, and provide your best estimates for missing data together with the sources for the estimates. Indications as to where any of the requested information or documents that are unavailable to you could be obtained by the Commission must also be provided. Second, the Commission only requires the submission of information relevant and necessary to its inquiry into the notified operation. In some cases not all the information required by this form will be necessary for this purpose. The Commission may therefore dispense with the obligation to provide certain information required by this form (see Article 3 (3) of the Regulation. This provision enables, where appropriate, each application or notification to be tailored to each case so that only the information strictly necessary for the Commission's examination is provided.This avoids unnecessary administrative burdens being imposed on undertakings, in particular on small and medium-sized ones. Where the information or documents required by this form are not provided for this reason, the application or notification should indicate the reasons why the information is considered to be unnecessary to the Commission's investigation.

Where the Commission finds that the information contained in the application or notification is incomplete in a material respect, it will, within one month from receipt, inform the applicant or the notifying party in writing of this fact and the nature of the missing information. In such cases, the application or notification shall become effective on the date on which the complete information is received by the Commission. If the Commission has not informed the applicant or the notifying party within the one month period that the application or notification is incomplete in a material respect, the application or notification will be deemed to be complete and valid (see Article 4 of the Regulation).

It is also important that undertakings inform the Commission of important changes in the factual situation including those of which they become aware after the application or notification has been submitted. The Commission must, therefore, be informed immediately of any changes to an agreement, decision or practice which is the subject of an application or notification (see Article 4 (3) of the Regulation). Failure to inform the Commission of such relevant changes could result in any negative clearance decision being without effect or in the withdrawal of any exemption decision[9] adopted by the Commission on the basis of the notification.

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[8] For further details of the consequences of non-notification see the Commission notice on cooperation between national Courts and the Commission (OJ No C 39, 13.2.1993, p. 6).

[9] See point (a) of Article 8 (3) of Regulation No 17.

F. The need for accurate information

In addition to the requirement that the application or notification be complete, it is important that you ensure that the information provided is accurate (see Article 3 (1) of the Regulation). Article 15 (1) (a) of Regulation No 17 states that the Commission may, by decision, impose on undertakings or associations of undertakings fines of up to ECU 5 000 where, intentionally or negligently, they supply incorrect or misleading information in an application for negative clearance or notification. Such information is, moreover, considered to be incomplete (see Article 4 (4) of the Regulation), so that the parties cannot benefit from the advantages of the opposition procedure or accelerated procedure (see above, Point E).

G. Who can lodge an application or a notification?

Any of the undertakings party to an agreement, decision or practice of the kind described in Articles 85 or 86 of the EC Treaty and Articles 53 or 54 of the EEA Agreement may submit an application for negative clearance, in relation to Article 85 and Article 53, or a notification requesting an exemption. An association of undertakings may submit an application or a notification in relation to decisions taken or practices pursued into in the operation of the association.

In relation to agreements and concerted practices between undertakings it is common practice for all the parties involved to submit a joint application or notification. Although the Commission strongly recommends this approach, because it is helpful to have the views of all the parties directly concerned at the same time, it is not obligatory. Any of the parties to an agreement may submit an application or notification in their individual capacities, but in such circumstances the notifying party should inform all the other parties to the agreement, decision or practice of that fact (see Article 1 (3) of the Regulation). They may also provide them with a copy of the completed form, where relevant once confidential information and business secrets have been deleted (see below, operational part, question 1.2).

Where a joint application or notification is submitted, it has also become common practice to appoint a joint representative to act on behalf of all the undertakings involved, both in making the application or notification, and in dealing with any subsequent contacts with the Commission (see Article 1 (4) of the Regulation). Again, whilst this is helpful, it is not obligatory, and all the undertakings jointly submitting an application or a notification may sign it in their individual capacities.

H. How to submit an application or notification

Applications and notifications may be submitted in any of the official languages of the European Community or of an EFTA State (see Article 2 (4) and (5) of the Regulation). In order to ensure rapid proceedings, it is, however, recommended to use, in case of an application or notification to the EFTA Surveillance Authority one of the official languages of an EFTA State or the working language of the EFTA Surveillance Authority, which is English, or, in case of an application or notification to the Commission, one of the official languages of the Community or the working language of the EFTA Surveillance Authority. This language will thereafter be the language of the proceeding for the applicant or notifying party.

Form A/B is not a form to be filled in. Undertakings should simply provide the information requested by this form, using its sections and paragraph numbers, signing a declaration as stated in Section 19 below, and annexing the required supporting documentation.

Supporting documents shall 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. The supporting documents may be originals or copies of the originals (see Article 2 (4) of the Regulation).

All information requested in this form shall, unless otherwise stated, relate to the calendar year preceding that of the application or notification. Where information is not reasonably available on this basis (for example if accounting periods are used that are not based on the calendar year, or the previous year's figures are not yet available) the most recently available information should be provided and reasons given why figures on the basis of the calendar year preceding that of the application or notification cannot be provided.

Financial data may be provided in the currency in which the official audited accounts of the undertaking(s) concerned are prepared or in Ecus. In the latter case the exchange rate used for the conversion must be stated.

Seventeen copies of each application or notification, but only three copies of all supporting documents must be provided (see Article 2 (2) of the Regulation).

The application or notification is to be sent to:

Commission of the European Communities,
Directorate-General for Competition (DG IV),
The Registrar,
200, Rue de la Loi,
B-1049 Brussels.

or be delivered by hand during Commission working days and official working hours at the following address:

Commission of the European Communities,
Directorate-General for Competition (DG IV),
The Registrar,
158, Avenue de Cortenberg,
B-1040 Brussels.

I. Confidentiality

Article 214 of the EC Treaty, Article 20 of Regulation No 17, Article 9 of Protocol 23 to the EEA Agreement, Article 122 of the EEA Agreement and Articles 20 and 21 of Chapter II of Protocol 4 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and of a Court of Justice require the Commission, the Member States, the EEA Surveillance Authority and EFTA States not to disclose information of the kind covered by the obligation of professional secrecy. On the other hand, Regulation No 17 requires the Commission to publish a summary of the application or notification, should it intend to take a favourable decision. In this publication, the Commission '... shall have regard to the legitimate interest of undertakings in the protection of their business secrets' (Article 19 (3) of Regulation No 17; se also Article 21 (2) in relation to the publication of decisions). In this connection, if an undertaking believes that its interests would be

harmed if any of the information it is asked to supply were to be published or otherwise divulged to other undertakings, it should put all such information in a separate annex with each page clearly marked 'Business Secrets'. It should also give reasons why any information identified as confidential or secret should not be divulged or published. (See below, Section 5 of the operational part that requests a non-confidential summary of the notification).

J. Subsequent Procedure

The application or notification is registered in the Registry of the Directorate-General for Competition (DG IV). The date of receipt by the Commission (or the date of posting if sent by registered post) is the effective date of the submission (see Article 4 (1) of the Regulation). However, special rules apply to incomplete applications and notifications (see above under Point E).

The Commission will acknowledge receipt of all applications and notifications in writing, indicating the case number attributed to the file. This number must be used in all future correspondence regarding the notification. The receipt of acknowledgement does not prejudge the question whether the application or notification is valid.

Further information may be sought from the parties or from third parties (Articles 11 to 14 of Regulation No 17) and suggestions might be made as to amendments to the arrangements that might make them acceptable. Equally, a short preliminary notice may be published in the C series of the Official Journal of the European Communities, stating the names of the interested undertakings, the groups to which they belong, the economic sectors involved and the nature of the arrangements, and inviting third party comments (see below, operational part, Section 5).

Where a notification is made together for the purpose of the application of the opposition procedure, the Commission may oppose the grant of the benefit of the group exemption with respect to the notified agreement. If the Commission opposes the claim, and unless it subsequently withdraws its opposition, that notification will then be treated as an application for an individual exemption.

If, after examination, the Commission intends to grant the application for negative clearance or exemption, it is obliged (by Article 19 (3) of Regulation No 17) to publish a summary and invite comments from third parties. Subsequently, a preliminary draft decision has to be submitted to and discussed with the Advisory Committee on Restrictive Practices and Dominant Positions composed of officials of the competent authorities of the Member States in the matter of restrictive practices and monopolies (Article 10 of Regulation No 17) and attended, where the case falls within the EEA Agreement, by representatives of the EFTA Surveillance Authority and the EFTA States which will already have received a copy of the application or notification. Only then, and providing nothing has happened to change the Commission's intention, can it adopt the envisaged decision.

Files are often closed without any formal decision being taken, for example, because it is found that the arrangements are already covered by a block exemption, or because they do not call for any action by the Commission, at least in circumstances at that time. In such cases comfort letters are sent. Although not a Commission decision, a comfort letter indicates how the Commission's departments view the case on the facts currently in their possession which means that the Commission could where necessary - for example, if it were to be asserted that a contract was

void under Article 85 (2) of the EC Treaty and/or Article 53 (2) of the EEA Agreement - take an appropriate decision to clarify the legal situation.

K. Definitions used in the operational part of this form

Agreement: The word 'agreement' is used to refer to all categories of arrangements, i. e. agreements between undertakings, decisions by associations of undertakings and concerted practices.

Year: All references to the word 'year' in this form shall be read as meaning calendar year, unless otherwise stated.

Group: A group relationship exists for the purpose of this form where one undertaking:
- owns more than half the capital or business assets of another undertaking, or
- has the power to exercise more than half the voting rights in another undertaking, or
- has the power to appoint more than half the members of the supervisory board, board of directors or bodies legally representing the undertaking, or
- has the right to manage the affairs of another undertaking.

An undertaking which is jointly controlled by several other undertakings (joint venture) forms part of the group of each of these undertakings.

Relevant product market: questions 6.1 and 11.1 of this form require the undertaking or individual submitting the notification to define the relevant product and/or service market(s) that are likely to be affected by the agreement in question. That definition(s) is then used as the basis for a number of other questions contained in this form. The definition(s) thus submitted by the notifying parties are referred to in this form as the relevant product market(s). These words can refer to a market made up either of products or of services.

Relevant geographic market: questions 6.2 and 11.2 of this form require the undertaking or individual submitting the notification to define the relevant geographic market(s) that are likely to be affected by the agreement in question. That definition(s) is then used as the basis for a number of other questions contained in this form. The definition(s) thus submitted by the notifying parties are referred to in this form as the relevant geographic market(s).

Relevant product and geographic market: by virtue of the combination of their replies to questions 6 and 11 the parties provide their definition of the relevant market(s) affected by the notified agreement(s). That (those) definition(s) is (are) then used as the basis for a number of other questions contained in this form. The definition(s) thus submitted by the notifying parties is referred to in this form as the relevant geographic and product market(s).

Notification: this form can be used to make an application for negative clearance and/or a notification requesting an exemption. The word 'notification' is used to refer to either an application or a notification.

Parties and notifying party: the word 'party' is used to refer to all the undertakings which are party to the agreement being notified. As a notification may be submitted by only one of the undertakings which are party to an agreement, 'notifying party' is used to refer only to the undertaking or undertakings actually submitting the notification.

OPERATIONAL PART

PLEASE MAKE SURE THAT THE FIRST PAGE OF YOUR APPLICATION OR NOTIFICATION CONTAINS THE WORDS 'APPLICATION FOR NEGATIVE CLEARANCE/NOTIFICATION IN ACCORDANCE WITH FORM A/B'

CHAPTER I

Sections concerning the parties, their groups and the agreement (to be completed for all notifications)

Section 1

Identity of the undertakings or persons submitting the notification

1.1. Please list the undertakings on behalf of which the notification is being submitted and indicate their legal denomination or commercial name, shortened or commonly used as appropriate (if it differs from
the legal denomination).

1.2. If the notification is being submitted on behalf of only one or some of the undertakings party to the agreement being notified, please confirm that the remaining undertakings have been informed of that fact and indicate whether they have received a copy of the notification, with relevant confidential information and business secrets deleted[1] (In such circumstances a copy of the edited copy of the notification which has been provided to such other undertakings should be annexed to this notification.)

1.3. If a joint notification is being submitted, has a joint representative[2] been appointed[3] ?

If yes, please give the details requested in 1.3.1 to 1.3.3 below.

If no, please give details of any representatives who have been authorized to act for each or either of the parties to the agreement indicating who they represent.

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1 The Commission is aware that in exceptional cases it may not be practicable to inform non-notifying parties to the notified agreement of the fact that it has been notified, or to provide them a copy of the notification. This may be the case, for example, where a standard agreement is being notified that is concluded with a large number of undertakings. Where this is the case you should state the reasons why it has not been practicable to follow the standard procedure set out in this question.

2 Note: For the purposes of this question a representative means an individual or undertaking formally appointed to make the notification or application on behalf of the party or parties submitting the notification. This should be distinguished from the situation where the notification is signed by an officer of the company or companies in question. In the latter situation no representative is appointed.

3 Note: It is not mandatory to appoint representatives for the purpose of completing and/or submitting this notification. This question only requires the identification of representatives where the notifying parties have chosen to appoint them.

1.3.1. Name of representative.
1.3.2. Address of representative.
1.3.3. Telephone and fax number of representative.

1.4. In cases where one or more representatives have been appointed, an authority to act on behalf of the undertaking(s) submitting the notification must accompany the notification.

Section 2

Information on the parties to the agreement and the groups to which theybelong

2.1. State the name and address of the parties to the agreement being notified, and the country of their incorporation.

2.2. State the nature of the business of each of the parties to the agreement being notified.

2.3. For each of the parties to the agreement, give the name of a person that can be contacted, together with his or her name, address, telephone number, fax number and position held in the undertaking.

2.4. Identify the corporate groups to which the parties to the agreement being notified belong. State the sectors in which these groups are active, and the world-wide turnover of each group[4]).

Section 3

Procedural matters

3.1. Please state whether you have made any formal submission to any other competition authorities in relation to the agreement in question. If yes, state which authorities, the individual or department in question, and the nature of the contact. In addition to this, mention any earlier proceedings or informal contacts, of which you are aware, with the Commission and/or the EFTA Surveillance Authority and any earlier proceedings with any national authorities or courts in the Community or in EFTA concerning these or any related agreements.

3.2. Please summarize any reasons for any claim that the case involves an issue of exceptional urgency.

3.3. The Commission has stated that where notifications do not have particular political, economic or legal significance for the Community they will normally be dealt with by means of comfort letter[5]. Would you be satisfied with a comfort letter? If you consider that it would be inappropriate to deal with the notified agreement in this manner, please explain the reasons for this view.

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[4] For the calculation of turnover in the banking and insurance sectors see Article 3 of Protocol 22 to the EEA Agreement.

[5] See paragraph 14 of the notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EC Treaty (OJ No C 39, 13. 2. 1993, p. 6).

3.4. State whether you intend to produce further supporting facts or arguments not yet available and, if so, on which points[6].

Section 4

Full details of the arrangements

4.1. Please summarize the nature, content and objectives pursued by the agreement being notified.

4.2. Detail any provisions contained in the agreements which may restrict the parties in their freedom to take independent commercial decisions, for example regarding:

- buying or selling prices, discounts or other trading conditions,
- the quantities of goods to be manufactured or distributed or services to be offered,
- technical development or investment,
- the choice of markets or sources of supply,
- purchases from or sales to third parties,
- whether to apply similar terms for the supply of equivalent goods or services,
- whether to offer different services separately or together.

If you are claiming the benefit of the opposition procedure, identify in this list the restrictions that exceed those automatically exempted by the relevant regulation.

4.3. State between which Member States of the Community and/or EFTA States[7] trade may be affected by the arrangements. Please give reasons for your reply to this question, giving data on trade flows where relevant. Furthermore please state whether trade between the Community or the EEA territory and any third countries is affected, again giving reasons for your reply.

Section 5

Non-confidential Summary

Shortly following receipt of a notification, the Commission may publish a short notice inviting third party comments on the agreement in question[8]. As the objective pursued by the Commission in publishing an informal preliminary notice is to receive third party comments as soon as possible after the notification has been received, such a notice is usually published without first providing it to the notifying parties for their comments. This section requests the information to be used in an informal preliminary notice in the event that the Commission decides to issue one. It

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[6] Note: In so far as the notifying parties provide the information required by this form that was reasonably available to them at the time of notification, the fact that the parties intend to provide further supporting facts or documentation in due course does not prevent the notification being valid at the time of notification and, in the case of structural joint ventures where the accelerated procedure is being claimed, the two month deadline commencing.

[7] See list in Annex II.

[8] An example of such a notice figures in annex 1 to this Form. Such a notice should be distinguished from a formal notice published pursuant to Article 19 (3) of Regulation No 17. An Article 19 (3) notice is relatively detailed, and gives an indication of the Commission's current approach in the case in question. Section 5 only seeks information that will be used in a short preliminary notice, and not a notice published pursuant to Article 19 (3).

is important, therefore, that your replies to these questions do not contain any business secrets or other confidential information.

1. State the names of the parties to the agreement notified and the groups of undertakings to which they belong.

2. Give a short summary of the nature and objectives of the agreement. As a guideline this summary should not exceed 100 words.

3. Identify the product sectors affected by the agreement in question.

CHAPTER II

Section concerning the relevant market (to be completed for all notifications except those relating to structural joint ventures for which accelerated treatment is claimed)

Section 6

The relevant market

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.

The following factors are normally considered to be relevant to the determination of the relevant product market and should be taken into account in this analysis[9]:

- the degree of physical similarity between the products/services in question,
- any differences in the end use to which the goods are put,
- differences in price between two products,
- the cost of switching between two potentially competing products,
- established or entrenched consumer preferences for one type or category of product over another,
- industry-wide product classifications (e. g. classifications maintained by trade associations).

The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply 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.

Factors relevant to the assessment of the relevant geographic market include[10] the nature and characteristics of the products or services concerned, the existence of entry barriers or consumer preferences, appreciable differences of the undertakings' market share or substantial price differences between neighbouring areas, and transport costs.

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[9] This list is not, however, exhaustive, and notifying parties may refer to other factors.

[10] This list is not, however, exhaustive, and notifying parties may refer to other factors.

6.1. In the light of the above please explain the definition of the relevant product market or markets that in your opinion should form the basis of the Commission's analysis of the notification.

In your answer, please give reasons for assumptions or findings, and explain how the factors outlined above have been taken into account. In particular, please state the specific products or services directly or indirectly affected by the agreement being notified and identify the categories of goods viewed as substitutable in your market definition.

In the questions figuring below, this (or these) definition(s) will be referred to as 'the relevant product market(s)'.

6.2. Please explain the definition of the relevant geographic market or markets that in your opinion should form the basis of the Commission's analysis of the notification. In your answer, please give reasons for assumptions or findings, and explain how the factors outlined above have been taken into account. In particular, please identify the countries in which the parties are active in the relevant product market(s), and in the event that you consider the relevant geographic market to be wider than the individual Member States of the Community or EFTA on which the parties to the agreement are active, give the reasons for this.

In the questions below, this (or these) definition(s) will be referred to as 'the relevant geographic market(s)'.

Section 7

Group members operating on the same markets as the parties

7.1. For each of the parties to the agreement being notified, provide a list of all undertakings belonging to the same group which are:

7.1.1. active in the relevant product market(s);

7.1.2. active in markets neighbouring the relevant product market(s) (i. e. active in products and/or services that represent imperfect and partial substitutes for those included in your definition of the relevant product market(s)).

Such undertakings must be identified even if they sell the product or service in question in other geographic areas than those in which the parties to the notified agreement operate. Please list the name, place of incorporation, exact product manufactured and the geographic scope of operation of each group member.

Section 8

The position of the parties on the affected relevant product markets

Information requested in this section must be provided for the groups of the parties as a whole. It is not sufficient to provide such information only in relation to the individual undertakings directly concerned by the agreement.

8.1. In relation to each relevant product market(s) identified in your reply to question 6.1 please provide the following information:

8.1.1. the market shares of the parties on the relevant geographic market during the previous three years;

8.1.2. where different, the market shares of the parties in (a) the EEA territory as a whole, (b) the Community, (c) the territory of the EFTA States and (d) each EC Member State and EFTA State during the previous three years[11]. For this section, where market shares are less than 20 %, please state simply which of the following bands are relevant: 0 to 5 %, 5 to 10 %, 10 to 15 %, 15 to 20 %.

For the purpose of answering these questions, market share may be calculated either on the basis of value or volume. Justification for the figures provided must be given. Thus, for each answer, total market value/volume must be stated, together with the sales/turnover of each of the parties in question. The source or sources of the information should also be given (e.g. official statistics, estimates, etc.), and where possible, copies should be provided of documents from which information has been taken.

Section 9

The position of competitors and customers on the relevant product market(s)

Information requested in this section must be provided for the group of the parties as a whole and not in relation to the individual companies directly concerned by the agreement notified.

For the (all) relevant product and geographic market(s) in which the parties have a combined market share exceeding 15 %, the following questions must be answered.

9.1. Please identify the five main competitors of the parties. Please identify the company and give your best estimate as to their market share in the relevant geographic market(s). Please also provide address, telephone and fax number, and, where possible, the name of a contact person at each company identified.

9.2. Please identify the five main customers of each of the parties. State company name, address, telephone and fax numbers, together with the name of a contact person.

Section 10

Market entry and potential competition in product and geographic terms

For the (all) relevant product and geographic market(s) in which the parties have a combined market share exceeding 15 %, the following questions must be answered.

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[11] i.e. Where the relevant geographic market has been defined as world wide, these figures must be given regarding the EEA, the Community, the territory of the EFTA States, and each EC Member State. Where the relevant geographic market has been defined as the Community, these figures must be given for the EEA, the territory of the EFTA States, and each EC Member State. Where the market has been defined as national, these figures must be given for the EEA, the Community and the territory of the EFTA States.

10.1. Describe the various factors influencing entry in product terms into the relevant product market(s) that exist in the present case (i.e. what barriers exist to prevent undertakings that do not presently manufacture goods within the relevant product market(s) entering this market(s)). In so doing take account of the following where appropriate:

- to what extent is entry to the markets influenced by the requirement of government authorization or standard setting in any form? Are there any legal or regulatory controls on entry to these markets?

- to what extent is entry to the markets influenced by the availability of raw materials?

- to what extent is entry to the markets influenced by the length of contracts between an undertaking and its suppliers and/or customers?

- describe the importance of research and development and in particular the importance of licensing patents, know-how and other rights in these markets.

10.2. Describe the various factors influencing entry in geographic terms into the relevant geographic market(s) that exist in the present case (i.e. what barriers exist to prevent undertakings already producing and/or marketing products within the relevant product market(s) but in areas outside the relevant geographic market(s) extending the scope of their sales into the relevant geographic market(s)?). Please give reasons for your answer, explaining, where relevant, the importance of the following factors:

- trade barriers imposed by law, such as tariffs, quotas etc.,

- local specification or technical requirements,

- procurement policies,

- the existence of adequate and available local distribution and retailing facilities,

- transport costs,

- entrenched consumer preferences for local brands or products,

- language.

10.3. Have any new undertakings entered the relevant product market(s) in geographic areas where the parties sell during the last three years? Please provide this information with respect to both new entrants in product terms and new entrants in geographic terms. If such entry has occurred, please identify the undertaking(s) concerned (name, address, telephone and fax numbers, and, where possible, contact person), and provide your best estimate of their market share in the relevant product and geographic market(s).

CHAPTER III

Section concerning the relevant market only for structural joint ventures for which accelerated treatment is claimed

Section 11

The relevant market

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.

The following factors are normally considered to be relevant[12] to the determination of the relevant product market and should be taken into account in this analysis:

- the degree of physical similarity between the products/services in question,
- any differences in the end use to which the goods are put,
- differences in price between two products,
- the cost of switching between two potentially competing products,
- established or entrenched consumer preferences for one type or category of product over another,
- different or similar industry-wide product classifications (e.g. classifications maintained by trade associations).

The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply 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.

Factors relevant to the assessment of the relevant geographic market include[13] the nature and characteristics of the products or services concerned, the existence of entry barriers or consumer preferences, appreciable differences of the undertakings' market share or substantial price differences between neighbouring areas, and transport costs.

Part 11.1

The notifying parties' analysis of the relevant market

11.1.1. In the light of the above, please explain the definition of the relevant product market or markets that in the opinion of the parties should form the basis of the Commission's analysis of the notification.

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[12] This list is not, however, exhaustive, and notifying parties may refer to other factors.

[13] This list is not, however, exhaustive, and notifying parties may refer to other factors.

In your answer, please give reasons for assumptions or findings, and explain how the factors outlined above have been taken into account.

In the questions figuring below, this (or these) definition(s) will be referred to as 'the relevant product market(s)'.

11.1.2. Please explain the definition of the relevant geographic market or markets that in the opinion of the parties should form the basis of the Commission's analysis of the notification.

In your answer, please give reasons for assumptions or findings, and explain how the factors outlined above have been taken into account.

Part 11.2

Questions on the relevant product and geographic market(s)

Answers to the following questions will enable the Commission to verify whether the product and geographic market definitions put forward by you in Section 11.1 are compatible with definitions figuring above.

Product market definition

11.2.1. List the specific products or services directly or indirectly affected by the agreement being notified.

11.2.2. List the categories of products and/or services that are, in the opinion of the notifying parties, close economic substitutes for those identified in the reply to question 11.2.1. Where more than one product or service has been identified in the reply to question 11.2.1, a list for each product must be provided for this question.

The products identified in this list should be ordered in their degree of substitutability, first listing the most perfect substitute for the products of the parties, finishing with the least perfect substitute[14].

[14] Close economic substitute; most perfect substitute; least perfect substitute these definitions are only relevant to those filling out Chapter III of the form (i. e. those notifying structural joint ventures requesting the accelerated procedure). For any given product (for the purposes of this definition 'product' is used to refer to products or services) a chain of substitutes exists. This chain is made up of all conceivable substitutes for the product in question, i. e. all those products that will, to a greater or lesser extent, fulfil the needs of the consumer in question. The substitutes will range from very close (or perfect) ones (products to which consumers would turn immediately in the event of, for example, even a very small price increase for the product in question) to very distant (or imperfect) substitutes (products to which customers would only turn to in the event of a very large price rise for the product in question). When defining the relevant market, and calculating market shares, the Commission only takes into account close economic substitutes of the products in question. Close economic substitutes are ones to which customers would turn to in response to a small but significant price increase for the product in question (say 5 %). This enables the Commission to assess the market power of the notifying companies in the context of a relevant market made up of all those products that consumers of the products in question could readily and easily turn to.

Please explain how the factors relevant to the definition of the relevant product market have been taken into account in drawing up this list and in placing the products/services in their correct order.

Geographic market definition

11.2.3. List all the countries in which the parties are active in the relevant product market(s). Where they are active in all countries within any given groups of countries or trading area (e. g. the whole Community or EFTA, the EEA countries, world-wide) it is sufficient to indicate the area in question.

11.2.4. Explain the manner in which the parties produce and sell the goods and/or services in each of these various countries or areas. For example, do they manufacture locally, do they sell through local distribution facilities, or do they distribute through exclusive, or non-exclusive, importers and distributors?

11.2.5. Are there significant trade flows in the goods/services that make up the relevant product market(s) (i) between the EC Member States (please specify which and estimate the percentage of total sales made up by imports in each Member State in which the parties are active), (ii) between all or part of the EC Member States and all or part of the EFTA States (again, please specify and estimate the percentage of total sales made up by imports), (iii) between the EFTA States (please specify which and estimate the percentage of total sales made up by imports in each such State in which the parties are active), and (iv) between all or part of the EEA territory and other countries? (again, please specify and estimate the percentage of total sales made up by imports.)

11.2.6. Which producer undertakings based outside the Community or the EEA territory sell within the EEA territory in countries in which the parties are active in the affected products? How do these undertakings market their products? Does this differ between different EC Member States and/or EFTA States?

However, this does not mean that the Commission fails to take into account the constraints on the competitive behaviour of the parties in question resulting from the existence of imperfect substitutes (those to which a consumer could not turn to in response to a small but significant price increase (say 5 %) for the products in question). These effects are taken into account once the market has been defined, and the market shares determined.

It is therefore important for the Commission to have information regarding both close economic substitutes for the products in question, as well as less perfect substitutes.

For example, assume two companies active in the luxury watch sector conclude a research and development agreement. They both manufacture watches costing ECU 1 800 to 2 000. Close economic substitutes are likely to be watches of other manufactures in the same or similar price category, and these will be taken into account when defining the relevant product market. Cheaper watches, and in particular disposable plastic watches, will be imperfect substitutes, because it is unlikely that a potential purchaser of a ECU 2 000 watch will turn to one costing ECU 20 if the expensive one increased its price by 5 %.

Section 12

Group members operating on the same markets as the parties to the notifiedagreement

12.1. For each of the parties to the agreement being notified, provide a list of all undertakings belonging to the same group which are:
12.1.1. active in the relevant product market(s);
12.1.2. active in markets neighbouring the relevant product market(s) (i. e. active in products/services that represent imperfect and partial substitutes[15] for those included in your definition of the relevant product market(s);
12.1.3. active in markets upstream and/or downstream from those included in the relevant product market(s).

Such undertakings must be identified even if they sell the product or service in question in other geographic areas than those in which the parties to the notified agreement operate. Please list the name, place of incorporation, exact product manufactured and the geographic scope of operation of each group member.

Section 13

The position of the parties on the relevant product market(s)

Information requested in this section must be provided for the group of the parties as a whole and not in relation to the individual companies directly concerned by the agreement notified.

13.1. In relation to each relevant product market(s), as defined in your reply to question 11.1.2, please provide the followinginformation:

13.1.1. the market shares of the parties on the relevant geographic market during the previous three years;

13.1.2. where different, the market shares of the parties in (a) the EEA territory as a whole, (b) the Community, (c) the territory of the EFTA States and (d) each EC Member State and EFTA State during the previous three years[16]. For this section, where market shares are less than 20 %, please state simply which of the following bands are relevant: 0 to 5 %, 5 to 10 %, 10 to 15 %, 15 to 20 % in terms of value or volume.

For the purpose of answering these questions, market share may be calculated either on the basis of value or volume. Justification for the figures provided must be given. Thus, for each answer, total market value/volume must be stated, together with the sales/turnover of each the parties in

[15] The following are considered to be partial substitutes: products and services which may replace each other solely in certain geographic areas, solely during part of the year or solely for certain uses.

[16] i.e. Where the relevant geographic market has been defined as world wide, these figures must be given regarding the EEA, the Community, the territory of the EFTA States, and each EC Member State and EFTA State. Where the relevant geographic market has been defined as the Community, these figures must be given for the EEA, the territory of the EFTA States, and each EC Member State and EFTA State. Where the market has been defined as national, these figures must be given for the EEA, the Community and the territory of the EFTA States.

question. The source or sources of the information should also be given, and where possible, copies should be provided of documents from which information has been taken.

13.2. If the market shares in question 13.1 were to be calculated on a basis other than that used by the parties, would the resultant market shares differ by more than 5 % in any market (i. e. if the parties have calculated market shares on the basis of volume, what would be the relevant figure if it was calculated on the basis of value?) If the figure were to differ by more than 5 % please provide the information requested in question 13.1 on the basis of both value and volume.

13.3. Give your best estimate of the current rate of capacity utilization of the parties and in the industry in general in the relevant product and geographic market(s).

Section 14

The position of competitors and customers on the relevant product market(s)

Information requested in this section must be provided for the group of the parties as a whole and not in relation to the individual companies directly concerned by the agreement notified.

For the (all) relevant product market(s) in which the parties have a combined market share exceeding 10 % in the EEA as a whole, the Community, the EFTA territory or in any EC Member State or EFTA Member State, the following questions must be answered.

14.1. Please identify the competitors of the parties on the relevant product market(s) that have a market share exceeding 10 % in any EC Member State, EFTA State, in the territory of the EFTA States, in the EEA, or world-wide. Please identify the company and give your best estimate as to their market share in these geographic areas. Please also provide the address, telephone and fax numbers, and, where possible, the name of a contact person at each company identified.

14.2. Please describe the nature of demand on the relevant product market(s). For example, are there few or many purchasers, are there different categories of purchasers, are government agencies or departments important purchasers?

14.3. Please identify the five largest customers of each of the parties for each relevant product market(s). State company name, address, telephone and fax numbers, together with the name of a contact person.

Section 15

Market entry and potential competition

For the (all) relevant product market(s) in which the parties have a combined market share exceeding 10 % in the EEA as a whole, the Community, the EFTA territory or in any EC Member State or EFTA State, the following questions must be answered.

15.1. Describe the various factors influencing entry into the relevant product market(s) that exist in the present case. In so doing take account of the following where appropriate:

- to what extent is entry to the markets influenced by the requirement of government authorization or standard setting in any form? Are there any legal or regulatory controls on entry to these markets?

- to what extent is entry to the markets influenced by the availability of raw materials?

- to what extent is entry to the markets influenced by the length of contracts between an undertaking and its suppliers and/or customers?

- what is the importance of research and development and in particular the importance of licensing patents, know-how and other rights in these markets.

15.2. Have any new undertakings entered the relevant product market(s) in geographic areas where the parties sell during the last three years? If so, please identify the undertaking(s) concerned (name, address, telephone and fax numbers, and, where possible, contact person), and provide your best estimate of their market share in each EC Member State and EFTA State that they are active and in the Community, the territory of the EFTA States and the EEA territory as a whole.

15.3. Give your best estimate of the minimum viable scale for the entry into the relevant product market(s) in terms of appropriate market share necessary to operate profitably.
15.4. Are there significant barriers to entry preventing companies active on the relevant product market(s):

15.4.1. in one EC Member State or EFTA State selling in other areas of the EEA territory;

15.4.2. outside the EEA territory selling into all or parts of the EEA territory.
Please give reasons for your answers, explaining, where relevant, the importance of the following factors:

- trade barriers imposed by law, such as tariffs, quotas etc.,

- local specification or technical requirements,

- procurement policies,

- the existence of adequate and available local distribution and retailing facilities,

- transport costs,

- entrenched consumer preferences for local brands or products,

- language.

CHAPTER IV

Final sections
To be completed for all notifications

Section 16

Reasons for the application for negative clearance

If you are applying for negative clearance state:

16.1. why, i.e. state which provision or effects of the agreement or behaviour might, in your view, raise questions of compatibility with the Community's and/or the EEA rules of competition. The object of this subheading is to give the Commission the clearest possible idea of the doubts you have about your agreement or behaviour that you wish to have resolved by a negative clearance.

Then, under the following three references, give a statement of the relevant facts and reasons as to why you consider Article 85 (1) or 86 of the EC Treaty and/or Article 53 (1) or 54 of the EEA Agreement to be inapplicable, i.e.:

16.2. why the agreements or behaviour do not have the object or effect of preventing, restricting or distorting competition within the common market or within the territory of the EFTA States to any appreciable extent, or why your undertaking does not have or its behaviour does not abuse a dominant position; and/or

16.3. why the agreements or behaviour do not have the object or effect of preventing, restricting or distorting competition within the EEA territory to any appreciable extent, or why your undertaking does not have or its behaviour does not abuse a dominant position; and/or

16.4. why the agreements or behaviour are not such as may affect trade between Member States or between the Community and one or more EFTA States, or between EFTA States to any appreciable extent.

Section 17

Reasons for the application for exemption

If you are notifying the agreement, even if only as a precaution, in order to obtain an exemption under Article 85 (3) of the EC Treaty and/or Article 53 (3) of the EEA Agreement, explain how:

17.1. the agreement contributes to improving production or distribution, and/or promoting technical or economic progress. In particular, please explain the reasons why these benefits are expected to result from the collaboration; for example, do the parties to the agreement possess complementary technologies or distribution systems that will produce important synergies? (if, so, please state which). Also please state whether any documents or studies were drawn up by the notifying parties when assessing the feasibility of the operation and the benefits likely to result therefrom, and whether any such documents or studies provided estimates of the savings or efficiencies likely to result. Please provide copies of any such documents or studies;

17.2. a proper share of the benefits arising from such improvement or progress accrues to consumers;

17.3. all restrictive provisions of the agreement are indispensable to the attainment of the aims set out under 17.1 (if you are claiming the benefit of the opposition procedure, it is particularly important that you should identify and justify restrictions that exceed those automatically exempted by the relevant Regulations). In this respect please explain how the benefits resulting from the agreement identified in your reply to question 17.1 could not be achieved, or could not be achieved so quickly or efficiently or only at higher cost or with less certainty of success (i) without the conclusion of the agreement as a whole and (ii) without those particular clauses and provisions of the agreement identified in your reply to question 4.2;

17.4. the agreement does not eliminate competition in respect of a substantial part of the goods or services concerned.

Section 18

Supporting documentation

The completed notification must be drawn up and submitted in one original. It shall contain the last versions of all agreements which are the subject of the notification and be accompanied by the following:

(a) sixteen copies of the notification itself;

(b) three copies of the annual reports and accounts of all the parties to the notified agreement, decision or practice for the last three years;

(c) three copies of the most recent in-house or external long-term market studies or planning documents for the purpose of assessing or analysing the affected markets) with respect to competitive conditions, competitors (actual and potential), and market conditions. Each document should indicate the name and position of the author;

(d) three copies of reports and analyses which have been prepared by or for any officer(s) or director(s) for the purposes of evaluating or analysing the notified agreement.

Section 19

Declaration

The notification must conclude with the following declaration which is to be signed by or on behalf of all the applicants or notifying parties[17].

'The undersigned declare that the information given in this notification is correct to the best of their knowledge and belief, that complete copies of all documents requested by form A/B have

[17] Applications and notifications which have not been signed are invalid.

been supplied to the extent that they are in the possession of the group of undertakings to which the applicant(s) or notifying party(ies) belong(s) and are accessible to the latter, 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 15 (1) (a) of Regulation No 17.

Place and date:

Signatures:'

Please add the name(s) of the person(s) signing the application or notification and their function(s).

Annex 4

Address of the Commission and its Information Offices in the Member States

The Member States as at the date of this Annex are: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom.

The address of the Commission's Directorate-General for Competition is:

Commission of the European Communities
Directorate-General for Competition
200 rue de la Loi
B-1049 Brussels
Tel. (322) 299 11 11

The address of the EFTA Surveillance Authority's Competition Directorate is:

EFTA Surveillance Authority
Competition Directorate
1-3 rue Marie-Thérèse
B-1040 Brussels
Tel. (322) 286 17 11

The addresses of the Commission's Information Offices in the Community are:

AUSTRIA
Kärtner Ring 5-7
A-1010 Wien
Tel. (43-1) 516 18 0

BELGIUM
73 rue Archimède B-1040 Bruxelles
Archimedesstraat 73 B-1040 Brussel
Tel. (32-2) 295 38 44

DENMARK
Højbrohus
Østergade 61
Postboks 144
DK-1004 København K
Tel. (45-33) 14 41 40

SPAIN
Paseo de la Castellana, 46
E-28046 Madrid
Tel. (34-1) 431 57 11

Av. Diagonal, 407 bis
18 Planta
E-08008 Barcelona
Tel. (34-3) 415 81 77

FEDERAL REPUBLIC OF GERMANY
Zitelmannstraße 22
D-53113 Bonn
Tel. (49-228) 53 00 9-0

Kurfürstendamm 102
D-10711 Berlin
Tel. (49-30) 896 09 30

Erhardtstraße 27
D-80331 München
Tel. (49-89) 202 10 11

FINLAND
31 Pohjoisesplanadi
00131 Helsinki
Tel. (358-9) 62 26 544

FRANCE
288, boulevard Saint-Germain
F-75007 Paris
Tel. (33-1) 40 63 38 00

CMCI
2, rue Henri Barbusse
F-13241 Marseille, Cedex 01
Tel. (33)491 90 98 07

GREECE
2 Vassilissis Sofias
GR-Athina 10674
Tel. (30-1) 72 51 000

IRELAND
Jean Monnet Center
18 Dawson Street
IRL-Dublin 2
Tel. (353-1) 662 51 13

ITALY
Via Poli 29
I-00187 Roma
Tel. (39-6) 699 991

Corso Magenta 59
I-20123 Milano
Tel. (39-2) 480 01 25 05

LUXEMBURG
Bâtiment Jean-Monnet
rue Alcide de Gasperi
L-2920 Luxembourg
Tel. (352) 4301 1

NETHERLANDS
Postbus 30465
NL-2500 GL Den Haag
Tel. (31-70) 346 93 26

PORTUGAL
Centro Europeu Jean Monnet
Largo Jean Monnet, 1-10°
P-1200 Lisboa
Tel. (351-1) 350 98 00

UNITED KINGDOM
Jean Monnet House
8 Storey's Gate
UK-London SW1P 3AT
Tel. (44-171) 973 19 92

Windsor House
9/15 Bedford Street
UK-Belfast BT2 7EG
Tel. (44-1232) 24 07 08

4 Cathedral Road
UK-Cardiff CF1 9SG
Tel. (44-1222) 37 16 31

9 Alva Street
UK-Edinburgh EH2 4PH
Tel. (44-131) 225 20 58

SWEDEN
Nyobrogatan 11
Stockholm
Tel. (46-8) 562 444 12

Information on European competition policy

The Directorate-General for Competition (DG IV) provides public access to information on European competition policy via *Europa*, the European Union's World Wide Web server (site: http://europa.eu.int). *Europa* contains information on the activities of the Union's institutions, and DG IV's homepage (http://europa.eu.int/en/comm/dg04/dg4home.htm) may be accessed through the section dealing with the activities of the European Commission.

DG IV's pages contain information on the main areas of competition policy - antitrust, mergers, liberalization, state aid and international aspects. Under each of these headings, the user can find sections containing press releases published in the previous two weeks, acts published in the Official Journal in the previous month, the full texts of community legislation in force and a list, with references, of Commission decisions and of judgments delivered by the Court of Justice and the Court of First Instance.

Separate sections set out speeches given and articles published by the Commission Member with special responsibility for competition policy, the Director-General of DG IV and DG IV officials, as well as previous issues of the *EC Competition Policy Newsletter*, the Annual Report on competition policy, a list of Community publications on competition available to the public, links with the websites of national and international competition authorities and other items of interest.

Annex 5

Further reading (in various EU languages, including official publications such as the *Official Journal* and Annual Competition Policy Report, the Competition Policy Newsletter and Compendia of legislation and Commission Notices).

Unless otherwise indicated, the following publications are available through the sales agents of EUR-OP , the Office for Official publications of the European Communities.
To order use the appropriate catalogue number.

Legislation
Official documents
Competition decisions
Competition reports
Other documents and studies

LEGISLATION

Competition law in the European Communities-Volume IA-Rules applicable to undertakings
Situation at 30 june 1994; this publication contains the text of all legislative acts relevant to Articles 85, 86 and 90.
Catalogue No: CM-29-93-A01-xx-C (xx= ES DA DE GR EN FR IT NL PT)

Competition law in the European Communities-Addendum to Volume IA-Rules applicable to undertakings
Situation at 1 March 1995.
Catalogue No: CM-88-95-436-xx-C (xx= ES DA DE GR EN FR IT NL PT)

Merger control in the European Union - (Ed. 1995)
Catalogue No: CV-88-95-428-xx-C (xx= ES DA DE GR EN FR IT NL PT)

Competition law in the European Communities-Volume IIA-Rules applicable to State aid
Situation at 31 December 1994; this publication contains the text of all legislative acts relevant to Articles 42, 77, 90, 92 to 94.
Catalogue No: CM-29-93-A02-xx-C (xx= ES DA DE GR EN FR IT NL PT)

Competition law in the EC -Volume II B- Explanation of rules applicable to state aid
Situation at December 1996
Catalogue No: CM-03-97-296-xx-C (xx= ES DA DE GR EN FR IT NL PT SV FI)

Brochure concerning the competition rules applicable to undertakings
as contained in the EEA agreement and their implementation by the EC Commission and the EFTA surveillance authority.
Catalogue No: CV-77-92-118-EN-C

OFFICIAL DOCUMENTS

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